

No. 07-474

IN THE
SUPREME COURT OF THE UNITED STATES

ANUP ENGQUIST,

Petitioner

v.

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

Respondents

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

**PETITIONER'S REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

STEPHEN L. BRISCHETTO
Counsel of Record
806 S.W. BROADWAY, STE 400
PORTLAND, OREGON 97205
503-223-5814

JOHN J. BURSCH
MATTHEW T. NELSON
WARNER NORCROSS & JUDD LLP, *Co-Counsel*
900 FIFTH THIRD CENTER, 111 LYON ST. NW
GRAND RAPIDS MICHIGAN 49503
616-752-2000

TABLE OF CONTENTS

I.	Introduction	1
II.	Reply to Respondents’ Statement of Facts . .	2
III.	The Lower Courts Need This Court’s Immediate Guidance Regarding <u>Olech</u> ’s Application to Public Employment Decisions	2
IV.	This Court Should Resolve The Split Among State Courts Concerning Whether “Split Recovery” Punitive Damages Statutes Violate the Takings Clause	5
V.	Conclusion	8

TABLE OF CITED AUTHORITIES

FEDERAL CASES

Ciechon v City of Chicago, 686 F 2d 511, 523 (7th Cir 1982)	4
Cobb v Pozzi, 352 F3d 79, 99 (2d Cir 2003) amended, 363 F3d 89, 110 (2nd Cir 2004)	4
Cobb v Pozzi, 363 F3d 89, 112 (2nd Cir 2004)	5
Diesel v Town of Lewisboro, 232 F3d 92, 103 (2nd Cir 2000)	4
Doubet v Eckelberg, 81 Fed Appx 59 (7th Cir 2003)	4
Engquist v Oregon Dep't of Agric, 478 F3d 985, 1014 n 3 (9th Cir 2007)	5, 6, 8
Giordano v City of New York, 274 F3d 740, 751 (2d Cir 2001)	4
Hedrich v Bd. Of Regents of Univ of Wisconsin System, 274 F3d 1174 (7th Cir 2001)	4
LeClair v Saunders, 627 F2d 606, 609-610 (2d Cir 1980)	4
Levenstein v Salafsky, 164 F3d 345 (7th Cir 1998)	4, 5
Miller v Ojima, 354 F Supp 2d 220 (EDNY 2005) . .	5

Mullane v Central Hanover Trust Co., 339 US 306,
313, 70 S Ct 652, 94 L Ed 865 (1949) 8

Neilson v D’Angelis, 409 F3d 100, 104 (2d Cir 2005)
. 4

Logan v Zimmerman Brush Co., 455 US 422, 102 S
Ct 1148, 71 L Ed 2d 265 (1982) 8

Phillips v Washington Legal Foundation, 524 US
156, 118 S Ct 1925, 141 L Ed 2d 174 (1998) 1, 8

Shipp v McMahan, 234 F3d 907 (5th Cir 2000) 4

Stachowski v Town of Cicero, 425 F3d 1075 (7th Cir
2005) 4

Village of Willowbrook v Olech, 528 US 562, 120 S Ct
1073, 145 L Ed 2d 1060 (2000) 1

Whiting v University of Southern Mississippi, 451
F3d 339, 348 (5th Cir 2006) 4

Zeigler v Jackson, 638 F 2d 776 (5th Cir 1981) 4

STATE CASES

Kirk v Denver Pub. Co, 818 P2d 262, 266 (Col 1991)
. 6, 7

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Introduction

Respondents concede the significant split among the Circuits regarding the first question presented—whether this Court’s traditional equal protection “rational basis” analysis in Village of Willowbrook v Olech, 528 US 562, 120 S Ct 1073, 145 L Ed 2d 1060 (2000), applies to public employment decisions. And despite Respondents’ protestations to the contrary, the issue’s maturity and importance are amply demonstrated by the fact that no less than eight Circuits have been forced to address the issue in the seven years that have elapsed since the Olech ruling. Accordingly, the Court should grant review of the first question presented.

With respect to the second question presented—the constitutionality of a state “split recovery” punitive damages statute – Respondents are wholly unable to reconcile the conflict between the Ninth Circuit decision below and this Court’s decision in Phillips v Washington Legal Foundation, 524 US 156, 118 S Ct 1925, 141 L Ed 2d 174 (1998), in which this Court defined the test for determining what constitutes “property” protected under the Takings Clause. Indeed, while the Phillips analysis is controlling on the punitive damage takings issue, see Pet. at 27, Respondents fail to discuss or even cite the Phillips decision anywhere in their Brief in Opposition. It is therefore appropriate for the Court to grant review of the second question presented as well.

II. Reply to Respondents' Statement of Facts

Respondents recount their own version of the facts, drawing all inferences in their favor, ignoring contrary evidence, and raising evidentiary theories that the jury rejected and Defendants failed to preserve, all contrary to well-established rules of appellate review.¹ The Petition and the Ninth Circuit opinion adequately and correctly recite the facts that frame the two important questions presented.

III. The Lower Courts Need This Court's Immediate Guidance Regarding Olech's Application To Public Employment Decisions

Respondents concede there is a split among the circuits as to whether rational basis Equal Protection analysis applies to individual public employment decisions. Br. in Opp. at 24. Nevertheless, Respondents argue, this Court should deny review because the Ninth Circuit's majority panel decision is consistent with Olech; the issue should be left to further "percolate" in the lower courts; the circuit conflict is a shallow one; the questions presented are

¹For example, Respondents admitted on appeal that the evidence at trial was sufficient to prove Respondents' insidious plan to eliminate Petitioner as an employee. Pet for Cert at 18. And Respondents failed to challenge the sufficiency of the evidence with respect to the following jury findings: (1) there was no rational basis for Respondents' actions toward Petitioner; (2) Respondents' actions toward Petitioner were arbitrary, malicious or vindictive; and (3) Respondents' actions caused the denial of promotion, the loss of bumping rights, and/or Petitioner's termination.

unimportant; and Petitioner will lose anyway. Each of these arguments is demonstrably incorrect.

First, Respondents concede that those Circuits applying rational basis Equal Protection analysis to individual public employment decisions do so in reliance upon this Court's decision in Olech. Br. in Opp. at 25-26. The need for this Court's immediate review is precisely because seven read Olech as applying to public employment decisions, and the Ninth Circuit does not.

Second, there is no need for this legal issue to further "percolate" in the lower courts. No less than eight Circuits have already addressed the issue, and, given the uniform practice of the Circuits not to overrule a published decision without an en banc hearing, it is unrealistic to think other Circuits will change their position now that the Ninth Circuit has issued a contrary ruling.

Third, there is no benefit to allowing the circuit conflict to simmer in the lower courts. The Circuits have already articulated at least three alternative methods for circumscribing rational basis Equal Protection claims to address the same concerns (federal court dockets flooded with Equal Protection claims and federal judges reviewing every individual public official decision) that caused the majority panel to rule Olech does not apply to the public employment setting. Pet. at 13-16. Respondents fail to articulate what more needs to be accomplished in the circuit and district courts to prepare the legal issue for this Court's review.

Fourth, the Circuit conflict is not shallow. The body of Equal Protection law in many of these Circuits has developed to the point where there are numerous appellate decisions applying Equal Protection rational basis analysis in the public employment setting, spanning periods of almost 20 years. See, e.g., Stachowski v Town of Cicero, 425 F3d 1075 (7th Cir 2005); Doubet v Eckelberg, 81 Fed Appx 59 (7th Cir 2003); Hedrich v Bd. Of Regents of Univ of Wisconsin System, 274 F3d 1174 (7th Cir 2001); Levenstein v Salafsky, 164 F3d 345 (7th Cir 1998); Ciechon v City of Chicago, 686 F 2d 511, 523 (7th Cir 1982); Whiting v University of Southern Mississippi, 451 F3d 339, 348 (5th Cir 2006); Shipp v McMahon, 234 F3d 907 (5th Cir 2000); Zeigler v Jackson, 638 F 2d 776 (5th Cir 1981); Neilson v D'Angelis, 409 F3d 100, 104 (2d Cir 2005); Giordano v City of New York, 274 F3d 740, 751 (2d Cir 2001); Cobb v Pozzi, 352 F3d 79, 99 (2d Cir 2003) amended, 363 F3d 89, 110 (2nd Cir 2004); Diesel v Town of Lewisboro, 232 F3d 92, 103 (2nd Cir 2000); see also, LeClair v Saunders, 627 F2d 606, 609-610 (2d Cir 1980). The Circuit split is not shallow, lacking in analysis, or likely to change.

Fifth, wholly aside from the millions of public employees affected by this issue, Pet. at 24 & n.2, the issue presented is of significant public importance. If the Ninth Circuit panel majority is correct, then public employers in seven other Circuits will spend years defending Equal Protection rational basis claims with no legal basis, wasting substantial taxpayer funds and public employer time. If the Ninth Circuit majority panel is wrong, then public employees throughout the largest circuit court in the country are denied access to

the federal courts for redress of their Constitutional rights.

Finally, if this Court grants review and vindicates Petitioner's view of the Equal Protection Clause, Petitioner will prevail, not lose. Both the jury and the trial judge have already rejected Respondents' argument that Petitioner failed to show she was treated differently than other similarly situated employees, and that is a result the Ninth Circuit did not disturb on appeal. Engquist v Oregon Dep't of Agric, 478 F3d 985, 1014 n 3 (9th Cir 2007). As for Respondents' qualified immunity argument, the trial judge and the majority of the circuit and district courts addressing the question have rejected qualified immunity challenges to Olech claims. See, e.g., Cobb v Pozzi, 363 F3d 89, 112 (2nd Cir 2004); Levenstein v Salafsky, 164 F3d 345, 353 (7th Cir 1998); Miller v Ojima, 354 F Supp 2d 220 (EDNY 2005); Yates v Beck, 2003 US Dist Lexis 16969 (WD N Car 2003); Olech v Village of Willowbrook, 2002 US Dist Lexis 19577 (ND Ill 2003).

Accordingly, this Court should grant review of whether Equal Protection rational basis analysis applies to individual public employment decisions.

IV. This Court Should Resolve The Split Among State Courts Concerning Whether "Split Recovery" Punitive Damages Statutes Violate the Takings Clause

Respondents deny the State courts are divided over whether split recovery punitive damages statutes effect an unconstitutional taking of property; contend

that Petitioner has no property interest in punitive damages awarded to the State after entry of a verdict in her favor and argue there is no conflict between Ninth Circuit's decision in this case and any decision of this Court. As a result, Respondents say this Court should decline review of Oregon's split recovery punitive damages statute.

Respondents admit that the controlling question in this case as in the state court cases is what legal interests constitutes "property" cognizable under the takings clause. Resp Br at 34-35. See, Engquist, *supra*, 478 F3d at 1002 ("If the punitive damages award does constitute property, it is a "taking" to confiscate 60 percent of it, such that the second prong almost certainly would be satisfied.")

Respondents are incorrect when they claim the State courts are not divided over the controlling issue - what constitutes property for purposes of the takings clause. Respondents contend there is a significant difference between the Utah and Colorado split recovery punitive damages statutes held unconstitutional and the split recovery punitive damages statutes in Oregon and other states which have passed state court constitutional takings challenges. The difference, Respondents argue, is that Oregon's statute gives Oregon its' interest upon entry of the verdict while Colorado and Utah's statute created the States' interest in the proceeds after entry of a judgment.

However, Respondents ignore the legal analysis of what constitutes "property" supporting the Colorado Supreme Court's decision in Kirk v Denver Pub. Co.

818 P2d 262, 266 (Col 1991). In Kirk, the Colorado Supreme Court held that a state law forcing a judgment creditor to pay the state general fund one-third of a judgment for exemplary damages to fund state services without conferring a benefit not furnished to other civil litigants violated the takings clause. The Colorado Supreme Court's holding that a judgment for exemplary damages is "property" was premised upon a finding that the underlying tort right of action is a legal interest constituting property:

"The concept of property, therefore, encompasses those enforceable contractual rights that traditionally have been recognized as choses in action ...(cite omitted)...Because the term 'property' includes a 'legal right to damages for an injury,'...(cite omitted)...it necessarily follows that the term 'property' also includes the judgment itself."

Kirk, *supra*, 818 P2d at 267.

It is on this question, whether a right of action for punitive damages is a legal interest constituting property, that the Colorado Supreme, the Ninth Circuit and the other state supreme courts differ:

"Our conclusion is bolstered by our consideration of the deterrence and punishment justifications for punitive awards, discussed below, and is in concert with the majority of state supreme courts who have decided the issue."

Engquist, supra, 478 F3d at 1002.

While Respondents argue that the Ninth Circuit's decision in this case does not conflict with this Court's decisions, quite the contrary is true. As pointed out in the Petition for Certiorari, Logan v Zimmerman Brush Co., 455 US 422, 102 S Ct 1148, 71 L Ed 2d 265 (1982) and Mullane v Central Hanover Trust Co., 339 US 306, 313, 70 S Ct 652, 94 L Ed 865 (1949) both stand for the proposition that the owner of a tort cause of action maintains a property interest cognizable under the constitution. Moreover, Respondents are wholly unable to reconcile the conflict between the Ninth Circuit's decision below and this Court's decision in Phillips v Washington Legal Foundation, 524 US 156 (1998).

Respondents fail to discuss or even cite Phillips Logan, or Mullane anywhere in their Brief in Opposition. Under Phillips, regardless of whether Engquist had a constitutionally cognizable interest in the *anticipated* generation of punitive damages, any damages the jury *actually* awarded immediately attach as a property right incident to Engquist's ownership of the underlying right of action.

This Court should grant review of Oregon's split recovery punitive damages statute.

V. Conclusion

For the reasons above stated and those previously advanced, the petition for writ of certiorari should be granted.

Respectfully submitted,

Stephen L. Brischetto
Counsel of Record
Attorney at Law
806 SW Broadway, Suite 400
Portland OR 97205
(503) 223-5814