# CLASS DISMISSED: EQUAL PROTECTION, THE "CLASS-OF-ONE," AND EMPLOYMENT DISCRIMINATION AFTER *ENGQUIST V. OREGON DEPARTMENT OF AGRICULTURE*

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*This Note examines whether government employees should be able to assert so-called "class-of-one" claims against public employers under the Fourteenth Amendment's Equal Protection Clause. Traditional equal protection claims allege that the government has impermissibly singled out the plaintiff for disparate treatment on account of his or her race, gender, or some other trait shared with a larger class of individuals. Such claims reflect the traditional understanding of the Equal Protection Clause as a prohibition on discriminatory group classifications. Class-of-one claims, however, merely allege that the plaintiff was intentionally singled out from other similarly situated individuals and subjected to unequal treatment for no rational, legitimate reason. The plaintiff need not allege that the discrimination was motivated by his or her membership in a larger class. Rather, the plaintiff is said to comprise a "class-of-one."*

*Recently, the Supreme Court held in* Engquist v. Oregon Department of Agriculture *that courts are barred from hearing class-of-one claims arising in the public employment context. Thus, government employees are now prohibited from asserting class-of-one claims against their employers. This Note traces the development of the class-of-one theory under the Equal Protection Clause and discusses its application in the public employment realm. This Note ultimately concludes that the Supreme Court's asserted rationales for eliminating the class-of-one rights of public employees do not hold up under close scrutiny and posits that the* Engquist *decision reflects a certain skepticism among the members of the Roberts Court concerning the social utility of litigation.*

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## INTRODUCTION

Typically, when public employees bring discrimination claims against their employers under the Equal Protection Clause of the Fourteenth Amendment, these plaintiffs allege that they have suffered employment discrimination on account of their race, gender, or some other commonly held characteristic. Such claims reflect the traditional understanding of the Equal Protection Clause as a prohibition against discriminatory government treatment of individuals due to their membership in a larger class. Until recently, public employees were also permitted to bring discrimination claims under an alternative equal protection theory—the relatively novel and controversial class-of-one claim. Plaintiffs in class-of-one cases seek recovery based on their status as individuals, not their membership in a larger group defined according to race, gender, or some other shared trait. Thus, in the employment context, class-of-one plaintiffs have typically alleged that a public employer "intentionally treat[ed] the plaintiff differently than others similarly situated . . . without any rational basis and solely for arbitrary, vindictive, or malicious reasons."[1] Last summer, however, the Supreme Court unwisely cut off this avenue of relief for public employees, holding in *Engquist v. Oregon Department of Agriculture* that class-of-one claims are inapplicable in the public employment context.[2]

In 1992, Anup Engquist was hired by the Oregon Department of Agriculture as an international food standards specialist, where her duties consisted of developing a database of the food regulations in foreign countries, marketing the Department's certification services at various trade shows, and consulting with companies that wished to export food overseas.[3] Engquist worked out of the Department's Export Service Center ("ESC"), a section organized within the Department's Laboratory Services Division.[4] During the term of her employment, Engquist had several run-ins with Joseph Hyatt, a systems analyst in the Laboratory Services Division.[5] Engquist repeat-

1. Brief of Appellant at 6, Engquist v. Or. Dep't of Agric., 478 F.3d 985 (9th Cir. 2007) (Nos. 05-35170, 05-35263).

2. 128 S. Ct. 2146 (2008).

3. Engquist v. Or. Dep't of Agric., 478 F.3d 985, 990 (9th Cir. 2007), *aff'd,* 128 S. Ct. 2146 (2008); Brief of Appellant, *supra* note 1, at 8.

4. *Engquist*, 478 F.3d at 990.

5. *Id.*

edly complained to Norma Corristan, director of the Laboratory Services Division, that Hyatt excessively monitored her work and made false statements about her to others in the Department.[6] Eventually, Corristan ordered Hyatt to attend diversity and anger management training.[7]

Soon thereafter, the Assistant Director of the Oregon Department of Agriculture, John Szczepanski, began oversight of the Laboratory Services Division.[8] By the summer of 2001, professional clashes between Szczepanski and Corristan were escalating, and Szczepanski began to complain that he could not "control" Engquist.[9] At the same time, Szczepanski began developing a close working relationship with Hyatt, providing him with "more access and input on important issues [regarding the Laboratory Services Division] than Ms. Corristan."[10] Eventually, Szczepanski determined that Corristan and Engquist needed to "be gotten rid of."[11] Thus, in the fall of 2001, Hyatt developed and drafted a plan at Szczepanski's request to eliminate their positions within the Department of Agriculture.[12]

Pursuant to the plan, Szczepanski first sought to fill the long-vacant position of ESC manager, with both Engquist and Hyatt applying for the opening.[13] Hyatt was offered the promotion despite Engquist's superior educational background and her extensive experience relating to the consulting and customer-service aspects of the management position.[14] Szczepanski defended his decision by claiming that Hyatt's experience starting his own coffee company and working as a Department chemist gave him the managerial skills that ESC needed.[15] Shortly thereafter, Szczepanski eliminated Corristan's position, ostensibly as part of a statewide budget reduction.[16] Engquist was then told that the ESC was being reorganized and that her

6. *Id.*
7. *Id.*
8. Cross-Appellant's Answering Brief on Appeal and Opening Brief on Cross-Appeal at 15, Engquist v. Dep't of Agric., 478 F.3d 985 (9th Cir. 2007) (Nos. 05-35170, 05-35263).
9. *Id.* at 15–16.
10. *Id.* at 15.
11. *Engquist*, 478 F.3d at 990.
12. *Id.*; Cross-Appellant's Answering Brief on Appeal and Opening Brief on Cross-Appeal, *supra* note 8, at 16.
13. *Engquist*, 478 F.3d at 990*;* Brief of Appellant, *supra* note 1, at 9–10.
14. *Engquist*, 478 F.3d at 990–91.
15. *Id.* at 991; Brief of Appellant, *supra* note 1, at 10.
16. *Engquist*, 478 F.3d at 991.

position was being eliminated as well.[17] Evidence was presented that Corristan and Engquist were the only full-time employees in the entire Department of Agriculture who were laid off as part of the budget reduction and reorganization.[18]

Corristan and Engquist brought separate claims against Szczepanski, Hyatt, and the Oregon Department of Agriculture.[19] Corristan filed suit in state court, alleging, inter alia, that she was discriminated against on the basis of her gender and ethnicity, resulting in a violation of her right to equal protection under the Fourteenth Amendment.[20] Corristan's equal protection claim resulted in a jury award of $1.1 million.[21] Engquist filed her claim in federal court, alleging, inter alia, discrimination in violation of the Fourteenth Amendment's Equal Protection Clause.[22] Like Corristan, Engquist included in her complaint a traditional equal protection claim—that is, an allegation of discrimination based on a suspect classification of race, color, gender, or national origin.[23] However, Engquist also sought relief based upon the so-called class-of-one theory, a relatively recent, controversial, and poorly understood claim under the Equal Protection Clause.[24] Under this class-of-one theory, Engquist alleged that Hyatt and Szczepanski "intentionally treat[ed] [her] differently than others similarly situated . . . without any rational basis and solely for arbitrary, vindictive, or malicious reasons."[25]

At trial, the jury rejected all of Engquist's equal protection claims relating to discrimination based on a suspect classification but nonetheless found Hyatt and Szczepanski liable under the class-of-one theory.[26] The Ninth Circuit, however, reversed.[27] Last summer in a six-to-three decision, the Supreme Court affirmed.[28] While the Court recognized the validity of class-of-one equal protection claims in other contexts, the Court

17. *Id.*
18. Cross-Appellant's Answering Brief on Appeal and Opening Brief on Cross-Appeal, *supra* note 8, at 7.
19. *Engquist*, 478 F.3d at 991.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id*; Brief of Appellant, *supra* note 1, at 5.
24. *Engquist*, 478 F.3d at 991.
25. *Id.* at 992 (first alteration in original); Brief of Appellant, *supra* note 1, at 6 (first alteration in original).
26. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2149 (2008).
27. *Engquist*, 478 F.3d at 996.
28. *Engquist*, 128 S. Ct. 2146.

held that the class-of-one theory was inapplicable to employment decisions made by public employers.[29]

This Note argues that, contrary to the Supreme Court's holding in *Engquist*, class-of-one equal protection claims should be permitted in the public employment context. Although a relatively recent addition to equal protection jurisprudence, the class-of-one theory has been readily accepted as a valid principle under the Equal Protection Clause. Its application to public employment disputes is entirely consistent with the text of the Equal Protection Clause, Supreme Court precedent, and sound public policy. Part I of this Note summarizes the early development of the Equal Protection Clause and explains the traditional formulation of equal protection claims. Part II begins by discussing the Supreme Court's formal recognition of the class-of-one theory in *Village of Willowbrook v. Olech* and continues by explaining why the *Olech* decision is consistent with prior precedent and the meaning and purpose of the Equal Protection Clause. Part III traces the development of the class-of-one theory after *Olech*, focusing on the confusion and controversy in the federal circuit courts surrounding class-of-one claims. Finally, Part IV evaluates the reasoning of the Ninth Circuit and Supreme Court in *Engquist* and argues that the class-of-one theory can be properly applied in the public employment context.

## I. THE DEVELOPMENT OF TRADITIONAL EQUAL PROTECTION JURISPRUDENCE

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[30] The Fourteenth Amendment was adopted in 1868 shortly after the end of the Civil War and the emancipation of African American slaves, and it is widely accepted that the initial purpose of the Amendment was to eliminate discrimination against former slaves and protect their rights from interference by white-controlled state and local governments.[31] As a result, some

29. *Id.* at 2151.

30. U.S. CONST. amend. XIV.

31. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring) ("[T]he driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks."); Palmer v. Thompson, 403 U.S. 217, 220 (1971) ("There can be no doubt that a major purpose of [the

early cases limited the application of the Equal Protection Clause to situations involving government classifications that singled out African Americans for disparate treatment.[32]

However, the Supreme Court has subsequently expanded the reach of the Fourteenth Amendment's Equal Protection Clause to cover group classifications that were never contemplated by the framers of the Fourteenth Amendment. These groups include racial minorities other than African Americans,[33] resident aliens,[34] women,[35] men,[36] illegitimate children,[37] homosexuals,[38] and even methadone users.[39] Under the traditional framework of equal protection analysis, the key inquiry is whether the government has created a classification and, if so, what sort of classification has been created.[40] Only after a court determines what sort of classification is at issue does it determine how closely it will scrutinize the government's justification for the classification.[41]

Initially, the Supreme Court merely required that government classifications be "reasonable."[42] Gradually, however, the Court began to formulate its current analytical framework for equal protection claims, whereby different levels of scrutiny are

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Fourteenth Amendment] was to safeguard [African Americans] against discriminatory state laws."); *Ex Parte* Virginia, 100 U.S. 339, 344–45 (1880) ("One great purpose of [the Fourteenth Amendment] was to raise [former slaves] from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States.").

Although there is no provision in the federal Constitution that prohibits the federal government from denying its citizens equal protection of the laws, the Supreme Court has held that equal protection principles apply to the federal government through the Due Process Clause of the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497 (1954); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 617 (2d ed. 2005).

32. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879); Slaughter-House Cases, 83 U.S. 36, 81 (1873) (suggesting that the Equal Protection Clause applied *only* to African Americans).

33. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

34. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 376 (1971); Traux v. Raich, 239 U.S. 33 (1915).

35. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996).

36. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

37. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977).

38. *See* Romer v. Evans, 517 U.S. 620 (1996).

39. *See* N.Y. City Transit Authority v. Beazer, 440 U.S. 569 (1979).

40. CHEMERINSKY, *supra* note 31, at 618.

41. *Id.*

42. Timothy Zick, *Angry White Males: The Equal Protection Clause and "Classes of One,"* 89 KY. L.J. 69, 70–71 (2000).

applied depending on the nature of the group classification.[43] The Court has applied at least three different levels of scrutiny under this modern framework.[44]

Government classifications that discriminate against aliens or that discriminate on the basis of race or national origin are subject to strict scrutiny, meaning that the government must persuade the court that the classification is truly "necessary to achieve a compelling government purpose."[45] In practice, strict scrutiny is almost always fatal to the challenged classification.[46] Discriminatory classifications based on gender are subject to intermediate scrutiny and are upheld only if they are "substantially related to an important government purpose."[47] Intermediate scrutiny is more deferential to the government classification than strict scrutiny—the government's purpose for discriminating need only be "important," rather than "compelling," and the means employed to achieve that purpose need only be "substantially related to" the purpose rather than "necessary" to achieve the government's goals.[48] All classifications that are not subject to strict or intermediate scrutiny are examined under rational basis review, where the classification will be upheld so long as it is "rationally related to a legitimate government purpose."[49] The rational basis test is the most deferential level of scrutiny, and government classifications subjected to rationality review have rarely been held to violate the Equal Protection Clause.[50]

The key to traditional equal protection jurisprudence is that the government discrimination must be class based, rather than individually discriminatory. Some courts have explicitly stated that a valid equal protection claim requires the plaintiff to allege that he or she was singled out impermissibly for unfavorable treatment because of his or her membership in a larger class. For instance, in *Oyler v. Boles*, the Supreme Court af-

43. *Id.*; CHEMERINSKY, *supra* note 31, at 619.

44. CHEMERINSKY, *supra* note 31, at 619. Some observers argue that the Court sometimes applies a fourth level of scrutiny, often referred to as "rational basis scrutiny with bite." *See* Hortensia S. Carreira, *Protecting the "Class-of-One,"* 36 REAL PROP. PROB. & TR. J. 331, 338–39 (2001); Gale Lynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L.J. 779 (1987).

45. CHEMERINSKY, *supra* note 31, at 619.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 619–20.

50. *Id.* at 620.

firmed the convictions of two criminal defendants who claimed that selective enforcement of West Virginia's habitual criminal statute violated their constitutional right to equal protection.[51] The Court explained that the defendants' equal protection claims failed because the selective enforcement of the statute was not "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary [group] classification."[52] Likewise, in *Futernick v. Sumpter Township*, the Sixth Circuit rejected an equal protection claim where the plaintiff merely asserted an equal protection violation based on local officials' selective enforcement of state environmental regulations.[53] And in *Powell v. City of Montgomery*, a federal district court held that the plaintiff, a firefighter, could not prevail on his equal protection claim because the selective enforcement of fire department employment regulations was not "deliberately based on an *unjustifiable*, *group-based standard*."[54]

Thus, the Supreme Court has traditionally defined the Equal Protection Clause as a barrier to "discrimination based on membership in a group, and more particularly, on members of suspect classes . . . or semi-suspect classes."[55] The Clause "reasonably has come to be understood primarily, or even exclusively, as a shield against state action that discriminates against a person or persons by virtue of membership in a socially disadvantaged group."[56] According to the traditional understanding of equal protection, therefore, the Clause protects the rights of groups, not individuals. The individual is protected only indirectly; he is required to show that he was

51. 368 U.S. 448 (1962).

52. *Id.* at 456 (citations omitted); *see also* Oregon v. Hicks, 35 P.2d 794, 803–04 (Or. 1958) (holding that selective enforcement of Oregon's habitual criminal statute did not violate the Equal Protection Clause because the selectivity was not based on an impermissible group classification).

53. 78 F.3d 1051 (6th Cir. 1996).

54. 56 F. Supp. 2d 1328, 1333 (M.D. Ala. 1999). Numerous other courts have required that equal protection claims allege discrimination based on group classifications. *See, e.g.*, Smith v. Town of Eaton, 910 F.2d 1469, 1472 (7th Cir. 1990) ("An equal protection claim must be based on 'intentional discrimination against [the plaintiff] because of his membership is a particular class, not merely [because] he was treated unfairly as an individual.' ") (quoting Huebschen v. Dep't of Health & Soc. Servs., 716 F.2d 1167, 1171 (7th Cir. 1983)); New Burnham Prairie Homes, Inc. v. Vill. of Burnham, 910 F.2d 1474, 1481 (7th Cir. 1990) (holding that in order to assert an equal protection claim, "a complaining party must assert disparate treatment based on their membership in a particular group. Discrimination based merely on *individual*, rather than group, reasons will not suffice.").

55. Carreira, *supra* note 44, at 336.

56. *Id.* at 337.

treated differently due to his membership in the particular group subjected to an illegitimate government classification. Yet this traditional formulation of the Equal Protection Clause has been supplemented by an alternative conception of equal protection claims—the class-of-one theory.

## II. AN ALTERNATIVE UNDERSTANDING OF EQUAL PROTECTION: *OLECH* AND THE CLASS-OF-ONE

Nothing in the language of the Fourteenth Amendment prohibits the application of the Equal Protection Clause to protect individuals as individuals rather than as members of a larger group. The Clause speaks of "persons," not groups or suspect classifications,[57] and "is essentially a direction that all persons similarly situated should be treated alike."[58] In 2000, the Supreme Court confronted this alternative understanding of the Equal Protection Clause and explicitly endorsed the class-of-one theory.

### *A.* Village of Willowbrook v. Olech

In *Village of Willowbrook v. Olech*, the Supreme Court was squarely confronted with the question of whether the Equal Protection Clause directly protects an individual from government discrimination, regardless of his or her membership in a larger group or class.[59] In a short per curiam opinion, the Court answered that question in the affirmative.[60] The plaintiffs in the case brought suit against the Village of Willowbrook because village officials refused to connect the plaintiffs' property to the municipal water supply unless the plaintiffs granted the village a thirty-three foot easement.[61] The village only required a fifteen foot easement from similar property owners, and the Olechs claimed that the demand for additional land was motivated by the village's ill will towards the plaintiffs arising from the plaintiffs' successful pursuit of a previous, unrelated lawsuit against the village.[62] The district court dis-

57. U.S. CONST. amend. XIV.

58. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

59. 528 U.S. 562 (2000).

60. *Id.* at 565.

61. *Id.* at 563.

62. *Id.*

missed the Olechs' suit for failure to state a valid equal protection claim, but the Seventh Circuit reversed, holding that a plaintiff may allege a class-of-one equal protection violation by asserting that state officials were motivated solely by a "spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective."[63]

In affirming the Seventh Circuit's ruling, the Supreme Court expressly recognized that a class-of-one equal protection claim exists "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[64] In short, a plaintiff, as a class-of-one, may allege a violation of the Equal Protection Clause when the government intentionally and irrationally discriminates against the plaintiff individually. The plaintiff need not allege membership in a larger class or group. It is important to note, however, that the Supreme Court's formulation of the class-of-one theory differed from that of the Seventh Circuit. The Court declined to comment on the lower court's "subjective ill will" formulation of the class-of-one theory and instead couched its class-of-one standard as intentional discrimination with "no rational basis for the difference in treatment."[65]

Justice Breyer, in his concurrence, expressed an oft-repeated concern that recognizing a class-of-one theory of equal protection based only on irrational, arbitrary government conduct could potentially transform every run-of-the-mill government decision into a constitutional case.[66] This concern was later echoed by the Ninth Circuit and the Supreme Court in the *Engquist* case, with each court stating that allowing class-of-one claims in the employment context would provide a constitutional cause of action for every disgruntled former government employee.[67] To prevent the federal courts from being overwhelmed by class-of-one equal protection claims, Breyer

63. *Id.* at 563–64 (quoting Olech v. Vill. of Willowbrook, 160 F.3d 386, 387 (7th Cir. 1998)).

64. *Id.* at 564 (citations omitted).

65. *Id.* at 564–65.

66. *See id.* at 565. A number of commentators have also attacked the class-of-one theory on the ground that it will constitutionalize minor disputes between governments and individuals subjected to unfavorable government decisions. *See, e.g.*, Zick, *supra* note 42, at 117–24.

67. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2156–57 (2008); Engquist v. Or. Dep't of Agric., 478 F.3d 985, 995 (9th Cir. 2007), *aff'd,* 128 S. Ct. 2146 (2008).

proposed that such claims be required to allege that the government's decision was motivated by "illegitimate animus," "vindictive action," or "ill will."[68] Thus, with *Olech*, the Supreme Court explicitly recognized class-of-one claims for the first time, and it was left to the lower courts to work out the details of this alternative equal protection theory.

### *B. Pre-*Olech *Class-of-One Cases*

The Supreme Court's formal recognition of class-of-one equal protection claims in *Olech* was preceded by a long-running debate in the lower courts concerning the validity of the class-of-one theory. As previously noted, many courts exclusively embraced the traditional formulation of the equal protection clause, holding that an equal protection claim always required the plaintiff to allege discriminatory treatment based on a larger group classification.[69] However, the Supreme Court sometimes formulated its analysis of the Equal Protection Clause in a way that arguably left the door open for the development of the class-of-one theory in the lower courts.

In *Yick Wo*, for example, the Supreme Court held that the discriminatory enforcement of a local San Francisco ordinance against Chinese launderers violated the principles of equal protection because the government had impermissibly discriminated "between persons in similar circumstances."[70] Similarly, in *McFarland v. American Sugar Refining Co.*, the Court invalidated a Louisiana statute on equal protection grounds because it "bristle[d] with severities that touch the plaintiff alone."[71] And in *City of Cleburne v. Cleburne Living Center*, the Court stated that the Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike."[72] In fact, the *Olech* Court itself treated the class-of-one theory as being firmly established, citing its 1923 holding in *Sioux City Bridge Co. v. Dakota County* for the proposition that the "purpose of the equal protection clause of

68. *Olech*, 528 U.S. at 565. Justice Breyer's proposal borrowed from a line of Seventh Circuit cases authored by Judge Posner. *See infra* Part II.B. Following *Olech*, some courts began requiring class-of-one plaintiffs to allege that the discriminatory treatment was the result of vindictive ill will or an illegitimate animus. *See infra* Part III.

69. *See supra* Part I.

70. Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).

71. 241 U.S. 79, 86 (1916).

72. 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202 (1982)).

the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."[73]

Prior to *Olech*, several of the circuit courts recognized the class-of-one theory.[74] However, the primary champion of the class-of-one theory was the Seventh Circuit, and its treatment of class-of-one claims eventually led to the Supreme Court's decision in *Olech*. One of the first opinions from the Seventh Circuit to articulate the class-of-one concept was *Ciechon v. City of Chicago*, in which the plaintiff claimed that the city discharged her from her job as a paramedic in violation of the Equal Protection Clause.[75] A patient died while in the plaintiff's care and the city, under intense pressure from the patient's family and the media, fired the plaintiff for this single incident.[76] Her partner, a paramedic equally responsible for the patient's care, was not subject to any disciplinary action.[77] The Seventh Circuit, while cautioning that it had "no intention of opening the floodgates to review all municipal personnel decisions,"[78] ruled that the city's unequal treatment of the two paramedics amounted to "intentional invidious discrimination by the state against persons similarly situated," in violation of the Equal Protection Clause.[79]

Following *Ciechon*, various panels of the Seventh Circuit engaged in a long-running back and forth debate regarding the constitutional validity and elements of the class-of-one concept. For example, in *New Burnham Prairie Homes, Inc. v. Village of Burnham*, the court completely rejected the class-of-one theory of equal protection.[80] According to the court, the plaintiffs' claim was fundamentally flawed because, in order "to assert a

73. *Olech*, 528 U.S. at 564 (quoting Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923)).

74. *See, e.g.*, Norton v. Vill. of Corrales, 103 F.3d 928, 933 (10th Cir. 1996); Rubinovitz v. Rogato, 60 F.3d 906, 911–12 (1st Cir. 1995); Yerardi's Moody St. Rest. & Lounge, Inc. v. Bd. of Selectmen, 878 F.2d 16, 21 (1st Cir. 1989); Zeigler v. Jackson, 638 F.2d 776, 779 (5th Cir. 1981); LeClair v. Saunders, 627 F.2d 606, 609–10 (2d Cir. 1980); Vanderhurst v. Colo. Mountain Coll. Dist., 16 F. Supp. 2d 1297, 1300–02 (D. Colo. 1998).

75. 686 F.2d 511 (7th Cir. 1982).

76. *Id.* at 516.

77. *Id.*

78. *Id.* at 517.

79. *Id.* at 522–23.

80. 910 F.2d 1474, 1481 (7th Cir. 1990).

constitutional claim based on violation of equal protection, a complaining party must assert disparate treatment based on their membership in a particular group. Discrimination based merely on *individual*, rather than group, reasons will not suffice."[81] Two years later, in *Wroblewski v. City of Washburn*, a separate panel of the Seventh Circuit responded to the *New Burnham* decision by stating that an equal protection claim does not necessarily require an allegation of discrimination based on membership in a distinct group or class.[82] Rather, "the state's act of singling out an individual for differential treatment itself creates the class" that forms the basis of an equal protection claim.[83]

The most extensive examination of the class-of-one theory, however, was developed in a series of Seventh Circuit decisions written by Judge Posner. In *Esmail v. Macrane*, the plaintiff, a liquor store owner, claimed that his license was not renewed by city officials on the basis of trivial or baseless charges, while those officials simultaneously "maintain[ed] a policy and practice of routinely granting new liquor licenses as well as renewing existing licenses requested by persons who had engaged in the same or similar conduct."[84] The plaintiff alleged that the non-renewal of his license stemmed from an unrelated prior dispute with local government officials.[85] Thus, the plaintiff maintained that the government had acted with "the sole and exclusive purpose of exacting retaliation and vengeance."[86] Judge Posner noted that a valid class-of-one equal protection claim must do more than merely allege uneven enforcement, selective prosecution, or differential treatment of identically situated persons.[87] A valid claim must also allege that the difference in treatment was an intentional result motivated by an illegitimate animus.[88]

While acknowledging that the class-of-one concept was not the primary concern behind the adoption of the Equal Protection Clause, Judge Posner recognized that neither the language

81. *Id.*; *see also* Smith v. Town of Eaton, 910 F.2d 1469, 1472 (7th Cir. 1990) (affirming the dismissal of plaintiff's claim for failure to allege class-based, rather than merely individual, discrimination).

82. 965 F.2d 452, 459 (7th Cir. 1992).

83. *Id.*

84. 53 F.3d 176, 178 (7th Cir. 1995).

85. *Id.*

86. *Id.*

87. *Id.* at 179.

88. *Id.*

nor the interpretation of the Clause limits its protection to members of larger, identifiable classes.[89] Rather, Judge Posner noted that the purpose of the Equal Protection Clause is to protect vulnerable classes from discriminatory state action, and because a class-of-one is likely to be exceptionally vulnerable to such action, it should be afforded equal protection under the Clause.[90] Thus, the *Esmail* court ruled that the plaintiff had stated a valid class-of-one claim, concluding that if "the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to [be protected under the Equal Protection Clause]."[91]

A year after *Esmail*, Judge Posner again examined the class-of-one theory in *Indiana State Teachers Association v. Board of School Commissioners*, where he reaffirmed one of the basic points of *Esmail*—a single individual can constitute a class for the purposes of equal protection.[92] Posner warned, however, that government actors must often act arbitrarily, and the "concept of equal protection is trivialized when it is used to subject every decision made by state or local government to constitutional review by federal courts."[93] Judge Posner reiterated that something more than differential treatment of similarly situated persons is needed to support a class-of-one equal protection claim.[94] A plaintiff must also allege that the discrimination was the intended result of ill will, vindictiveness, or "malignant animosity."[95]

Judge Posner made clear in *Olech*, however, that under rational basis review the presence of an illegitimate animus should not automatically render the government's differential treatment unconstitutional.[96] Instead, the discriminatory action must lack any possible rational basis, such that the illegitimate animus is the *sole motivating factor* for the difference in treatment of similarly situated persons.[97] The Posner opinion stated:

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89. *See id.* at 180.
90. *See id.* (citing Ben-Shalom v. Marsh, 881 F.2d 454, 466 (7th Cir. 1989)).
91. *Id.* at 179.
92. 101 F.3d 1179, 1181 (7th Cir. 1996).
93. *Id.*
94. *Id.*
95. *Id.* at 1181–82 (citing *Esmail*, 53 F.3d at 179).
96. Olech v. Vill. of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998).
97. *Id.*; *see also* Bell v. Duperrault, 367 F.3d 703, 713 (7th Cir. 2004) (Posner, J., concurring) (stating that illegitimate animus "must be the only reason[ ] for the

> [T]he "vindictive action" class of equal protection cases requires proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant. If the defendant would have taken the complained-of action anyway, even if it didn't have the animus, the animus would not condemn the action; a tincture of ill will does not invalidate governmental action.[98]

The Supreme Court's decision in *Olech*, however, declined to address the Seventh Circuit's illegitimate animus formulation of the class-of-one theory.[99] Thus, the class-of-one case law was split into two seemingly discordant strands—the Supreme Court's requirement that a plaintiff merely allege that he "has been intentionally treated differently from others similarly situated and . . . there is no rational basis for the difference in treatment," [100] and the Seventh Circuit's formulation requiring the plaintiff to prove, additionally, that he was irrationally singled out for adverse treatment due to subjective ill will.

## III. DEVELOPMENT AND APPLICATION OF THE CLASS-OF-ONE THEORY OF EQUAL PROTECTION AFTER *OLECH*

Following the Supreme Court decision in *Olech*, the lower courts have struggled to define both the elements and the boundaries of the class-of-one theory. In particular, several courts have been reluctant to allow the class-of-one theory to constitutionalize trivial disputes by transforming those disagreements into equal protection claims.[101] These courts have generally recognized that state and local governments have limited resources and must often act arbitrarily in the performance of their duties, and thus question the wisdom of the *Olech* decision. Other courts, following the lead of Justice Breyer's concurrence in *Olech*, have attempted to confront this reality by adopting the Seventh Circuit's illegitimate animus

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adverse action of which the plaintiff is complaining. If there are legitimate as well as illegitimate reasons, the presence of the latter will not taint the former."); Albiero v. City of Kankakee, 246 F.3d 927, 932 (7th Cir. 2001) ("Ill will must be the sole cause of the complained-of action. A showing of 'uneven law enforcement,' standing alone, will not suffice." (citation omitted)).

98. *Olech*, 160 F.3d at 388.

99. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000).

100. *Id.* at 564.

101. *See, e.g.*, Engquist v. Or. Dep't of Agric., 478 F.3d 985 (9th Cir. 2007), *aff'd,* 128 S. Ct. 2146 (2008).

formulation of the class-of-one theory, thus requiring the plaintiff to allege that the government's disparate treatment was the result of "vindictiveness," "ill will," or "illegitimate personal animus."

### *A. Confusion and Controversy After* Olech

Echoing Breyer's concurrence in *Olech*, concern quickly arose that the class-of-one theory would open up the federal courts to a flood of litigation constitutionalizing simple disputes between individuals and local and state governments.[102] The circuit courts, in particular the Seventh Circuit and Judge Posner, have attempted to mold *Olech* into a workable standard by reading the Supreme Court's formulation of the class-of-one theory as actually requiring proof of subjective ill will as well as no rational basis for the different treatment of similarly situated persons.

Thus, in *Hilton v. City of Wheeling*, the first class-of-one case following *Olech*, Judge Posner noted that if the *Olech* decision was strictly interpreted, nearly any unexplained difference in treatment of similar situated persons could result in an equal protection claim, and "the federal courts would be drawn deep into the local enforcement of petty state and local laws."[103] Therefore, Posner proposed to gloss the "no rational basis" standard adopted by *Olech* "to mean that to make out a prima facie case the plaintiff must present evidence that the defendant deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position."[104] The cause of the discriminatory treatment must have been "a totally illegitimate animus toward the plaintiff."[105]

In a later case, Judge Posner suggested that the divergent formulations of the class-of-one theory could also be reconciled by reading *Olech*'s requirement of "intentionally different

102. *See id.*; *see also* Zick, *supra* note 42, at 117–24.

103. 209 F.3d 1005, 1008 (7th Cir. 2000).

104. *Id.* Judge Posner later clarified that "reasons of a personal nature" should be understood to include more than mere personal hostility, but should also encompass other possible "improper motives." Bell v. Duperrault, 367 F.3d 703, 710 (7th Cir. 2004) (Posner, J., concurring) (pointing to the case *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), as an example, where the plaintiff was made a scapegoat in order for the city to avoid media scrutiny and a threatened lawsuit).

105. *Hilton*, 209 F.3d at 1008.

treatment" as consistent with the Court's decision in *Personnel Administrator of Massachusetts v. Feeny*, which held that a government official "intends" a result when he acts to achieve that result, rather than in spite of it.[106] In other words, Judge Posner would require a class-of-one plaintiff to show that the government acted with a specific desire to intentionally treat the plaintiff differently than other persons similarly situated, and that the difference in treatment lacked a rational justification. It would not be enough for a plaintiff to merely allege that the government acted with an awareness that its conduct would result in disparate treatment. The Supreme Court and Seventh Circuit versions of the class-of-one theory could therefore be reconciled to accommodate an illegitimate animus requirement: when a government official acts with the intention of treating one of two or more similarly situated individuals less favorably, with no rational, legitimate basis for the difference in treatment, the official likely acts with an impermissible animus and the plaintiff may pursue a class-of-one claim.

Unfortunately, not all courts have integrated the Supreme Court standard with the illegitimate animus formulation. Even within the Seventh Circuit, confusion remains. Some panels of the court have followed Judge Posner and the *Hilton* line of cases, holding that a showing of illegitimate animus is a required element in a valid class-of-one claim.[107] Others, however, have interpreted the illegitimate animus formulation as an alternative to the Supreme Court's *Olech* standard and thus allow a plaintiff to proceed under either formulation—though, as Judge Posner notes, it is unclear why a class-of-one plaintiff would ever bother to proceed beyond the requirements of *Olech* if given a choice.[108]

Outside the Seventh Circuit, other courts have followed the *Hilton* line and thus treat illegitimate animus as an essential ingredient in class-of-one equal protection cases.[109] Several

106. *See* Tuffendsam v. Dearborn County Bd. of Health, 385 F.3d 1124, 1127 (7th Cir. 2004) (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979)).

107. *See, e.g.*, Crowley v. McKinney, 400 F.3d 965, 972 (7th Cir. 2005); Purze v. Vill. of Winthrop Harbor, 286 F.3d 452, 455 (7th Cir. 2002); Cruz v. Town of Cicero, 275 F.3d 579, 587 (7th Cir. 2001).

108. *See, e.g.*, Bell v. Duperrault, 367 F.3d 703, 707–09, 711 (7th Cir. 2004); Nevel v. Vill. of Schaumburg, 297 F.3d 673, 681 (7th Cir. 2002); Albiero v. City of Kankakee, 246 F.3d 927, 932 (7th Cir. 2001).

109. *See, e.g.*, *Bell*, 367 F.3d at 711 (Posner, J., concurring) (citing Williams v. Pryor, 240 F.3d 944, 951 (11th Cir. 2001); Shipp v. McMahon, 234 F.3d 907, 916–17 (5th Cir. 2000), *rev'd on other grounds*, McClendon v. City of Columbia, 305

courts have treated the issue as an unresolved question and have not committed to accepting or rejecting the illegitimate animus requirement.[110] Only one court, in the Second Circuit, has definitively stated—although in dicta—that proof of subjective ill will is not required in class-of-one cases.[111]

### *B. The Class-of-One and Public Employment*

Despite the controversy and confusion surrounding the class-of-one concept, courts generally permitted class-of-one equal protection claims to be brought in the public employment context, at least until the Supreme Court's ruling in *Engquist*. The lower courts thus allowed an employee to allege that a government employer subjected him to an adverse public employment decision for an arbitrary or illegitimate reason. For example, in *Bartell v. Aurora Public Schools*, the plaintiff, who was employed by a local school district, alleged that his supervisors maliciously pursued a sexual harassment investigation that eventually led to his discharge.[112] Although the Tenth Circuit ultimately affirmed the dismissal of the plaintiff's equal protection claim, the court declared that the class-of-one concept is a "viable legal theory" in the public employment context.[113] Likewise, in *Neilson v. D'Angelis*, a court security officer employed by the New York Office of Court Administration alleged that his class-of-one equal protection rights were violated when supervisors disciplined him for workplace misconduct, while other officers engaging in misconduct were not subjected to any adverse employment actions.[114] The Second Circuit reversed the district court judgment in favor of the plaintiff for failure to satisfy the similarly situated requirement, but the court acknowledged the right of public employees

F.3d 314, 329 (5th Cir. 2002); Bryan v. City of Madison, 213 F.3d 267, 276–77 and n.17 (5th Cir. 2000)).

110. *See id.* (citing Hayut v. State Univ. of N.Y., 352 F.3d 733, 754 n.15 (2d Cir. 2003); DeMuria v. Hawkes, 328 F.3d 704, 707 n.2 (2d Cir. 2003); Giordano v. City of New York, 274 F.3d 740, 743 (2d Cir. 2001)).

111. *See id.* (citing Jackson v. Burke, 256 F.3d 93, 96–97 (2d Cir. 2001) (per curiam)).

112. 263 F.3d 1143, 1144, 1148 (10th Cir. 2001), *overruled by* Pignanelli v. Pueblo Sch. Dist. No. 60, 540 F.3d 1213, 1222 (10th Cir. 2008).

113. *Id.* at 1148.

114. 409 F.3d 100, 101 (2d Cir. 2005), *overruled by* Appel v. Spiridon, 531 F.3d 138, 140 (2d Cir. 2008).

to bring class-of-one claims against their government employers.[115]

Prior to the Supreme Court's decision in *Engquist*, the First, Third, Fifth, Sixth, and Seventh Circuits also concluded that class-of-one claims may be brought against public employers.[116] The remaining circuits apparently did not confront the issue. The Ninth Circuit's decision in *Engquist* marked the first time that a circuit court definitively held that class-of-one claims are not applicable in the public employment context.[117]

### *C. The Ninth Circuit's Refusal to Allow Class-of-One Claims in the Public Employment Context*

In *Engquist*, the Ninth Circuit considered whether to apply the class-of-one theory in the public employment context as a matter of first impression.[118] The court began its discussion by characterizing the class-of-one theory as a dangerous legal instrument that "could provide a federal cause of action for review of almost every executive or administrative government decision."[119] The court then refused to consider whether or not class-of-one claims required an allegation of illegitimate personal animus, contending that such a requirement was inconsistent with *Olech* and the Ninth Circuit's own precedent.[120] The court thus summarily dismissed the possibility that a requirement of illegitimate animus is consistent with *Olech*, as Judge Posner contends. As a result, the Ninth Circuit also failed to consider that, in response to its concern that class-of-one employment cases would overwhelm the federal courts with litigation, an illegitimate animus requirement could effec-

115. *See id.* at 104 (stating that although the plaintiff was not a member of a protected class, "here, the plaintiff . . . can still prevail in what is known as a 'class of one' equal protection claim").

116. *See, e.g.*, Hill v. Borough of Kutztown, 455 F.3d 225, 239 (3d Cir. 2006); Whiting v. Univ. of S. Miss., 451 F.3d 339, 348–50 (5th Cir. 2006); 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); Campagna v. Mass. Dep't of Envtl. Prot., 334 F.3d 150, 156 (1st Cir. 2003).

117. Engquist v. Or. Dep't of Agric., 478 F.3d 985, 996 (9th Cir. 2007), *aff'd,* 128 S. Ct. 2146 (2008). The Ninth Circuit has, however, held that a class-of-one claim can be brought in the regulatory context. *See* Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 944–45 (9th Cir. 2004) (applying class-of-one theory to the water quality control board's arbitrary enforcement of water quality regulations).

118. *Engquist*, 478 F.3d at 992.

119. *Id.* at 993 (citation omitted).

120. *Id.* at 993–94 n.1.

tively limit the number of class-of-one employment claims brought in federal court.

While conceding that class-of-one claims may be appropriate in the legislative or regulatory context,[121] the Ninth Circuit pointed to a number of considerations that led it to conclude that the class-of-one theory was inapplicable in the public employment context. First, the court noted that generally there is a distinction between the "government acting as a proprietor that [is] managing its own internal affairs rather than as a lawmaker that [is] attempting to regulate or license."[122] Therefore, "the government [acting] as employer indeed has far broader powers than does the government [acting] as sovereign," and the ability of courts to review the employment decisions of a public employer should be correspondingly limited.[123]

In particular, the court noted that in other areas of constitutional law the Supreme Court has restricted the ability of public employees to bring claims against their government employers.[124] Thus, the court observed that in the First Amendment context "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 comments from employer discipline."[125] The court likewise found support for its holding from the fact that, in the Fourth Amendment context, a government employer generally need not obtain a warrant to search an employee's workspace since imposing such a requirement on public employers would unduly interfere with the day-to-day operations of government business.[126] Thus, the Ninth Circuit concluded that "the 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."[127]

Second, the *Engquist* Court contended that class-of-one claims would destroy at-will employment in the public sector.[128] Reluctant to disrupt government personnel policies, the court feared that extension of class-of-one claims into the pub-

121. *Id.* at 994.
122. *Id.* (citation and internal quotations omitted).
123. *Id.*
124. *Id.*
125. *Id.* at 994–95 (quoting Garcetti v. Ceballos, 126 S. Ct. 1951 (2006)).
126. *Id.* at 995 (citing O'Connor v. Ortega, 480 U.S. 709 (1987)).
127. *Id.* (citation omitted).
128. *Id.*

lic employment realm would forbid any arbitrary or malicious firing.[129] In addition, class-of-one protection was considered superfluous, since public employees are often protected against arbitrary treatment by civil service regulations or collective bargaining agreements.[130]

Third, the court was alarmed by the possibility that public employment class-of-one claims would overwhelm the federal courts and require the courts to "review the multitude of personnel decisions that are made daily by public agencies."[131] The court, therefore, held that class-of-one theory of equal protection was inapplicable in the public employment context and reversed the trial verdict in favor of Engquist with respect to her class-of-one equal protection claim.[132]

### *D. The Supreme Court Decision Eliminating Class-of-One Claims in Public Employment*

Last summer, in a six-to-three decision authored by Chief Justice Roberts, the Supreme Court affirmed the ruling of the Ninth Circuit in *Engquist,* now making it impossible for any public employee to allege a class-of-one equal protection claim against his or her employer.[133] The Court's decision came despite the fact that it reaffirmed class-of-one claims as legitimate avenues of relief under the Fourteenth Amendment, as well as recognizing that the Equal Protection Clause protects "administrative as well as legislative acts," such that "[s]tates do not escape the strictures of the Equal Protection Clause in their role as employers."[134] According to the Court, however, "unique considerations" dictated that class-of-one claims be deemed inapplicable in the public employment context.[135]

The Supreme Court, like the Ninth Circuit, noted that the government has broader powers when acting as an employer rather than as a lawmaker, and may therefore deal with its employees in ways that would be forbidden if it were dealing with ordinary citizens.[136] Thus, although the Court indicated in *Olech* that it was willing to allow class-of-one claims against

129. *Id.*
130. *Id.* at 995 n.3.
131. *Id.* at 995 (citation omitted).
132. *Id.* at 996.
133. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146 (2008).
134. *Id.* at 2150 (citations omitted).
135. *Id.* at 2151.
136. *Id.*

the government acting as a regulator, when the government acts as an employer it should be given greater leeway.[137] Like the Ninth Circuit, the Court reasoned that in the First and Fourth Amendment contexts the constitutional rights of government employees may be restricted or eliminated when the exercise of those rights is outweighed by the government's need to effectively and efficiently perform its duties.[138] According to the Court, therefore, class-of-one equal protection rights may likewise be "balanced against the realities of the employment context," particularly because class-of-one employment claims do not implicate the "core concern" of the Equal Protection Clause—that is, discriminatory legislation based on membership in a larger identifiable class.[139]

Turning to policy arguments, the members of the majority also shared the Ninth Circuit's concern that permitting class-of-one employment claims would effectively end the employment-at-will doctrine in the public sector, where there is a "settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer."[140] At the heart of the Court's opinion was the concern that class-of-one claims cannot be reconciled with the notion that employment decisions are subjective and individualized determinations that involve nebulous discretionary judgments.[141] This concern was not implicated in *Olech* and the cases upon which it relied because, according to the Court, the government regulators in those cases operated with very little discretion and there existed clear government standards "against which departures, even for a single plaintiff, could be readily assessed."[142] For example, in *Olech* the zoning board demanded that the plaintiffs grant the village a thirty-three foot easement while it required only a fifteen foot easement for all others.[143] The board's departure from a clear, non-discretionary standard raised a concern that similarly situated individuals were treated differently for wholly arbitrary reasons, permitting the plaintiffs to raise a class-of-one claim.[144]

137. *Id.* at 2151–52.
138. *Id.*
139. *Id.* at 2152.
140. *Id.* at 2155 (citation and quotation marks omitted).
141. *Id.* at 2154.
142. *Id.* at 2153.
143. *Id.* at 2153–54.
144. *Id.*

However, the majority found the case to be quite different with respect to employment decisions, which often involve discretionary judgments based on vague, subjective assessments with no clear standard for identifying impermissible departures.[145] The Court thus noted that in the public employment context

> [t]he rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.[146]

In other words, treating similarly situated employees differently is simply "par for the course," given the wide discretion permitted employers when it comes to managing their employees.[147] Permitting class-of-one claims in the employment context purportedly would be incompatible with the discretion inherent in the employment-at-will doctrine.[148]

Finally, the Court expressed the oft-repeated concern that recognizing class-of-one employment claims could open the federal courts to a flood of trivial employment disputes.[149] In the Court's estimation, potentially any disgruntled employee could "conjure up a claim of differential treatment" that would become the basis for an equal protection claim.[150] Even though the Court recognized that it would normally be difficult for a class-of-one plaintiff to prevail, subjecting governments to defend such claims in the first place would be problematic, since courts would likely be overwhelmed with class-of-one employment cases.[151] The *Engquist* Court thus affirmed the Ninth Circuit, eliminating class-of-one claims in the employment context.[152]

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145. *Id.* at 2154.
146. *Id.*
147. *Id.* at 2155.
148. *Id.* at 2156.
149. *Id.* at 2156–57.
150. *Id.* at 2156.
151. *Id.* at 2157.
152. *Id.*

## IV. CLASS-OF-ONE EQUAL PROTECTION CLAIMS IN THE PUBLIC EMPLOYMENT CONTEXT

The Fourteenth Amendment's Equal Protection Clause is designed to ensure that a class of individuals is not singled out for unequal treatment at the hands of the government, unless the government can provide a rational justification for its action.[153] As *Olech* stated, "the number of individuals in a class is immaterial for equal protection analysis."[154] Thus, the Clause promises that no individual shall be subjected to adverse treatment due to the irrational whim of government officials. This basic principle holds special importance for millions of public employees who depend on their jobs as a source of livelihood. For these government workers, the class-of-one theory of equal protection may be their only defense from being irrationally singled out by a supervisor for adverse treatment in a way that threatens their most vital source of income. Any proposal to exclude class-of-one claims from the public employment context should therefore be justified and well supported by existing law and sound public policy.

As discussed below, no such justifications exist, contrary to the Supreme Court's opinion in *Engquist*. Rationales for restricting the First and Fourth Amendment rights of public employees are inapplicable in class-of-one equal protection cases. Furthermore, permitting class-of-one claims to be brought against government employers would not threaten whatever is left of the employment-at-will doctrine in the public sector.[155] And despite the concerns expressed by the *Engquist* majority, permitting class-of-one employment discrimination claims would not constitutionalize everyday employment disputes, thereby overwhelming the courts with a flood of equal protection cases.

153. *Id.* at 2158 (Stevens, J., dissenting).

154. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

155. As Justice Stevens explained in his dissenting opinion in *Engquist*, "recent constitutional decisions and statutory enactments have all but nullified the significance of the [employment-at-will] doctrine [in the public sector]. . . . Accordingly, preserving the remnants of 'at-will' employment provides feeble justification for creating a broad exception to a well-established category of constitutional protections." *See* Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2160 (2008) (Stevens, J., dissenting).

### *A. No Justification Exists for Eliminating Class-of-One Equal Protection Claims Against Public Employers*

The Equal Protection Clause has, of course, long been used to regulate government conduct in the employment sphere so as to prohibit discrimination based on an individual's membership in a larger class.[156] Prior to *Engquist*, the Supreme Court had never before narrowed the Equal Protection Clause's scope when applied to public employment situations.[157] Certainly nothing in *Olech* indicated that class-of-one equal protection claims should be strictly limited to the regulatory context. The Supreme Court has, however, acknowledged that some constitutional provisions would be unduly burdensome if strictly applied to government employers and therefore must be applied less stringently in light of workplace realities.[158] The cases relied on by the Ninth Circuit and the Supreme Court in *Engquist* to suggest that class-of-one claims against public employers should be restricted in light of the government's broad personnel management powers are simply inapplicable to equal protection cases.

For instance, the Ninth Circuit cited *Singleton v. Cecil* to suggest that government employers always have broad authority to discipline and discharge employees without attracting judicial scrutiny.[159] In *Singleton,* the Eighth Circuit rejected the due process claim of a police officer who argued that he was fired arbitrarily by his department.[160] In deciding the case, the court noted that, when analyzing constitutional claims, it is important to recognize the difference in the government's powers as an employer versus its more limited powers as a regulator.[161] However, the court acknowledged that even in the employment context a plaintiff could have a valid constitutional claim against a government employer if the complained-of action so shocked the conscience as to "offend judicial notions of

156. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Pers. Adm'r v. Feeney, 442 U.S. 256 (1979); N.Y. City Transit Auth. v. Beazer, 440 U.S. 568 (1979); Washington v. Davis, 426 U.S. 229 (1976).

157. *See* Engquist v. Or. Dep't of Agric., 478 F.3d 985, 1012 (9th Cir. 2007) (Reinhardt, J., dissenting), *aff'd,* 128 S. Ct. 2146 (2008).

158. *See, e.g.*, *Engquist*, 128 S. Ct. at 2151 (citing O'Connor v. Ortega, 480 U.S. 709, 721 (1987)).

159. *Engquist*, 478 F.3d at 994 (citing Singleton v. Cecil, 176 F.3d 419 (8th Cir. 1999) (en banc)).

160. *Singleton*, 176 F.3d at 421–22.

161. *Id.* at 425.

fairness . . . or . . . human dignity."[162] Therefore, far from supporting *Engquist*'s suggestion that the government acting as an employer has nearly unfettered authority to discipline and discharge employees, *Singleton* recognizes that public employment decisions are constrained by the Constitution, prohibiting employers from treating employees in ways that are "truly irrational" and "more than . . . arbitrary."[163]

In addition, both the Ninth Circuit and the Supreme Court cited *Bishop v. Wood* for the proposition that courts should not be in the business of overseeing the personnel decisions of government agencies.[164] In *Bishop*, the Supreme Court made the common sense observation that numerous mistakes are inevitable in the day-to-day operations of public agencies, and that the court system was not the appropriate forum to constantly review the facts underlying every employment decision.[165] Thus, the Court noted that incorrect and ill-advised employment decisions are routine and not constitutionally protected by the Fourteenth Amendment.[166]

However, the *Bishop* Court also recognized that not every employment action is shielded from judicial scrutiny: the personnel decisions of government employers are only presumed to be appropriate in "the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights."[167] Thus, although the Supreme Court has recognized that imprudent and mistaken employment decisions are beyond the reach of judicial review, a valid claim exists when a public employee alleges that he was denied his constitutional rights. Logically, then, when a government employer intentionally singles out an employee for disparate treatment in violation of his equal protection rights, a remedy should exist.

Nevertheless, the *Engquist* opinions contended that because the Supreme Court has allowed the First and Fourth Amendment rights of public employees to be restricted more than the rights of private citizens, Fourteenth Amendment equal protection rights may also be limited, and class-of-one

162. *Id.* at 425 n.7 (citation and internal quotations omitted).
163. *Id.*
164. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2151–52 (2008); *Engquist*, 478 F.3d at 994.
165. Bishop v. Wood, 426 U.S. 341, 349–50 (1976).
166. *Id.*
167. *Id.* at 350.

claims should be altogether prohibited in the employment context.[168] However, the Supreme Court had never before indicated that an individual's equal protection rights are dependent on whether the government is acting in its capacity as a regulator or an employer.[169] Moreover, the Supreme Court has not completely abolished the First or Fourth Amendment rights of public employees. Rather, the Court has simply determined that certain government employment decisions should be given more constitutional leeway in order for public agencies to effectively perform their duties.[170]

In *Pickering v. Board of Education*, cited by the *Engquist* majority, the Supreme Court observed that the "theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."[171] However, the *Pickering* Court recognized that government employers have an interest in efficiently delivering services to the public through their employees.[172] An employer therefore is permitted to discipline an employee for speech addressing a matter of public concern so long as it can show that the government's interest in performing its duty outweighs the employee's interest in exercising his or her First Amendment rights.[173] The free expression rights of public employees are thus limited only when their exercise would unduly interfere with the ability of a government agency to effectively and efficiently provide services and perform its obligations.

In *Waters v. Churchill,* also cited by the *Engquist* majority, the Supreme Court clearly laid out the justification for allowing public employers to restrict the free speech rights of their employees.[174] It comes from "the nature of the government's mission as employer."[175] When an individual is employed to help a public agency accomplish its mission and perform its duties, and then speaks or acts in a way to impede the agency's objec-

168. *Engquist*, 128 S. Ct. at 2151–52; *Engquist*, 478 F.3d at 994–95.

169. *See Engquist*, 478 F.3d at 1012 (Reinhardt, J., dissenting).

170. *See, e.g.*, City of San Diego v. Roe, 543 U.S. 77, 82–84 (2004); Waters v. Churchill, 511 U.S. 661, 674–75 (1994); O'Connor v. Ortega, 480 U.S. 709, 721 (1987); Pickering v. Bd. of Educ., 391 U.S. 563, 568–69 (1968).

171. *Pickering*, 391 U.S. at 568 (citation omitted); *see also Roe*, 543 U.S. 77, 80 (2004) ("A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment.").

172. *Pickering*, 391 U.S. at 568.

173. *Id.* at 572–73.

174. *See* Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2151 (2008) (citing Waters v. Churchill, 511 U.S. 661, 674–75 (1994)).

175. *Waters*, 511 U.S. at 674.

tives, the employer must be permitted to discipline the employee for the sake of the government's efficient operation.[176] Thus, the Court concluded that the key to restricting constitutional rights in the employment context is understanding that

> 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 in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.[177]

The essential justification for limiting a government employee's constitutional rights, therefore, is that it is necessary in order for the public employer to efficiently provide public services and perform its lawful duties.[178] Absent such a justification, an employee should enjoy the same constitutional rights and protections that are afforded any other citizen.

In the Fourth Amendment context, the Supreme Court has noted that requiring a government employer to establish probable cause and obtain a warrant anytime it needed to search an absent employee's workspace for a file folder would be plainly unworkable.[179] However, the Court has also cautioned that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private em-

176. *Id.* at 675.

177. *Id.*

178. The Supreme Court's recent decision in *Garcetti v. Ceballos* is not to the contrary. *See* 547 U.S. 410 (2006). There, the Court limited the First Amendment rights of public employees by holding 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." *Id.* at 421. The Court justified its holding, in part, by noting that

> [e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.

*Id.* at 422–23. Thus, the *Garcetti* decision may be seen to represent a one-time, categorical balancing of interests in which the promotion of workplace efficiency will always outweigh an employee's interest in First Amendment free expression when speaking in his or her official capacity.

179. O'Connor v. Ortega, 480 U.S. 709, 719–25 (1987).

ployer."[180] Instead, those rights should be restricted due to "the government's need for supervision, control, and the efficient operation of the workplace."[181] Thus, in *O'Connor v. Ortega*, the Court held that the usual warrant and probable cause requirements relating to government searches and seizures must be supplanted by a "reasonableness" standard in the public employment context.[182] The inception of the search must be based on a reasonable belief that it will turn up a needed file or uncover employee misconduct, and the scope of the search must be reasonable in relation to the government objective.[183] The government interest justifying this relaxed standard for "work-related intrusions by public employers is the efficient and proper operation of the workplace."[184]

In short, individuals have not been completely deprived of their constitutional rights merely because they work for the government.[185] Rather, a good sense judgment has been made that public agencies simply could not function properly if forced to tolerate virtually any conduct or speech engaged in by their employees, no matter how abusive or disruptive. Any limitation on the constitutional rights of public employees should thus be justified on the basis of workplace realities, not some abstract notion of constitutionally immune government authority vis-à-vis its workforce.

The real-world imperatives that warrant a restriction of some constitutional rights in the public employment realm simply do not justify the elimination of the class-of-one equal protection rights of public employees. The essence of the class-of-one claim is that the government singled out one individual for disparate treatment from others similarly situated for no rational, legitimate reason. Thus, no class-of-one claim exists where a government employer acts to promote the efficient execution of its duties or mission since the employment action, *ipso facto*, is rational and legitimate. Instead, a valid class-of-one claim must allege that the employment decision was motivated by factors completely unrelated to the employment rela-

180. *Id.* at 717; *see also* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989) ("[T]he Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer.").

181. *Ortega*, 480 U.S. at 720.

182. *Id.* at 725–26.

183. *Id.*

184. *Id.* at 723.

185. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 417 (2006) (citation omitted).

tionship in order for it to lack any conceivable rational basis. By their very nature, therefore, class-of-one claims do not challenge a public employer's interest in maintaining an efficiently operating workplace.

In *Engquist*, for example, the plaintiff alleged that her supervisors singled her out for adverse treatment "without any rational basis and solely for arbitrary, vindictive, and malicious reasons."[186] In its defense, the Oregon Department of Agriculture

> offered no explanation whatsoever for its decision[ ]; it did not claim that Engquist was a subpar worker, or even that her personality made her a poor fit in the workplace or that her colleagues simply did not enjoy working with her. In fact, the State explicitly disclaimed the existence of any workplace or performance-based rationale.[187]

Had the Department offered any sort of conceivable justification related to its need to maintain an efficiently operating workplace, Engquist's claim would almost certainly have failed at trial. Engquist, however, was able to allege that her employment was terminated for reasons unrelated to legitimate workplace concerns.[188] Under such circumstances, where a public employee has been unfairly deprived of his or her livelihood for reasons of a wholly illegitimate or irrational nature, the individual ought to enjoy the same class-of-one equal protection rights as any other citizen.

### *B. Class-of-One Claims Do Not Endanger the Employment-at-Will Doctrine*

Contrary to the assertions of the Ninth Circuit and the Supreme Court in *Engquist*, permitting class-of-one employment claims would not endanger the employment-at-will doctrine in the public sphere.[189] The employment-at-will doctrine is merely a presumption that, subject to contrary evidence, the

186. Brief of Appellant, *supra* note 1, at 6.

187. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2158–59 (2008) (Stevens, J., dissenting).

188. Brief of Appellant, *supra* note 1, at 6.

189. Indeed, there may be little remaining of the employment-at-will doctrine in the public sector. As Justice Stevens has noted, "recent constitutional decisions and statutory enactments have all but nullified the significance of the [employment-at-will] doctrine [in the public sector]." *Engquist*, 128 S. Ct. at 2160 (Stevens, J., dissenting).

parties in an employment relationship have agreed that the employee can be terminated at any time, for a "good reason, bad reason, or no reason at all."[190] This presumption of at-will employment can be overcome, for example, by a contractual agreement that the employee will be terminated only for a "good cause."[191] More important, however, is the fact that the employment-at-will doctrine is subject to a substantial exception—that an employee cannot be fired for an "illegal" reason.[192]

Illegal reasons for firing an employee can be derived from public policy, statutory enactments, or constitutional provisions. Thus, an employer may not fire an employee for refusing to commit a criminal act or for taking steps to comply with the law.[193] Likewise, an employee may not be discharged in a way that violates an applicable statute.[194] For example, Congress determined that certain employer motivations should be illegal when it enacted the Civil Rights Act of 1964, which prohibited discrimination on the basis of race, color, national origin, religion, or sex.[195] Title VII of the statute limits the at-will doctrine by prohibiting any employer, including public employers, from terminating an employee on the basis of one of these factors.[196]

Additionally, public employees are protected by the provisions of the U.S. Constitution, which limit the authority of a public employer to terminate employees in violation of their constitutional rights. Thus, the Fifth and Fourteenth Amendments prohibit a public employer from depriving a government employee of his property or liberty interests in his job without "some kind of prior hearing."[197] Similarly, a public employer may not terminate, for instance, an African-American because of his race in violation of his Fourteenth Amendment right to equal protection.[198] Of course, this prohibition exists because

190. *Id.* at 2155 (majority opinion) (internal quotations omitted); Montgomery County Hosp. Dist. v. Brown, 965 S.W.2d 501, 502 (Tex. 1998).

191. *See, e.g.*, Ohanian v. Avis Rent A Car Sys., Inc., 779 F.2d 101 (2d Cir. 1985).

192. *See* RICHARD CARLSON, EMPLOYMENT LAW 715 (2005).

193. *See, e.g.*, Woodson v. AMF Leisureland Ctr., Inc., 842 F.2d 699 (3d Cir. 1988) (holding that employer cannot fire employee for refusing command to serve alcohol to a drunk customer in violation of the law).

194. *See* CARLSON, *supra* note 192, at 715.

195. *Id.*

196. 42 U.S.C. § 2000e-2 (2006).

197. Bd. of Regents of State Colleges v. Roth 408 U.S. 564, 569–70 (1972); CARLSON, *supra* note 192, at 753.

198. *See* CARLSON, *supra* note 192, at 715.

the Equal Protection Clause has traditionally operated to prohibit government employers from making employment decisions that irrationally single out members of a vulnerable class for unequal treatment. Thus, employers are not free to discriminate against female or African-American employees simply because the employment-at-will doctrine normally permits employers to make arbitrary and malicious employment decisions. Equal protection rights codified in the Fourteenth Amendment therefore supersede the common law employment-at-will doctrine. The class-of-one theory, with its foundation in the Fourteenth Amendment, necessarily limits—but does not fundamentally endanger—at-will employment. The concept of employer discretion afforded by the at-will doctrine is therefore not offended by recognizing class-of-one claims in the public employment context.

### *C. Class-of-One Claims Will Not Overwhelm Courts with Equal Protection Employment Cases*

*Engquist* was not the first opinion to express concern that class-of-one claims had the potential to overwhelm courts with ordinary, trivial disputes.[199] Justice Breyer expressed the same concern in *Olech*.[200] These concerns are, however, overblown. In the regulatory context, where state and local government officials make countless zoning and licensing decisions every year, there is no indication that plaintiffs have overwhelmed the courts with class-of-one claims. And in the employment context, in those circuits that permitted class-of-one claims against government employers, the courts were not flooded with new equal protection cases.[201] In fact, in the first seven years after the Supreme Court's decision in *Olech*, there have been only 162 reported federal cases of plaintiffs asserting a class-of-one claim against a public employer—a miniscule number considering that approximately 15,000 employment discrimination claims are brought in federal court each year.[202]

199. *See, e.g.*, Ciechon v. City of Chi., 686 F.2d 511, 517 (7th Cir. 1982).

200. Vill. of Willowbrook v. Olech, 528 U.S. 562, 565–66 (2000) (Breyer, J., concurring).

201. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2160–61 (2008) (Stevens, J., dissenting); Engquist v. Or. Dep't of Agric., 478 F.3d 985, 1013 (9th Cir. 2007) (Reinhardt, J., dissenting), *aff'd*, 128 S. Ct. 2146 (2008).

202. Brief for the Petitioner at 49, Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146 (2008) (No. 07-474); *see also Engquist*, 128 S. Ct. at 2161 n.4 (Stevens, J., dissenting) ("Prior to the Ninth Circuit's decision . . . 'class-of-one' claims arising

Thus, no evidence exists to support the *Engquist* majority's fear that class-of-one employment claims will generate a flood of new cases in the federal courts.

The relative scarcity of class-of-one cases in the employment context is partly due to the fact that, by its nature, the class-of-one claim is only available to a few aggrieved plaintiffs, as every such claim must sufficiently plead at least three, and possibly four, critical elements. At the very least, a plaintiff must sufficiently plead each of the three elements of the Supreme Court's *Olech* class-of-one formulation; a plaintiff must allege that (1) he or she has been intentionally treated differently (2) from others similarly situated and (3) that there is no rational basis for the difference in treatment.[203] Furthermore, because the Seventh Circuit's illegitimate animus requirement can be, and should be, reconciled with the Supreme Court's *Olech* formulation of the class-of-one, plaintiffs should be required to sufficiently plead that an illegitimate animus motivated the discriminatory treatment.

Thus, a class-of-one plaintiff should be made to sufficiently allege all four elements at the pleading stage in order to obtain judicial review of his or her claim. Furthermore, even under the liberal pleading standards of the Federal Rules of Civil Procedure, a plaintiff asserting a class-of-one claim must plead enough facts to show that a claim for relief is "plausible on its face."[204] In other words, "a formulaic recitation of the [class-of-one] elements . . . will not do. Factual allegations must be enough to raise a right to relief above the speculative level."[205] As detailed below, if the *Engquist* Court had permitted class-of-one employment claims, these pleading requirements could have helped to ensure that innocuous and routine employment decisions made by government agencies would not give rise to a flood of constitutional disputes.

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in the public-employment context were permitted by every court that was presented with one. Yet there have been only approximately 150 cases – both in the district courts and the courts of appeal – addressing such claims since *Olech*.").

203. *See Olech*, 528 U.S. at 564.

204. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1973–74 (2007); *see also id.* at 1965 n.3 ("While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant 'set out *in detail* the facts upon which he bases his claim,' Rule 8(a)(2) [of the Federal Rules of Civil Procedure] still requires a 'showing,' rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests.") (citations omitted).

205. *Twombly*, 127 S.Ct. at 1965 (citations omitted).

### 1. The "Similarly Situated" Requirement

To state a valid class-of-one equal protection claim, a plaintiff is required to allege that he was treated differently than similarly situated persons.[206] This requirement ensures that the claim genuinely implicates the Equal Protection Clause because "[i]t is the comparative element that distinguishes the Equal Protection Clause from the Due Process Clause."[207] Whereas the due process guarantee of the Fourteenth Amendment "emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated," the Equal Protection Clause "emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."[208]

Thus, the essence of an equal protection claim is disparate treatment of similarly situated persons, not simply unfair treatment of an incomparable individual.[209] In addition, the similarly situated requirement, if sufficiently alleged, tends to prove that the government acted intentionally and that the government action lacked a rational basis for the disparate treatment.[210] If two classes or individuals are similar in all relevant respects, then logically, each should be treated the same. When a class-of-one plaintiff is singled out for less favorable treatment than others similarly situated, an inference arises that the plaintiff "was intentionally singled out for reasons that so lack any reasonable nexus with a legitimate government policy that an improper purpose—whether personal or otherwise—is all but certain."[211]

The similarly situated requirement limits the availability of the class-of-one claim because "[p]laintiffs claiming an equal protection violation must first identify and relate specific instances where persons similarly situated in all relevant re-

206. *Olech*, 528 U.S. at 565.

207. Jennings v. City of Stillwater, 383 F.3d 1199, 1213 (10th Cir. 2004) (citation omitted).

208. *Id.* (citation omitted).

209. Zeigler v. Jackson, 638 F.2d 776, 779 (5th Cir. 1981) ("[T]he essence of the equal protection requirement is that the state treat all those similarly situated similarly.").

210. *See, e.g.*, Neilson v. D'Angelis, 409 F.3d 100, 105 (2d Cir. 2005), *overruled by* Appel v. Spiridon, 531 F.3d 138, 140 (2d Cir. 2008).

211. *Id.*

spects were treated differently."[212] Moreover, the plaintiff must show "more than a general similarity" between himself and a comparable employee.[213] And although some courts hold that "an exact correlation need not exist between a plaintiff's situation and that of others,"[214] the requirement is often strictly enforced, with courts requiring that the degree of similarity be "extremely high," such that "the [other] person must be similarly situated in all material respects to the point that they are prima facie identical to the plaintiff."[215]

To provide one example, in *Ferguson v. City of Rochester School District*, the plaintiff, a schoolteacher, participated in a voluntary resignation program designed to replace more-senior, higher-paid educators with less-experienced and lower-paid teachers.[216] In exchange for their irrevocable resignations, participating employees received monetary compensation as well as full health benefits.[217] The plaintiff submitted her resignation form, but days later attempted to rescind her submitted form.[218] School officials told her that her resignation was irrevocable and could not be withdrawn.[219]

In support of her class-of-one equal protection claim, the plaintiff alleged that she was similarly situated to another schoolteacher who had been permitted to withdraw her resignation after separating from her husband.[220] In that instance, the school district allowed the rescission because of the "extreme and unforeseen" financial hardship that would have otherwise resulted from the resignation.[221] The court dismissed the plaintiff's claim for failing to adequately allege the similarly situated requirement.[222] The court found that the plaintiff simply changed her mind regarding her decision, whereas the other educator requested a withdrawal of her resignation due to an intervening, unexpected, and severe change in her fi-

212. Rubinovitz v. Rogato, 60 F.3d 906, 910 (1st Cir. 1995) (citation omitted).
213. Ferguson v. City of Rochester Sch. Dist., 485 F. Supp. 2d 256, 259 (W.D.N.Y. 2007).
214. Buchanan v. Maine, 469 F.3d 158, 178 (1st Cir. 2006).
215. *Ferguson*, 485 F. Supp. 2d at 260 (citations and internal quotation marks omitted).
216. *Id.* at 257.
217. *Id.*
218. *Id.* at 258.
219. *Id.*
220. *Id.* at 259.
221. *Id.*
222. *Id.* at 262–63.

nancial circumstances.[223] Thus, the court concluded that the two employees were not similarly situated because they were not "prima facie identical," and that the school district could, therefore, have rationally treated them differently.[224]

### 2. The "Intentionality" Requirement

A class-of-one plaintiff is also required to show that the difference in treatment between similarly situated persons was intentional.[225] Adverse employment decisions that unintentionally discriminate among similarly situated individuals—that is, mistakes or incompetent negligence that unwittingly result in disparate treatment—do not create a class-of-one equal protection claim.[226] The discriminatory treatment must have been deliberate.

The intentionality requirement derives from the Supreme Court's decision in *Snowden v. Hughes*, where the Court explained that the government's mistaken or erroneous actions are not, without more, a denial of equal protection.[227] Instead, there must be present "an element of intentional or purposeful discrimination."[228] Class-of-one claims that fail to allege that the government's action was intentional are dismissed.

In *Batra v. Board of Regents of University of Nebraska*, for example, the court upheld the dismissal of the plaintiffs' class-of-one equal protection claim where the complaint failed to allege that the public employer's conduct was more than "random governmental incompetence."[229] Likewise, in *Giordano v. City of New York,* a police officer's class-of-one equal protection claim failed for insufficiently alleging that the employer's disparate treatment was intentional.[230] Although the plaintiff was terminated due to his use of a blood thinning medication while another NYPD officer on the same medication retained his position, the complaint failed to allege that the police department knew of the second officer's use of the blood thinning medication.[231] Thus, because the employer was unaware that

223. *Id.* at 261–62.
224. *Id.* at 262.
225. Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000).
226. Bishop v. Wood, 426 U.S. 341, 350 (1976).
227. 321 U.S. 1, 8 (1943).
228. *Id.*
229. 79 F.3d 717, 722 (8th Cir. 1996).
230. 274 F.3d 740, 751–52 (2d Cir. 2001).
231. *Id.*

it was treating the plaintiff differently than a similarly situated employee, the disparate treatment was not intentional.[232] Even when disparate treatment exists among similarly situated individuals and the difference in treatment is intentional, the plaintiff must still show that the government's action lacked a rational basis.

### 3. The "No Rational Basis" Requirement

According to the Supreme Court's decision in *Olech*, government conduct in class-of-one cases is subject to rational basis scrutiny, meaning that the action will be deemed lawful, and the plaintiff's claim will fail, if the disparate treatment bears "a rational relation to a legitimate state interest."[233] This is the most deferential standard of scrutiny, typically placing the burden "on the challenging party to negative any reasonable conceivable state of facts that could provide a rational basis" for the government's decision.[234] The government conduct being scrutinized, however, is not the decision to harm a particular plaintiff but rather the decision to harm the plaintiff instead of some similarly situated person. Thus, a class-of-one plaintiff must show that the government lacked a legitimate reason for treating him or her differently than similarly situated persons.

Again, it must be noted that the similarly situated requirement is logically intertwined with the required showing of no rational basis for the government's discriminatory treatment. For instance, if two employees have transgressed the same rule or policy and are similar in all other relevant respects—in terms of job title, disciplinary history, skills, and so forth—there can likely be no rational basis for treating one employee less favorably than the other; there can be no legitimate basis for differentiation, and each should logically be treated the same.

However, if the employees are dissimilar in some way, there may exist a distinction that allows a reasoned choice. Thus, class-of-one opinions which conclude that the government acted rationally to pursue a legitimate state interest al-

232. *Id.*

233. Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 944 (9th Cir. 2004) (citation omitted).

234. Whiting v. Univ. of S. Miss., 451 F.3d 339, 349 (5th Cir. 2006) (citation omitted).

most always determine as well that the plaintiff was not similarly situated to other employees.[235] Furthermore, the choice to treat one employee differently from the other will only bear a "rational relation to a legitimate state interest" when it relates to the government's interests as an employer.[236] On the rare occasions when plaintiffs have been found to satisfy the "no rational basis" requirement, the plaintiffs were able to demonstrate that a malignant animus or improper motive was the sole motivating factor for the government's decision.[237]

Still, much of the consternation surrounding class-of-one claims stems from the concern that plaintiffs will successfully bring equal protection claims under the Supreme Court's *Olech* standard when the government discriminated against the plaintiff for no reason at all—that is, when one person is randomly singled out from others similarly situated without any rational basis for treating that individual differently.[238] In the employment context, this might occur where a government agency needs to reduce its payroll under budgetary constraints and must therefore eliminate jobs in a particular department. If two similarly situated employees—with the same level of seniority, the same employment history, and so on—hold identical positions, and one of them must be discharged, the decision to terminate one or the other will be wholly arbitrary.

Setting aside the argument that the only rational basis for making such an arbitrary decision is to randomly choose an employee, for instance by a coin flip,[239] the employer's decision in this hypothetical situation lacks a rational basis. The terminated plaintiff may very well bring a technically valid, yet unjustified, class-of-one claim. The solution to this problem is to integrate the Supreme Court's *Olech* formulation of the class-of-one with an illegitimate animus requirement.

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235. *See, e.g.*, Neilson v. D'Angelis, 409 F.3d 100, 106 (2d Cir. 2005) (holding that the plaintiff was not similarly situated with other employees because his infraction was of a different caliber, and concluding that the employer could have rationally viewed his infraction as more severe and worthy of harsher discipline), *overruled by* Appel v. Spiridon, 531 F.3d 138, 140 (2d Cir. 2008).

236. *See, e.g.*, *Squaw Valley*, 375 F.3d at 944.

237. *See, e.g.*, Ciechon v. City of Chi., 686 F.2d 511, 523–24 (7th Cir. 1982).

238. *See, e.g.*, Lauth v. McCollum, 424 F.3d 631, 633 (7th Cir. 2005) ("If . . . 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.").

239. *See* Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2159 (2008) (Stevens, J., dissenting) (noting that when faced with a choice between two closely balanced alternatives, it is entirely rational to use a coin flip "as a tie breaker").

### 4. The "Illegitimate Animus" Requirement

Due to the realization that, if the *Olech* decision were strictly interpreted, nearly any unexplained difference in treatment of similarly situated persons could result in an equal protection claim, a valid class-of-one claim should require the plaintiff to allege that the discriminatory treatment was the result of an illegitimate animus.[240] As Judge Posner notes, "illegitimate animus" should be understood to include more than mere personal hostility, but should also encompass other possible "improper motives," such as scapegoating.[241] An illegitimate animus requirement would be consistent with the *Olech* class-of-one formulation if, as Judge Posner suggests, one reads *Olech*'s requirement of "intentionally different treatment" consistent with the Court's decision in *Personnel Administrator of Massachusetts v. Feeny*, which held that a government official "intends" a result when he acts to achieve that result, rather than in spite of it.[242] In other words, the plaintiff must show that the government acted with a desire to intentionally treat the plaintiff differently than other persons similarly situated, rather than with a mere awareness that its conduct would result in disparate treatment, and this desire to intentionally treat the plaintiff differently must be shown, under the *Olech* standard, to lack a rational relation to a legitimate government objective.

This requirement will not be met where the plaintiff merely alleges that the government acted arbitrarily, *knowing* that similarly situated individuals would be treated differently, but without any *desire* to treat those individuals differently. Instead, the plaintiff must allege that the government, without any legitimate basis, singled out the plaintiff with the purpose of subjecting him or her to unequal treatment. Necessarily, this requires the plaintiff to show that the reason for the government's conduct derives from an illegitimate animus or an improper motive. Furthermore, illegitimate animus must also be "the only reason[ ] for the adverse action of which the plain-

240. *See* Tuffendsam v. Dearborn County Bd. of Health, 385 F.3d 1124, 1127 (7th Cir. 2004).

241. *See* Bell v. Duperrault, 367 F.3d 703, 710 (7th Cir. 2004) (Posner, J., concurring) (pointing to the case *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), as an example, where the plaintiff was made a scapegoat in order for the city to avoid media scrutiny and a threatened lawsuit).

242. *Id.*

tiff is complaining. If there are legitimate as well as illegitimate reasons [for the employer's decision], the presence of the latter will not taint the former."[243] Thus, in the hypothetical situation described above, where an employer must lay off one of two identical employees as part of a mandatory budget reduction, randomly choosing to discharge one employee over the other would not give rise to a class-of-one claim since the purpose of the employer's choice was not to treat the two individuals differently, even though the employer was certainly aware that his choice would have that effect.

In sum, by integrating an illegitimate animus requirement with the Supreme Court's formulation of the class-of-one in *Olech*, the Supreme Court in *Engquist* could have been assured that class-of-one causes of action would be limited to a small number of employees genuinely wronged by unequal, irrational, and malicious government conduct. If the *Engquist* Court had chosen this route, there should have been little concern that the federal courts would be overwhelmed with a flood of class-of-one cases.

## CONCLUSION

The Supreme Court's *Engquist* opinion created an unfortunate and unnecessary restriction on the equal protection rights of government employees. There is simply no compelling reason to exclude public employees from the full promise of the Equal Protection Clause by eliminating their class-of-one rights. Thus, this Note has argued that the rationales put forth by the *Engquist* majority for eliminating class-of-one claims from the public employment context are illusory. However, the harm done by *Engquist* is very real. By eliminating class-of-one claims in the employment context, the Court has expressly approved of employer practices that maliciously single out unwitting employees for adverse treatment, jeopardizing their livelihoods, for no conceivable rational basis. In so doing, the Court neglected several of this country's basic principles: that all individuals are entitled to the fundamental right of fair treatment by the government; that "the nature and the theory of our institutions of government, [and] the principles on which they are supposed to rest . . . do not . . . leave room for the play and action of purely personal and arbitrary

243. *Id.* at 713.

power;"[244] and that "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of [some capricious government official], seems intolerable in any country where freedom prevails."[245]

One is left to wonder, then, what are the larger lessons of the *Engquist* decision. Does it provide evidence, along with *Garcetti* and *Ledbetter*, that the Roberts Court will be hostile to employment discrimination claims?[246] One plausible answer may be that, at root, the *Engquist* decision is a mere continuation of the Rehnquist Court's "skepticism as to the ability of litigation [in general] to function as a mechanism for organizing social relations and collectively administering justice."[247] Professor Andrew Siegel has observed that

> the language of . . . [the Rehnquist] Court decisions betrays a highly negative view of litigation. Decisions limiting punitive damages refer to a perception that damages awards have "run wild"; decisions disallowing lawsuits against state governments portray "a Kafkaesque universe in which the defenseless state is 'hauled' into Court or 'thrust' by 'fiat' and 'against its will' into 'disfavored status' and 'subject to the power of private citizens' "—language from Court decisions that, Siegel notes, pervasively portrays litigation as "mire and unseemliness," not a legitimate method of dispute resolution.[248]

244. Yick Wo v. Hopkins, 118 U.S. 356, 369–70 (1886).

245. *Id.* at 370.

246. *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (construing plaintiff's Title VII pay discrimination claim as untimely filed by holding that a pay-setting decision is a discrete act that sets the date for filling an EEOC charge, a date which is unaffected by the issuance of each new paycheck), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (limiting the First Amendment claims of public employees by holding 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"). *But see* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (construing the anti-retaliation provision of Title VII broadly).

247. Andrew Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1108 (2006).

248. Scott Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981, 1003 (2007) (citing Siegel, *supra* note 247).

The Roberts Court may be picking up where its predecessor left off. After all, the concern that arguably dominates Chief Justice Roberts' opinion in *Engquist* is the unsubstantiated fear that governments will be "forced" to defend an overwhelming flood of class-of-one claims "conjured up" by plaintiffs, with courts "obliged" to search for meritorious claims like "the proverbial needle in a haystack."[249] Unfortunately, after *Engquist*, even those public employees with meritorious class-of-one claims—those who have been illegitimately singled out for discriminatory treatment by a vindictive and spiteful employer—are barred from having their equal protection rights vindicated in court.

249. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2148, 2157 (2008); *see also id.* at 2160 (Stevens, J., dissenting) ("Presumably the concern that actually motivates today's decision is the fear that governments will be forced to defend against a multitude of 'class of one' claims . . . .").