NO. 07-474

IN THE

SUPREME COURT OF THE UNITED STATES

ANUP ENGQUIST,

Petitioner

v.

OREGON DEPARTMENT OF AGRICULTURE, ET AL.

Respondents

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

BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

Francisco M. Negrón, Jr.*
General Counsel
Naomi Gittins
Lisa Soronen
National School Boards Ass'n
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

Elizabeth Eynon-Kokrda
Kenneth W. Hartman
Baird Holm, LLP
1500 Woodmen Tower
Omaha NE 68102
(402) 344-0500

*Counsel of Record

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INTEREST OF *AMICUS CURIAE*[1]

The National School Boards Association (NSBA) is a not-for-profit federation of state associations of school boards across the United States. The NSBA federation represents the nation's 95,000 school board members, who, in turn, govern approximately 15,000 local school districts. These school districts employ over 6 million teachers[2] and another approximately 6 million non-certificated staff, including paraprofessionals, custodians and other building maintenance personnel, school psychologists and social workers, bus drivers, and food service workers. Taken as a whole, public school districts are the nation's single largest government employer.[3] NSBA is dedicated to the improvement of public education in America and has long been involved in advocating for a reasonable balance between the obligation of public schools to promote the efficiency of the public

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[1] This brief is filed with the consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

[2] U.S. Census Bureau, Census 2000 Special Employment Opportunity Tabulation, *available at,* http://www.census.gov/hhes/www/eeoindex/page_c.html?

[3] In comparison, as of January 1, 2003 1.4 million people were on active duty in the U.S. military with an additional 1.3 million people in the National Guard and Reserves. U.S. Census Bureau, Facts for Features – U.S. Armed Forces and Veterans, *available at*, http://www.census.gov/Press-Release/www.2003/cb03-ff04se.html.

education system, and the private interests of employees affected by governmental action.

NSBA submits this brief to emphasize the significant adverse impact that overturning the Ninth Circuit's decision in *Engquist v. Oregon Department of Agriculture* would have on the operation of our nation's schools.

SUMMARY OF THE CASE

Anup Engquist was an employee of the Oregon Department of Agriculture (ODA) who, during the course of her employment, experienced repeated difficulties with Joseph Hyatt, another ODA employee. Hyatt was disciplined for his behavior by then-Director of ODA Laboratory Services, Norma Corristan. Hyatt eventually drafted a plan for the Assistant Director of the entire ODA, John Szczepanski, to reorganize the Export Service Center (ESC), a laboratory of the ODA in which Engquist worked. Assistant Director Szczepanski had made it known that he could not "control" Engquist, and Hyatt told a co-worker that he and the Assistant Director were working to "get rid of" Engquist.

Ultimately, Hyatt was promoted by Szczepanski, over Engquist who also applied for the position, to manage the ESC. Shortly thereafter, the Governor of Oregon called for budget reductions in state departments, and the Director of ODA Laboratory Services (Corristan) position was eliminated by Szczepanski. A few months thereafter, Engquist was informed by Hyatt that her position also was being eliminated, due to

reorganization. She was offered, pursuant to her collective bargaining agreement, the opportunity to "bump" into another position, but there was no position open at her level for which she was qualified, and thus she was laid off. Engquist sued the Oregon Department of Agriculture, claiming, in pertinent part, that as a "class of one" her equal protection rights had been violated. This claim proceeded to a jury trial, and the jury concluded that Defendants were liable for violations of equal protection and substantive due process. The United States Court of Appeals for the Ninth Circuit reversed, holding that the class-of-one theory was not applicable to decisions made by public employees.

SUMMARY OF THE ARGUMENT

The Ninth Circuit and the United States Court of Appeals for the Seventh Circuit are the only two circuits to analyze the "class of one" theory in the context of state and local public employment in any depth. Both Circuits have concluded that, unless constrained, the "class of one" remedial theory of equal protection could provide a federal cause of action for review of almost every state or local governmental personnel decision. This is in keeping with this Court's longstanding warning that the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. *See Bishop v. Wood*, 426 U.S. 341, 349-50 (1976). In the context of our nation's 15,000 school districts, which employ approximately 12 million people nationwide, this Court should not create a new

"class of one" remedy, placing itself in the position of a super personnel department sitting in judgment of every personnel decision of those 12 million school employees nationwide.

A new judicial remedy in the realm of public employment law is unnecessary. If this Court endorses these "class of one" equal protection claims for every disgruntled public school employee aggrieved by employment disciplinary action taken against him or her, then it will effectively override the multitude of already-existing protections held by the 12 million largely-unionized school employees that has been carefully constructed by lawmakers and contractual negotiations to achieve a balance between worker rights and an efficient education system. The effect upon school districts across the nation of making every disciplinary act, whether it resulted in termination or not, into a prima facie constitutional equal protection case would be chilling, and a waste of precious time and money. Rendering a system that already is challenged for resources to educate children needlessly less efficient and less safe is simply unwise and unnecessary policy.

The "class of one" theory is a judicial remedy that is only appropriate in the context of public employment law if it is needed to address a wrong that would otherwise go unredressed. It arose in the context of government acting as "sovereign," and treating citizens differently by requiring different easements from property owners identically situated. While this Court has fashioned a variety of non-statutory remedies for violations of the Constitution by federal and state officials, when it has faced the question of whether it should augment

an already-elaborate remedial system for aggrieved government employees with a new judicial remedy for a constitutional violation, as is the instant case, it has drawn the line. *See Bush v. Lucas*, 462 U.S. 367 (1983). Having already firmly declined to create a new substantive legal liability when a federal governmental employee was improperly disciplined, this Court should follow its own precedent in the instant case.

This Court has regularly drawn a distinction between governmental entities acting in their role as "sovereign" as compared to governmental actions in the dispatch of internal affairs. *See Connick v. Meyers,* 461 U.S. 138 (1983); *Waters v. Churchill*, 511 U.S. 661 (1994); *Arnett v. Kennedy*, 416 U.S. 134 (1974). There is a clear delineation between the government operating as a regulator, licensor, or lawmaker as compared with the government acting as proprietor, managing internal operations. In addition, because state and federal governments do not constitutionally have the complete freedom of action enjoyed by private employers, in exchange the Court has limited the rights of public employees as compared to ordinary citizens, instituting a balance between when the employee is acting as an employee versus a citizen. *See Pickering v. Board of Educ.*, 391 U.S. 563 (1968). *See also Garcetti v. Ceballos*, 547 U.S. 410 (2006).

The Ninth Circuit has properly concluded that the "class of one" theory of equal protection has no place in the public employment setting. This Court does not want to become a super personnel department, there is no need for this new remedy, and governmental entities have long been accorded the leeway to efficiently and effectively manage

their internal affairs. NSBA urges this Court to affirm the decision of the Ninth Circuit.

ARGUMENT

I. The policy decision before this Court is whether federal courts will become super personnel departments, responsible for addressing every grievance made by school district employees across the country.

This Court has recognized that the federal courts should not become super personnel departments through the creation of a new remedial equal protection theory when extensive remedies already exist and the government appropriately has wide latitude in making personnel decisions when acting as an employer. "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error." *Bishop v. Wood*, 426 U.S. 341, 349-350 (1976). Just as this Court found, in *Bishop*, that the Due Process clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions, so too should it find that the "class of one" remedy is not an appropriate application of Equal Protection in the school district employment context. The Court, in *Bishop*, further considered the fact that by implication, to do otherwise leads to

the conclusion that almost every discharge of an employee gives rise to a constitutionally protected interest. 426 U.S. at 350 n.14.

The public policy argument against extending the "class of one" remedy to school district employment decisions is decisive here. Putting the yoke of "class of one" onto every individual governmental employer internal personnel action essentially gives any teacher aggrieved by an employment decision a prima facie equal protection case in federal court, opening endless new vistas of unwarranted liability to school districts. The specific remedy of "class of one" would extend most disciplinary cases past both a motion to dismiss and a motion for summary judgment. In terms of a motion to dismiss, the very fact that a teacher was disciplined, while his or her peers were not, would ostensibly create alleged differing treatment of similarly situated teachers. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Fed. R. Civ. Pro. 8(a)(2). While this standard still "requires more than labels and conclusions," and "a formulaic recitation of a cause of action's elements will not do," the factual allegations simply must "be enough to raise a right to relief above the speculative level . . . on the assumption that all of the complaint's allegations are true." *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1964-65 (2007). Similarly, it is hard to imagine a case that would not contain at least some genuine issue of material fact, such that summary

judgment would not be warranted and the case would proceed to trial.

It is easy to imagine the limitless avenues for federal claims based on the literally millions of employment decisions made by school districts throughout the United States every day. The personnel decisions that a school district employee could challenge are endless. If the Ninth Circuit is reversed, every time a school district fires, demotes, denies tenure, transfers teachers, etc., the employment decision would be subject to this new "class of one" remedial theory. As Judge Posner recognized, an unbridled "class-of-one" remedial theory opens "endless vistas of federal liability". *Lauth v. McCollum*, 424 F.3d 631, 633 (7th Cir. 2005). Many such cases would come to federal court "dressed as" constitutional cases. 424 F.3d at 632.

A case of unequal treatment by a supervisor is remarkably easy to invent, as Judge Posner also pointed out in *Lauth v. McCollum*, *supra.* Even without application of "class of one" to the school employment setting, the problem of disgruntled teachers interjecting federal constitutional issues into what are primarily personal disputes already occurs all too often. For example, in *Vukadinovich v. Bartels*, 853 F.2d 1387 (7th Cir. 1988), a teacher filed suit under 42 U.S.C. § 1983 alleging violation of his Fourteenth Amendment rights in connection with the termination of his employment as a public high school teacher. Vukadinovich was a teacher of industrial arts, for which he did not have permanent certification,[4] and he also coached

[4] When he was hired, Vukadinovich was not licensed to teach industrial arts. The school obtained a limited teaching license

basketball. *Vukadinovich*, 853 F.2d at 1388. He resigned as a basketball coach, and in a local newspaper article was quoted with comments to the effect that he had been asked to step down as coach and didn't think it was fair. *Id.* Soon after the article, he received notice that his teaching contract was to be cancelled due to his lack of a proper certificate. *Id*. at 1389. Vukadinovich sued, claiming in part that he was treated differently than other uncertified teachers in retaliation for the exercise of his First Amendment rights. *Id*. In other words, he did not dispute that he could have been fired simply because he was uncertified; but instead claimed that he was selected for termination, while other uncertified teachers were not, because he exercised his right to free speech. *Id*. The Seventh Circuit noted that:

> Although in a sense any events which transpire in a public school are matters of public concern, we have recently quoted *Connick* as stating, "'To presume that all matters which transpire within a government office are of public concern would

for him, allowing him to teach industrial arts until he could complete the courses required for certification, on the basis that they certified "an emergency need for personnel in the teaching area," as required by Indiana regulation. However, Vukadinovich never did what was needed to obtain a permanent certification to teach industrial arts.

> mean that virtually every remark ... would plant the seed of a constitutional case.'"

Id. at 1390, (*citing Hesse v. Board of Educ.,* 848 F.2d 748, 752 (7th Cir. 1988) (*quoting Connick*, 461 U.S. at 149)). The Seventh Circuit found Vukadinovich's speech unprotected, and thus, found that his § 1983 claim failed. 853 F.2d at 1391. The Seventh Circuit reached its decision in 1988, but the outset of Vukadinovich's litigation commenced in 1981. *Id*. at 1389.

When teachers are permitted to transform what are essentially personal disputes with employers into constitutional claims, not only is the waste of time and money on litigation tremendous, but student achievement and welfare may be compromised. School districts must be able to swiftly and effectively discipline or terminate employees who put student education or safety at risk by failing to execute their responsibilities in the manner prescribed by the school board and state lawmakers. They must be able to do so without undue fear of Fourteenth Amendment claims based solely upon the "dissimilar" treatment a single employee may allege when his or her peers "similarly situated" by the very fact that they are also employees of the school district are not disciplined in what the employee perceives to be the same manner for alleged similar employee misconduct.

Courts have long recognized the authority of schools to control the policies, rules, and regulations governing employment of teachers and staff. Given

the vulnerability of young students in the care of schools for multiple hours every day and the heightened accountability standards for student performance that have been imposed in the last five years,[5] it is especially critical that school boards retain control over the employee disciplinary process. All public school districts in the country are answerable to taxpayers and to the federal government, who are increasingly holding them responsible for the academic performance of their students in myriad ways. Every state has passed some form of performance-based accountability—setting the standards for content to be taught in the classroom, conducting state-wide testing, setting targets for student learning, and critically, putting sanctions in place if student outcomes are not meeting expectations. Performance-based accountability is also the centerpiece of No Child Left Behind, which connects millions of dollars in public school federal funding to student outcomes, and severely sanctions schools and districts who fail to meet the federally-required improvement on tests. This entire new era of accountability is based upon the premise that school districts and their administrators are capable of not only monitoring student performance, but of making decisive managerial decisions about resources, responsibilities and structures that are connected to performance. Nothing could be closer to student performance than teacher performance. Implementing changes in teacher responsibilities and promptly correcting and/or sanctioning teachers

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[5] *See* No Child Left Behind Act, 20 U.S.C. § 6301 *et seq*. (2008).

who are unwilling or unable to meet the heightened expectations of today's classroom is imperative.

Courts have long recognized the authority of schools to control their policies, rules, and regulations governing employment of teachers and staff. *See, e.g., Milliken v. Bradle*y, 418 U.S. 717 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools.") The educational mission is of such crucial importance that Justice Frankfurter noted that one of the four "essential freedoms" of a public educational institution was "to determine for itself on academic grounds *who* may teach…." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added).

This Court's precedents simply do not support the existence of a constitutional cause of action behind every action a public employee makes in the course of doing his or her job. The Fourteenth Amendment ought not be used to effectively make every instance of managerial discipline into a federal equal protection case. When any unexplained or unjustified disparity of treatment by a school employee or school board is deemed a prima facie denial of equal protection, limitless claims of federal liability are possible. Regardless of whether or not such cases can be regularly won is beside the point. Engquist's proposed contrary rule in the instant case would commit state and federal courts to a new, permanent and intrusive role, mandating additional and unnecessary judicial oversight of the daily decisions of over 95,000 school board members.

II. This Court has refused to create a new judicial equal protection remedy in the realm of federal public employment law.

A. This Court pays heed to "special factors counseling hesitation" before creating a new judicial remedy.

Creating a "class of one" equal protection claim for every disgruntled public school employee aggrieved by an employment action would unnecessarily add a new judicial remedy to the multitude of already-existing remedies held by the 12 million largely-unionized public school employees in the United States. These remedies were carefully constructed by lawmakers, as well as by public employers and unions through contractual negotiations, to achieve a balance between worker rights and an efficient education system. In creating a new judicial remedy, the Court must be cognizant of these already-existing remedies. *See Bush v. Lucas*, 462 U.S. 367 (1983). In *Bush v. Lucas*, the Court held that it would not create a new judicial remedy for federal public employees as it would be "inappropriate for us to supplement that regulatory scheme with a new judicial remedy." *Id.* at 368.

Of particular importance here, the Court acknowledged that it must pay "particular heed . . . to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* at 377. The "special factors counseling hesitation" do not go to the merits of the new remedy, but instead focus on the "question of who should decide whether

such a new remedy should be provided." *Id*. at 380. The Court made clear that

> [t]he question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for

> violations of employees' [constitutional rights].

Id. at 388.

B. The "special factors counseling hesitation" here include more than the numerous measures examined in *Bush* but also the measures adopted by federal, state, and local governments to protect the rights of employees of school districts.

Federal, state, and local governments have adopted various measures to protect employees from employers who would commit unlawful or otherwise inappropriate actions. These include federal and state whistle-blower protection laws; labor codes; and for virtually every teacher in the United States, statutory protections which provide specific due process rights concerning notice and opportunity to be heard before the school board that is recommending discipline, non-renewal or termination of the teacher's contract.[6] Finally, two-thirds of all states have collective bargaining statutes covering teachers and mandating that local school districts bargain over the terms and

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[6] *See* Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Update for 2007 (2007), *available at* http://www.ecs.org/clearinghouse/75/64/7564.doc, which delineates statutes in every state in the United States that provide certain job protections and due process considerations for teachers.

conditions of employment.[7] These protections serve to make an additional cause of action for alleged equal protection violations based on the “class of one” concept simply unnecessary.

In terms of substantive rights granted by statute, local school districts frequently can terminate tenured teachers only under extreme and statutorily defined conditions usually framed as "just cause." Typical grounds for dismissal include incompetence, immorality, insubordination, and neglect of duty. Procedurally, a tenured teacher is entitled to timely and adequate notice of the reasons for dismissal, a fair hearing with legal counsel before the school board, an opportunity to cross-examine witnesses, and an impartial decision based solely on the evidence presented. *See* David M. Pedersen, "Statutory Dismissal of School Employees," Termination of School Employees: Legal Issues and Techniques §§ 10-1, 10-2 (National School Boards Association 1997). During such hearings a teacher would be able to raise the claim that the school board has no "just cause" to terminate him or her when other similarly situated employees were not removed for substantially the same conduct. Moreover, all states allow teachers

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[7] Collective bargaining agreements often establish rights and procedures applicable to disciplining and terminating teachers, which usually exceed the rights set forth in statutes. *See* Education Commission of the States, Collective Bargaining Policies for Teachers (June 2002), *available at* http://www.ecs.org/clearinghouse/37/48/3748.htm. Typically these rights include discipline and dismissal for just cause only, which generally involves progressive discipline, due process requirements prior to and during the disciplinary process, and extensive grievance and arbitration procedures that supplement or displace statutory hearing procedures.

to appeal the school board's decisions to some entity—for example, a state court, a tenure commission, or a state board of education. *See* Education Commission of the States, footnote 6, *supra*. Many states allow teachers to appeal to the state supreme court, meaning the case could be reviewed four or five times. *See id.*[8]

In addition to the statutory rights and remedies discussed above, the federal government has created other additional remedies. These include: Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. (prohibits employment discrimination based on, race, color, religion, sex, and national origin); the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. (prohibits employment discrimination against qualified individuals with disabilities); the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*. (protects individuals who are 40 years of age or older); and the Equal Pay Act, 29 U.S.C. § 206(d) *et seq*. (protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination). The United States Equal Employment Opportunity Commission (EEOC), established by Congress, enforces all of these laws.[9] And, of course, Congress has provided private rights of action pursuant to 42 U.S.C. §§

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[8] Overlying this are federal laws that mandate certification and qualifications of teachers in order to receive federal funds. *See* No Child Left Behind Act, 20 U.S.C. § 6301 *et seq*. (2008).

[9] For fiscal year 2007, the EEOC handled 82,792 complaints. Nearly 43,000 of those complaints resulted in a No Reasonable Cause finding. U.S. Equal Employment Opportunity Commission, Table, All Statutes FY 1997-FY 2007, *available at*, http://www.eeoc.gov/stats/all.html.

1981 and 1983. Finally, this Court would create quite a paradox by announcing a new federal constitutional remedy to school teachers that Congress itself has specifically chosen to avoid. *See Lauth*, 424 F.3d at 633 (noting that it would not "inject the federal courts into an area of labor relations that Congress disclaimed a federal interest in.").[10]

This Court should not tamper with these extensive and carefully constructed measures. These special factors counsel against the creation of the new judicial remedy of "class of one" for public employees. Given Congress' reluctance and the panoply of federal, state, and local laws and regulations protecting employees of school districts, there is, quite simply, "no gap in legal protections to justify dragging in equal protection concepts designed for entirely different situations." *Id.* at 633. As Judge Posner cogently explained, "when as in this case the unequal treatment arises out of the employment relation, the case for federal judicial intervention in the name of equal protection is especially thin." *Id.*

Given all the protections discussed above, the case for a new judicial remedy here is not just thin, it evaporates. Petitioner herself brought claims under Title VII, 42 U.S.C. § 1981, equal protection, procedural and substantive due process, and intentional interference with contract. *Engquist*, 478 F.2d at 991. However, she did not avail herself of a claim under 42 U.S.C. § 1983 or of remedies

[10] The National Labor Relations Act does not apply to state or municipal employees. 29 U.S.C. §152(2) (2008). *Abood v. Detroit Board of Education*, 431 U.S. 209, 233 (1977).

through her collective bargaining agreement. *Id.* at 995 n.5. As such, there is no gap in legal protections to warrant the creation of a new judicial remedy to supplement the already-existing remedies created by federal, state, and local governments, as well as clearly established constitutional rights.

III. This Court has always treated the government as employer differently than the government as sovereign, and thus school districts as employers must be treated differently.

A. The need for constitutional limitations on the government when acting as employer is substantially less than when the government is acting as sovereign.

This Court has long recognized the distinction between the government acting as employer, managing its own internal affairs, and the government acting as sovereign, attempting to legislate, regulate, or license. "[T]he government as employer indeed has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994). *See also Healy v. James*, 408 U.S. 169, 201 (1972) (Rehnquist, J., concurring) (stating that the government in its capacity as employer differs constitutionally from the government in its capacity as the sovereign executing laws). However, when the government acts in its sovereign capacity, "it reaches out to deal with, direct, or regulate the conduct of the citizen; in

some instances against the will of the citizen, and often in interference with the citizen's own property or contract rights." *U.S. v. General Petroleum Corp. of Cal.*, 73 F.Supp. 225, 250 (D. Cal. 1946). When this occurs, "the law requires strict boundaries around the exercise of power." *Id.* at 250.

When the Government acts as an employer, it "must have wide discretion and control over the management of its personnel and internal affairs." *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974). As this Court recently observed in *Garcetti v. Ceballos*, *supra*, "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions." 547 U.S. at 418. This is because, without such control, "there would be little chance for the efficient provision of public services." *Id.* The Court thus emphasized "affording government employers sufficient discretion to manage their operations" and discouraged "[the] displacement of managerial discretion by judicial supervision." *Id.* at 422-23.

In addition, it is a long-settled principle that governmental actions are subject to a lower level of constitutional scrutiny when the operative governmental function is not the power to regulate or license, as lawmaker, but, rather, as proprietor, to manage its internal operations. *U.S. v. Kokinda*, 497 U.S. 720, 725 (1990) (*citing Cafeteria & Restaurant Workers v. McElroy Local 473, AFL-CIO,* 367 U.S. 886, 896 (1961) (quotations omitted)). "Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be

subject." *International Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992). In other words, the restrictions that the Constitution places upon the government in its capacity as employer are not the same as the restrictions that it places upon the government as sovereign. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 94 (1990) (Scalia, J., dissenting). The Court has "recognized this in many contexts, with respect to many different constitutional guarantees." *Rutan*, 497 U.S. at 94 (Scalia, J., dissenting).[11]

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[11] Notably, this Court has also recognized that constitutional protections need not be as strong outside the government as employer context. For example, in *National Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998), the Court considered whether a provision of the National Foundation on the Arts and the Humanities Act violated the First and Fifth Amendments. The statute, 20 U.S.C. § 954(d)(1) (2008), required the Chairperson of the National Endowment for the Arts to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *Finley*, 524 U.S. at 572. The Court determined that the Act was not unconstitutionally vague even though "the terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns." 524 U.S. at 588. The Court observed, "We recognize, as a practical matter, that artists may conform their speech to what they believe to be the decisionmaking criteria in order to acquire funding. . . . But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *Id*. at 589. The court noted that "[i]n the context of selective subsidies, it is not always feasible for Congress to legislate with clarity. Indeed, if this statute is unconstitutionally vague, then so too are all Government

Moreover, the Court has cautioned against "constitionaliz[ing] the employee grievance." *See Connick v. Meyers*, 461 U.S. 138, 154 (1983). In *Pickering v. Board of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 568 (1968), the Court adopted a balancing test between the interests of a public employee (there, a teacher), as a citizen, in commenting upon matters of public concern and the interests of the State (there, a school district), as an employer, in promoting the efficiency of the public services it performs through its employees. The Court noted that it was indisputable that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568.

B. This Court has repeatedly limited the scope of constitutional protections afforded to public employees in light of the government's need to carry out its mission effectively and efficiently.

"Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner." *O'Connor v. Ortega*, 480 U.S. 709, 724 (1987) (plurality opinion). "[I]n many cases, public employees are entrusted with tremendous responsibility." *Id.* at 724. As such, they have "a direct and overriding interest in

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programs awarding scholarships and grants on the basis of subjective criteria such as 'excellence.'" *Id.*

ensuring that the work of the agency is conducted in a proper and efficient manner." *Id.*

In light of the government's need to carry out its mission effectively and efficiently, this Court has repeatedly limited the scope of constitutional protections afforded to public employees. For example, in *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, *supra*, the Court limited due process protections because of the government's need to maintain security in military operations. 367 U.S. at 896. Noting the government's interest in the "dispatch of its own internal affairs," the Court asserted that the "Fifth Amendment does not require a trial-type hearing in every conceivable case" and that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* at 894-95 (quotations omitted). The Court observed:

> [T]he governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment.

Id. at 896.

This Court likewise limited the scope of due process protections afforded public employees in *Kelley v. Johnson*, 425 U.S. 238 (1976), because of the governmental interest of the county police department. There, the Court upheld a department regulation which established hair-grooming standards for male members of the police force, despite an officer's argument that the regulation infringed upon his liberty interest. *Id.* at 239. The Court noted that the officer "sought the protection of the Fourteenth Amendment, not as a member of the citizenry at large, but on the contrary as an employee of the police department," and this distinction was "highly significant." *Id.* at 244-45.

In addition, the Court has widely limited the scope of public employees' First Amendment protections. In *Connick v. Meyers*, the Court held:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

461 U.S. at 147. The Court noted that "government offices could not function if every employment decision became a constitutional matter." *Id.* at 143. The Court warned that "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark . . . would plant the seed of a constitutional case." *Id.* at 149.

Similarly, in *Waters v. Churchill, supra*, the Court observed that "not every procedure that may safeguard protected speech is constitutionally mandated." 511 U.S. at 670. There, the Court examined "[w]hat it is about the government's role as employer that gives it a freer hand in regulating the speech of its employees rather than it has in regulating the speech of the public at large." *Id.* at 671. The Court opined that "the extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible." *Id.* at 674-75. The Court thus declared:

> 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 employer. The government cannot restrict the speech of the

> public at large just in the name of efficiency. But where the government is employing someone for the very purpose of achieving its goals, such restrictions may well be appropriate.

Id. at 675. The Court maintained that "where the government is acting as employer, its efficiency concerns should . . . be assigned a greater value." *Id.*

Likewise, in *Garcetti v. Ceballos*, *supra*, this Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421. The Court reasoned in part that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen" and instead "simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22.

C. This Court has recognized that wide latitude is necessary for public employers, and this is particularly true for public school districts, given the special characteristics of the school environment.

In *Arnett v. Kennedy, supra*, this Court noted that "[p]rolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." 416 U.S. at 168. As such, "the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial." *Id*. at 168. When the government actor is a public school district, such as one of the 15,000 school districts represented by the Amicus here, its interests are heightened all the more. Public schools have a "legitimate need to maintain an environment in which learning can take place." *New Jersey v. T.L.O.*, 469 U.S. 325, 339-340 (1985) (holding that school officials need not obtain a warrant before searching a student who is under their authority). "In a public school environment . . . the State is responsible for maintaining discipline, health, and safety." *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 830 (2002).

This Court has repeatedly recognized the "special characteristics of the school environment," most notably in discussing the rights of students. *See Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007), *citing Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969). For example, in *Morse v. Frederick*, the Court determined that "the governmental interest in stopping student drug abuse . . . allow[s] schools to restrict student expression that they reasonably regard as promoting illegal drug use." 127 S.Ct. at 2629. The Court rightly noted that "[s]chool principals have a difficult job, and a vitally important one." *Id.* at

2629. As such, when a student "suddenly and unexpectedly unfurled [a] banner" which read "Bong Hits 4 Jesus," and the principal "had to decide to act—or not act—on the spot," the Court maintained the principal acted reasonably in concluding that the banner promoted illegal drug use and disciplining the student accordingly. *Id.*

The "special characteristics of the school environment" which attend the rights of students also affect school districts as public employers. When a citizen is working as a public employee, the constitutional rights that employee enjoys are circumscribed by the very nature of that employment. "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti*, 547 U.S. at 418. This Court's policy has been "'the common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *O'Connor*, 480 U.S. at 722, *citing Connick,* 461 U.S. at 143. Just as this Court has found that certain school employee speech is not protected by the First Amendment, so too should this court find that certain school employee behavior is not protected by the Fourteenth Amendment under a "class of one" remedy. "Without a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently." *Connick*, 461 U.S. at 143.

CONCLUSION

The Ninth Circuit's decision has properly concluded that the "class of one" theory of equal protection has no place in the public employment setting. The existing statutory and regulatory structure already put in place by Congress and every state in the United States needs no new judicial remedy for a constitutional violation. There is a clear distinction between governmental entities acting in their role as "sovereign" as compared to governmental actions in the dispatch of internal affairs. The very reason that governmental entities are held to different standards than private entities is to assure that public employees' rights as citizens are protected. This Court has repeatedly held that the rights of a public employee when acting not as a citizen, but as an employee, may and must be abrogated in order to balance the needs of public entities to effectively manage their internal affairs. The line of First Amendment cases is very instructive. If, instead, the Ninth Circuit is overturned and a new judicial "class of one" equal protection remedy is created for every disgruntled public school employee aggrieved by employment disciplinary action taken against him or her, this will effectively override the multitude of already-existing protections held by our nation's 12 million school employees, protections which have been carefully crafted to achieve an appropriate balance between worker rights and an efficient education system. It will lead to the commitment of substantial additional amounts of time and money by already-strapped school districts that need to spend their limited resources on the education of

students, not additional litigation, when ample school district employee protections already exist. For these reasons, amicus NSBA urges this Court to uphold the Ninth Circuit.

Respectfully submitted,

Francisco M. Negron, Jr.*
Naomi Gittins
Lisa Soronen
Nat'l Sch. Boards Ass'n
1680 Duke Street
Alexandria, VA 22314
703-838-6722
* Counsel of Record

Elizabeth Eynon-Kokrda
Kenneth W. Hartman
Baird Holm, LLP
1500 Woodmen Tower
Omaha, NE 68102
402-344-0500