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THE SUPREME COURT'S DECISION IN *ENGQUIST V. OREGON DEPARTMENT OF AGRICULTURE*: WHY THE COURT SHOULD HAVE CHOSEN THE SCALPEL INSTEAD OF THE MEAT-AXE

*Christopher Cazenave\**

INTRODUCTION

In 2000, the Supreme Court, in its decision in *Village of Willowbrook v. Olech*,<sup>1</sup> explicitly recognized an arguably different type of equal protection claim.<sup>2</sup> While there is substantial support for the role of the Equal Protection Clause as a restraint on unreasonable government classifications (i.e., legislative classifications based on race, gender, etc.),<sup>3</sup> the Court in *Olech* “conclude[d] that the number of individuals in a class is immaterial for equal protection analysis.”<sup>4</sup> The *Olech* Court held that “[o]ur cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference.”<sup>5</sup> Although the language in the *Olech* opinion suggests that the Court was merely reiterating longstanding equal protection jurisprudence,<sup>6</sup> lower federal courts began to limit *Olech* perhaps to satiate the fear that everyday disputes would “com[e] into federal court dressed as a constitutional case.”<sup>7</sup>

Lower courts have attempted to confine the class of one theory by requiring that plaintiffs prove one or more of at least three additional ele-

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<sup>1</sup> 528 U.S. 562 (2000).

<sup>2</sup> See *id.* at 564. See also Robert C. Farrell, *Classes, Persons, Equal Protection, and Village of Willowbrook v. Olech*, *WASH. L. REV.* 367, 367-68 (2003).

<sup>3</sup> Farrell, *supra* note 2, at 371-80.

<sup>4</sup> *Vill. Of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

<sup>5</sup> *Id.*

<sup>6</sup> See *id.* at 564-65 (citing the 1923 Supreme Court case of *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), to support the Court’s holding allowing for a class of one equal protection claim).

<sup>7</sup> *Lauth v. McCollum*, 424 F.3d 631, 632 (7th Cir. 2005); *Jennings v. City of Stillwater*, 383 F.3d 1199, 1211 n.4 (10th Cir. 2004) (collecting authorities which discuss the limitations that courts have placed on class of one claims to lower the possibility for a federal cause of action to review decisions made by state actors).

ments not expressly declared by the court in *Olech*: (1) requiring that a plaintiff show that comparators, the persons to whom the plaintiff is comparing herself, be “*prima facie* identical in all relevant respects”; (2) demanding that plaintiffs prove that the differential treatment was a result of “totally illegitimate animus” or “vindictive action;” and/or (3) requiring that a plaintiff show a specific intent to discriminate excluding the possibility that the employer acted on the basis of mistake.<sup>8</sup> These additional requirements have led to some incongruity among the circuits.<sup>9</sup>

Recently, in *Engquist v. Oregon Department of Agriculture*,<sup>10</sup> the Supreme Court revisited the class of one equal protection claim—this time, in the context of public employment.<sup>11</sup> In a 6-3 decision, the *Engquist* Court affirmed the Ninth Circuit’s decision to create a bright-line rule holding that the class of one theory is inapplicable to claims brought by a public employee against his public employer.<sup>12</sup> Chief Justice Roberts, writing for the majority, agreed with the Ninth Circuit’s application of *Olech* which concluded that “[w]hether to apply the class of one theory to decisions of public employers presents a significantly different question than whether to apply it to legislative or regulatory acts of government.”<sup>13</sup> However, before the Ninth Circuit’s decision in *Engquist*, no other court had gone as far as to entirely disallow *Olech*’s application in the context of public employment.<sup>14</sup>

While *Engquist* only limited the application of *Olech* and the class of one theory in the context of public employment, post-*Engquist* decisions coming from lower federal courts have used *Engquist* as a stepping stone to further limit the scope of a class of one claim.<sup>15</sup> These courts implement this limitation by first characterizing the government’s role in a particular claim as that resembling the role of the government as a public employer.<sup>16</sup> Next, the courts are able to summarily dismiss the plaintiff’s claim by holding that because the government was granted broad discretion in a certain context—similar to that granted in the context of public employment—the government enjoys a per se exclusion from a class of one equal protection claim.<sup>17</sup> This Article seeks to illustrate how the Supreme Court’s decision in *Engquist* has federal courts answering the wrong question regarding class of one equal protection claims. Unlike *Engquist* and its progeny, the exercise

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<sup>8</sup> Farrell, *supra* note 2, at 403-15.

<sup>9</sup> See e.g., Bell v. Duperrault 367 F.3d 703, 709-12 (7th Cir. 2004) (Posner, J., concurring) (describing post-*Olech* cases as “all over the map” and asking the Supreme Court to review its decision in *Olech*).

<sup>10</sup> 128 S. Ct. 2146 (2008).

<sup>11</sup> *Id.*

<sup>12</sup> *Engquist v. Or. Dept. of Agric.*, 128 S. Ct. 2146, 2157 (2008).

<sup>13</sup> *Engquist v. Or. Dept. of Agric.*, 478 F.3d 985, 994 (9th Cir. 2007); *Engquist*, 128 S. Ct. at 2153.

<sup>14</sup> *Engquist*, 478 F.3d at 1011 (Reinhardt, J., dissenting); *Engquist*, 128 S. Ct. at 2150.

<sup>15</sup> See *infra* Part III.A.

<sup>16</sup> See *infra* Part III.A.

<sup>17</sup> See *infra* Part III.A.

should not be solely focused on the threshold characterization of the government's function in a given decision. Instead, this Article argues that the added strictures placed on a conventional class of one claim already serve to limit the fear that everyday disputes will come into federal courts disguised as constitutional cases. Therefore, rather than developing a complex scheme of per se exclusions to the class of one claim, the *Engquist* Court should have concentrated on strengthening—or weakening—the elements of a class of one claim that have been developing for decades now in the lower federal courts.<sup>18</sup> The solution is not to admit the well-settled principal that the Equal Protection Clause “protect[s] persons, not groups”<sup>19</sup> only to turn around and completely deny that protection to certain persons. Admittedly, current class of one equal protection jurisprudence is less than entirely clear, but as stated by Justice Stevens dissenting in *Engquist*, “the Court should use a scalpel rather than a meat-axe.”<sup>20</sup>

With that, Part I provides background discussing the contours of the constitutional protection provided under the Equal Protection Clause, and the birth of the class of one theory culminating with the Supreme Court's express recognition of the doctrine in *Village of Willowbrook v. Olech*.<sup>21</sup> Part II.A summarizes the transformation of the *Olech* class of one rule by

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<sup>18</sup> Some have argued that the class of one theory and *Olech* are inconsistent with equal protection jurisprudence in its entirety. See Timothy Zick, *Angry White Males: The Equal Protection Clause and “Classes of One”*, 89 KY. L. J. 69, 76 (2000) (concluding that the original understanding of the Equal Protection Clause coupled with Supreme Court precedent does not support extending the Equal Protection Clause to classes of one). Additionally, both the Sixth and Seventh Circuits held, prior to *Olech*, that showing membership in a class was required to state a claim. *Bass v. Robinson*, 167 F.3d 1041, 1050 (6th Cir. 1999); *Herro v. City of Milwaukee*, 44 F.3d 550, 552 (7th Cir. 1995). In *Bass v. Robinson*, the plaintiff brought a civil rights action alleging that the defendant, a police officer, used excessive force in effecting the plaintiff's arrest. *Bass*, 167 F.3d at 1050. The Sixth Circuit in *Bass* held that “[b]ecause the Plaintiff failed to allege invidious discrimination based upon his membership in a protected class, his equal protection claim fails at the inception.” *Id.* (citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). Next, in *Herro v. City of Milwaukee*, an applicant for a tavern license filed a civil rights action against local government officials following the denial of his application. *Herro*, 44 F.3d at 550-51. Although the Seventh Circuit agreed with the district court's finding that the defendant presented a plausible reason for Herro's differential treatment, the Seventh Circuit went on to state that “[e]ven were we to doubt the plausibility of defendants' asserted reasons for decision . . . this Court is skeptical that Herro has established a *prima facie* equal protection claim. . . . A person bringing an action under the Equal Protection Clause must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual.” *Herro*, 44 F.3d at 552 (quoting *New Burnham Prairie Homes v. Vill. of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990)); see also *Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1058 (6th Cir. 1996) (“[W]e see compelling reasons that the sundry motivations of local regulators should *not* be policed by the Equal Protection Clause of the United States Constitution, absent the intent to harm a protected group or punish the exercise of a fundamental right. The sheer number of possible cases is discouraging.”).

<sup>19</sup> *Engquist v. Or. Dept. of Agric.*, 128 S. Ct. 2146, 2150 (2008) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

<sup>20</sup> *Id.* at 2158 (Stevens, J., dissenting).

<sup>21</sup> *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

discussing the various limitations that federal courts have placed on the doctrine's application. Next, Parts II.B, II.C, and II.D lay out the facts in *Engquist* and the arguments presented by both the Ninth Circuit and the Supreme Court in which both courts disavowed the application of the class of one theory in the context of public employment. Part III concludes by arguing that *Engquist* set the perfect stage for the Supreme Court to revisit *Olech* and further clarify class of one equal protection jurisprudence as a whole. Instead, *Engquist* has set the stage for yet more confusion among lower federal courts. The next time the Court is presented with this opportunity, the Court should deeply consider Judge Reinhardt's dissenting remarks made in the Ninth Circuit recognizing that—no matter what the context—the rational basis test employed in a class of one claim has always served to protect individuals “against heinous governmental conduct.”<sup>22</sup>

## I. BACKGROUND—EQUAL PROTECTION CLAUSE

### A. *Prevention of Unreasonable Classifications Versus Protection of Individual Rights*

The Equal Protection Clause of the Fourteenth Amendment declares, in part, that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>23</sup> Although the language of the Fourteenth Amendment appears to provide a protection against disparate treatment of individuals, “[i]n most contexts, the basic role of the Equal Protection Clause is to act as a limit on government classifications.”<sup>24</sup> “Indeed, the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks.”<sup>25</sup> Therefore, heeding to the view that the Fourteenth Amendment provides protection against unreasonable classifications, a plaintiff, to state a successful claim, must first show that he is a member of the class allegedly affected by the legislative classification.<sup>26</sup>

However, the Fourteenth Amendment has also been alternatively interpreted to allow for protection of individual rights not based on membership in a particular class.<sup>27</sup> This alternative interpretation appears, at times,

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<sup>22</sup> *Engquist v. Or. Dept. of Agric.*, 478 F.3d 985, 1012 (9th Cir. 2007) (Reinhardt, J., dissenting).

<sup>23</sup> U.S. CONST. amend. XIV, § 1.

<sup>24</sup> Farrell, *supra* note 2, at 367.

<sup>25</sup> *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring). *See also* Zick, *supra* note 18, at 72-73.

<sup>26</sup> *See* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW – SUBSTANCE & PROCEDURE, § 14.7, at 566-68 (3d ed. 1999).

<sup>27</sup> *E.g.*, *Olech*, 528 U.S. at 564.

to be in conflict with the traditional class-based interpretation.<sup>28</sup> One commentator has noted that “like trains riding on parallel tracks that never meet, the two incompatible views of equal protection do not come into direct conflict, but simply ignore each other.”<sup>29</sup> Others argue that allowing claims of individual disparate treatment without reference to a particular class “brushes aside a century of equal protection jurisprudence . . . .”<sup>30</sup> As the name suggests and as discussed next, the class of one theory finds its origins in the Fourteenth Amendment’s role as a protector of individual rights.<sup>31</sup>

## B. *The Origins of the Class of One Theory*

### 1. The Seventh Circuit’s Role as Architect Behind the Class of One Theory

While the Supreme Court in *Olech* cited to its 1923 decision in *Sioux City Bridge Co. v. Dakota County* to lend longstanding support for “successful equal protection claims brought by a ‘class of one,’”<sup>32</sup> more recent developments in the Seventh Circuit help to track the formation of a distinct class of one equal protection claim.<sup>33</sup> In *Ciechon v. City of Chicago*,<sup>34</sup> a discharged paramedic brought several claims against the city including a charge that her termination violated her right to the equal protection of the laws.<sup>35</sup> Plaintiff Eva Ciechon was terminated after alleged improper conduct where the facts revealed that her partner and co-paramedic, Richard Ritt, was not terminated for the same improper conduct.<sup>36</sup> The court in *Ciechon* held that the Equal Protection Clause protects people “against intentional invidious discrimination by the state against persons similarly situated.”<sup>37</sup> The court further held that the city had no rational basis for discharging Ms. Ciechon while not disciplining Mr. Ritt and that “[t]his choice was not made out of error, neglect, or mistake.”<sup>38</sup> The *Ciechon* court did not require any showing that Ms. Ciechon was a member of a protected class.<sup>39</sup>

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<sup>28</sup> Farrell, *supra* note 2, at 367.

<sup>29</sup> *Id.*

<sup>30</sup> Zick, *supra* note 18, at 134. *See also* Farrell, *supra* note 2, at 375-79.

<sup>31</sup> *See Olech*, 528 U.S. at 564; Farrell, *supra* note 2, at 379.

<sup>32</sup> *Olech*, 528 U.S. at 564.

<sup>33</sup> *See* Farrell, *supra* note 2, at 385-88.

<sup>34</sup> 686 F.2d 511 (7th Cir. 1982).

<sup>35</sup> *Id.* at 516.

<sup>36</sup> *See id.* at 522.

<sup>37</sup> *Id.* at 522-23 (citing *Snowden v. Hughes*, 321 U.S. 1, 8 (1944)).

<sup>38</sup> *Id.* at 523.

<sup>39</sup> *See id.* at 522-24.

Rather, Ms. Ciechon prevailed by showing that “[t]he unequal treatment of Ciechon and Ritt was unreasonable and arbitrary and deprived Ciechon of equal protection of the law.”<sup>40</sup>

Next, Judge Posner, writing for the Seventh Circuit in *Esmail v. Macrane*,<sup>41</sup> upheld the equal protection claim of a liquor store owner who claimed that the mayor violated his equal protection rights by failing to renew the owner’s liquor license.<sup>42</sup> The store owner alleged that he was the victim of a vindictive campaign by the mayor who controlled the issuance of liquor licenses.<sup>43</sup> Taking these allegations as true on appeal, the court stated that “[t]his is an unusual kind of equal protection case, though not an unprecedented kind,” that fell under the purview of the Seventh Circuit’s decision in *Ciechon*.<sup>44</sup> The court stated that “[a] class of one is likely to be the most vulnerable of all, and we do not understand therefore why it should be denied the protection of the equal protection clause.”<sup>45</sup> Therefore, under *Esmail*, a plaintiff has a successful equal protection claim by showing that government action “was a spiteful effort to ‘get’ him for reasons wholly unrelated to any legitimate state objective.”<sup>46</sup>

Finally and rather suitably, the Seventh Circuit’s decision in *Olech v. Village of Willowbrook*<sup>47</sup> arranged for the Supreme Court’s review and definitive acknowledgment of the class of one theory as a valid claim under the Equal Protection Clause.<sup>48</sup> Judge Posner, writing again for the Seventh Circuit, reaffirmed the court’s opinion in *Esmail* holding that while the Equal Protection Clause is more often raised by members of a protected class, a valid claim also existed where an individual can demonstrate that he is a victim of government action taken with “illegitimate animus” unconnected from any justifiable government purpose.<sup>49</sup> To summarize the underlying facts, the Village of Willowbrook (“Village”) demanded a 33-foot easement as part of an agreement to connect Grace Olech’s home to the municipal water supply.<sup>50</sup> Other residents of the Village were only required to grant a 15-foot easement as part of the connection procedure.<sup>51</sup> Ms. Olech’s complaint alleged that the Village’s purpose for the non-customary easement was the fact that the Olechs’ had successfully sued the Village

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<sup>40</sup> Ciechon v. City of Chicago, 686 F.2d 511, 524 (7th Cir. 1982) (citing *Olshock v. Vill. of Skokie*, 541 F.2d 1254, 1260 (7th Cir. 1976)).

<sup>41</sup> 53 F.3d 176 (7th Cir. 1995).

<sup>42</sup> *Id.* at 178.

<sup>43</sup> *Id.* at 177.

<sup>44</sup> *Id.* at 178-80.

<sup>45</sup> *Id.* at 180.

<sup>46</sup> *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995).

<sup>47</sup> 160 F.3d 386 (7th Cir. 1998), *aff’d*, 528 U.S. 562 (2000).

<sup>48</sup> *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

<sup>49</sup> *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 387 (7th Cir. 1998).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

several years earlier.<sup>52</sup> Judge Posner argued that the Olechs' were not required to show permanent deprivation or an "orchestrated campaign" of retaliation and rather, a successful claim could be maintained by demonstrating that the defendants took "vindictive action" against the Olechs.<sup>53</sup> Judge Posner recognized the problem of constitutionalizing fairly trivial municipal disputes.<sup>54</sup> However, he contended that this concern would be satiated by requiring "proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant."<sup>55</sup> "[A] tincture of ill will does not invalidate governmental action."<sup>56</sup> This requirement of "illegitimate animus" is significant to highlight because, as the next Part discusses, the *Olech* Court removed the requirement of showing any "subjective ill will" only to have this requirement quickly reinstated by lower federal courts.<sup>57</sup>

## 2. The Supreme Court Reviews the Seventh Circuit's Decision in *Olech*

In a short opinion, the Supreme Court affirmed the Seventh Circuit's decision in *Olech* validating the class of one theory.<sup>58</sup> However, dissimilar from Judge Posner's reasoning at the lower level, the unanimous Supreme Court did not require that Ms. Olech illustrate ill-will or "illegitimate animus."<sup>59</sup> Instead, a plaintiff stated a successful claim "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."<sup>60</sup> Justice Breyer, in a concurring opinion, recognized that the Seventh Circuit's requirement of "illegitimate animus" was intended to "minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right."<sup>61</sup> The Supreme Court's decision in *Olech* made it unmistakable that the Equal Protection Clause does extend to protecting individual rights unconnected from membership in a particular

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 388.

<sup>54</sup> *Id.*

<sup>55</sup> *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998).

<sup>56</sup> *Id.*

<sup>57</sup> *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000). *See supra* note 110 and accompanying text.

<sup>58</sup> *See id.* at 564-65.

<sup>59</sup> *Olech*, 528 U.S. at 565.

<sup>60</sup> *Id.* at 564.

<sup>61</sup> *Id.* at 565-66 (Breyer, J., concurring).

class.<sup>62</sup> However, the formation of the class of one theory is particularly important because, as discussed next, the Supreme Court's nonchalant recognition of this doctrine has led some federal courts to question whether *Olech* was ever intended to significantly alter and augment equal protection jurisprudence.<sup>63</sup> Lower federal courts almost immediately began to limit the effect of *Olech* by either raising the burden to prove elements expressly stated by the Supreme Court,<sup>64</sup> and/or by requiring plaintiffs to prove additional elements not set forth in *Olech*.<sup>65</sup>

## II. THE RECEPTION OF *OLECH* BY THE FEDERAL COURTS

Until the Ninth Circuit's decision in *Engquist*, lower federal courts did not place categorical restrictions on the application of the class of one theory.<sup>66</sup> Instead, courts implemented broad limitations that applied regardless of whether the government was in its role as a regulator or as an employer.<sup>67</sup> First, this Part discusses the three doctrine-wide limitations that have been placed on the class of one theory.<sup>68</sup> Second, the discussion turns to introduce the facts in *Engquist* as well as the reasons set forth by the Ninth Circuit and the Supreme Court where both courts placed an unprecedented categorical restriction on the application of the class of one theory.<sup>69</sup> It is helpful to recall the rule in *Olech* to witness how the different circuits have altered both the vocabulary and emphasis on different elements of the rule:

Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment.<sup>70</sup>

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<sup>62</sup> See Farrell, *supra* note 2, at 400 n. 238 ("Although the Equal Protection Clause does not protect individuals from adverse affects of reasonable legislative classifications, it does protect an individual from an arbitrary individual administrative decision by a government official.")

<sup>63</sup> *E.g.*, *Engquist v. Or. Dep't of Agric.* 478 F.3d 985, 996 (9th Cir. 2007); *Campagna v. Mass. Dept. of Envtl. Prot.*, 206 F. Supp. 2d 120, 127 (D. Mass. 2002), *aff'd*, 334 F.3d 150 (1st Cir. 2003).

<sup>64</sup> See discussion *infra* Part II.A.1.

<sup>65</sup> See discussion *infra* Part II.A.3.

<sup>66</sup> See *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2150 (2008); *Engquist*, 478 F.3d at 1011 (Reinhardt, J., dissenting).

<sup>67</sup> See *Engquist*, 478 F.3d at 1013 (Reinhardt, J., dissenting). For a detailed summary of the impact of the Supreme Court's decision in *Village of Willowbrook v. Olech*, see MICHAEL MCGUINNESS, PRACTISING LAW INSTITUTE, DEVELOPMENTS IN PUBLIC EMPLOYEE FIRST AMENDMENT AND EQUAL PROTECTION LAW 166-212 (2007).

<sup>68</sup> For a further discussion on the three limitations referred to above, see Farrell, *supra* note 2, at 402-15.

<sup>69</sup> See *Engquist*, 128 S. Ct. at 2157; *Engquist*, 478 F.3d at 996.

<sup>70</sup> *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

A. *Three Techniques Implemented by Lower Federal Courts to Limit the Reach of Olech*

1. Requiring that Comparators Are Prima Facie Identical

The Supreme Court in *Olech* required that the plaintiff offer proof that comparators were “similarly situated.”<sup>71</sup> Since *Olech*, courts have required that to prevail on a class of one claim, plaintiffs need to offer comparators that are more than “similarly situated.”<sup>72</sup> Rather, the “similarity between plaintiffs and the persons with whom they compare themselves must be extremely high.”<sup>73</sup> For example, in *Purze v. Village of Winthrop Harbor*,<sup>74</sup> the Seventh Circuit denied a class of one claim brought by prospective developers who relied on comparisons among three other developments to allege that the Village of Winthrop Harbor treated these developers more favorably.<sup>75</sup> The court cited *Ciechon*, a Seventh Circuit case decided well before the Supreme Court’s decision in *Olech*,<sup>76</sup> to support the proposition that the plaintiff was required and failed to show that comparators were “identically situated in all relevant respects rationally related to the government’s mission.”<sup>77</sup>

Similarly, in *Neilson v. D’Angelis*,<sup>78</sup> the Second Circuit reversed a jury decision in favor of the plaintiff’s class of one claim holding that the plaintiff failed to prove, as a matter of law, that the comparators were similarly situated within the meaning of the class of one doctrine.<sup>79</sup> In this case, Mr. Nielson, previously an armed security guard, was disciplined for improperly unholstering his weapon and failing to inform his superiors that he had done so.<sup>80</sup> Mr. Neilson introduced evidence that other officers were subjected to lesser disciplinary measures for similar behavior.<sup>81</sup> The court in *Neilson* reasoned that the comparators “committed offenses that some rational people might deem as or more serious than Nielson’s offense,” but “other rational people might regard them as less serious.”<sup>82</sup> Therefore, the *Neilson* court required that the plaintiff show that no rational person could

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<sup>71</sup> *Id.*

<sup>72</sup> See e.g., *Lauth v. McCollum*, 424 F.3d 631, 634 (7th Cir. 2005).

<sup>73</sup> *Neilson v. D’Angelis*, 409 F.3d 100, 104 (2d Cir. 2005) (citing *Purze v. Vill. of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002)).

<sup>74</sup> 286 F.3d 452 (7th Cir. 2002).

<sup>75</sup> *Id.* at 455.

<sup>76</sup> See discussion *supra* I.B.1.

<sup>77</sup> *Purze*, 286 F.3d at 455.

<sup>78</sup> 409 F.3d 100 (2d Cir. 2005).

<sup>79</sup> *Id.* at 101.

<sup>80</sup> *Id.* at 101-02.

<sup>81</sup> *Id.* at 103.

<sup>82</sup> *Id.* at 106.

have disciplined each officer differently given the nature of the offenses.<sup>83</sup> In *Neilson*, the court writes, “[t]he parties in this case, however, appear to assume that the standard of ‘similarity’ in ‘class of one’ cases is analogous to that used in cases where discrimination based on membership in a specific protected class is claimed.”<sup>84</sup>

As another illustration of the “*prima facie* identical” requirement, in *Ferguson v. City of Rochester School District*,<sup>85</sup> a teacher previously employed in a New York public school brought an action against her former employer alleging that her employer wrongfully rejected her request to rescind a certain employment contract.<sup>86</sup> The Voluntary Employee Separation Agreement (“VESA”) was a cost-cutting program enacted by the school district which provided monetary compensation and health benefits to more veteran, higher-paid teachers who agreed to resign from their positions in the school district.<sup>87</sup> Plaintiff Thomasina Ferguson entered into the VESA which required a signed notice indicating that the agreement was irrevocable.<sup>88</sup> After signing the form on a Friday, Ms. Ferguson submitted a letter to the school district the following Monday wishing to rescind her decision to accept voluntary separation.<sup>89</sup> The school district informed Ms. Ferguson that her decision was irrevocable per the terms of the agreement.<sup>90</sup> Ms. Ferguson then brought a class of one equal protection action alleging that the school district had allowed another individual, Jeanne Nix, to rescind her VESA election under very similar circumstances.<sup>91</sup>

The court’s rejection of Ms. Ferguson’s claim rested on a finding that she failed to show that her circumstances were “*prima facie* identical” to that of Ms. Nix, her comparator.<sup>92</sup> Ms. Nix, who was allowed to rescind her agreement, provided evidence that her husband suddenly left her and she would suffer “severe economic hardship” given the sudden loss of financial support from her husband.<sup>93</sup> To offer proof that her situation was similar to that of Ms. Nix’s, Ms. Ferguson alleged that: (1) on the day she signed the agreement, she was taking prescribed medication that affected her judgment; (2) the VESA election caused similar economic hardship to that faced by Ms. Nix, and that Ms. Ferguson was also sick and under a significant amount of family duress when she signed the agreement; and (3) on the day she signed the agreement, Ms. Ferguson and her husband believed they

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<sup>83</sup> *Id.*

<sup>84</sup> *Neilson*, 409 F.3d at 104.

<sup>85</sup> 485 F. Supp. 2d 256 (W.D.N.Y. 2007).

<sup>86</sup> *Id.* at 257.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 258.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Ferguson*, 485 F. Supp. 2d at 259.

<sup>92</sup> *Id.* at 261.

<sup>93</sup> *Id.* at 259.

would be moving to Texas but plans suddenly changed.<sup>94</sup> The court found that “[e]ven viewing the record in the light most favorable to the plaintiff, Ferguson’s and Nix’s situations at the times of their rescission requests were not so similar that the District could not rationally have treated them differently.”<sup>95</sup> The court noted that its task was not to find “whether Ferguson’s stated reasons for her request would have given the District a rational reason to grant it,” but rather, “[t]he issue is whether Ferguson and Nix were sufficiently dissimilar that the District had a rational basis for treating them differently.”<sup>96</sup>

The court keyed on the fact that the departure of Ms. Nix’s husband was an “intervening” event suffered after Ms. Nix decided to take voluntary separation from employment.<sup>97</sup> Although Ms. Ferguson’s allegation that her and her husband decided not to move to Texas could be characterized as an intervening event, the court declared that Ms. Ferguson’s deposition testimony revealed that the “plaintiff simply felt far less sanguine about her decision” and so she changed her mind.<sup>98</sup> So, after taking a close look at *Purze*, *Neilson*, and *Ferguson*, lower courts have continually and expressly recognized a difference between a plaintiff’s burden in a class of one equal protection claim relative to a class-based equal protection claim. The requirement that plaintiffs show that comparators are “*prima facie* identical” provides the courts with an expansive technique to limit a potential class of one claim.<sup>99</sup>

## 2. Showing a Specific Intent to Discriminate

*Olech*’s application of the class of one doctrine does require that the plaintiff show that he was “intentionally treated different from others similarly situated.”<sup>100</sup> Taking this requirement one step further, the Second Circuit in *Giordano v. City of New York*,<sup>101</sup> in the recent aftermath of *Olech*, specifically highlighted that the plaintiff must show “*intentional* disparate treatment.”<sup>102</sup> Mr. Giordano, a police officer, sued his employer alleging that he was wrongfully terminated for using a blood thinner.<sup>103</sup> In support of his claim, Mr. Giordano submitted evidence that the New York Police Department (“Department”) continued to employ another officer, Thomas

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<sup>94</sup> *Id.* at 261.

<sup>95</sup> *Id.* at 260-61.

<sup>96</sup> *Id.* at 261.

<sup>97</sup> *See Ferguson*, 485 F. Supp. 2d at 261.

<sup>98</sup> *Id.* at 262.

<sup>99</sup> *See MCGUINNESS*, *supra* note 67, at 201.

<sup>100</sup> *Olech*, 528 U.S. at 564.

<sup>101</sup> 274 F.3d 740 (2d Cir. 2001).

<sup>102</sup> *See id.* at 751.

<sup>103</sup> *Id.* at 742.

Rowe, even though the Department knew that Mr. Rowe was taking the same blood thinner found in Mr. Giordano's system.<sup>104</sup> However, the court rejected Mr. Giordano's equal protection claim reasoning that he failed to prove that the Police Department medical unit (Unit), who was directly responsible for his termination, was aware that Mr. Rowe was taking the same blood thinner.<sup>105</sup> Consequently, the *Giordano* court concluded that the Unit could not have levied the disparate treatment alleged by Mr. Giordano because the Unit was not actually aware that Mr. Rowe was also taking a blood thinner.<sup>106</sup> This requirement imposes upon a plaintiff the arguably difficult task of proving that those responsible for the alleged disparate treatment were subjectively aware of any then present characteristics of the comparators now used by the plaintiff to illustrate disparate treatment.

### 3. Proving that the Government Possessed a Subjective Ill-Will

Perhaps the most notable limitation on class of one claims created by federal courts is the requirement that a plaintiff show "subjective ill will" or "illegitimate animus."<sup>107</sup> In the Seventh Circuit's opinion in *Olech*, Judge Posner wrote that the class of one equal protection claim requires a showing of "totally illegitimate animus toward the plaintiff by the defendant."<sup>108</sup> In reviewing the Seventh Circuit's decision, the Supreme Court acknowledged that the plaintiff's allegations, "quite apart from the [defendant's] subjective motivation, are sufficient to state a claim of relief under traditional equal protection analysis."<sup>109</sup> Yet, lower courts have ignored this Supreme Court reasoning by immediately reinstating the Seventh Circuit's "subjective ill-will" requirement, and continuing to apply this requirement in more recent cases.<sup>110</sup>

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<sup>104</sup> *Id.* at 751.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *E.g.*, *Levenstein v. Salafsky*, 414 F.3d 767, 775-76 (7th Cir. 2005) ("We have recognized that a person may also state a claim under the 'class of one' theory by showing that . . . the cause of the differential treatment is a 'totally illegitimate animus toward the plaintiff by the defendant.'" (quoting *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998))); *Bell v. Duperrault*, 367 F.3d 703, 709 (7th Cir. 2004) ("While [defendant's] alleged behavior was perhaps inconsiderate or inappropriate, it does not demonstrate the type of 'deep-seated animosity' that this Court has found to support an equal protection claim." (citing *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995))); *Bartell v. Aurora Public Schools*, 263 F.3d 1143, 1149 (10th Cir. 2001) ("[The defendant] must show that 'the action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' [the defendant] for reasons wholly unrelated to any legitimate state objective.'" (quoting *Esmail*, 53 F.3d at 180)).

<sup>108</sup> *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998).

<sup>109</sup> *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000).

<sup>110</sup> Almost immediately after the Supreme Court's decision in *Olech*, Judge Posner, in *Hilton v. City of Wheeling*, 209 F.3d 1005 (2000), effectively ignored the Supreme Court's rejection of the "subjective ill-will" requirement citing to the opinion he authored in the Seventh Circuit to support a re-

For an illustration of the stubbornness by the courts to set aside the subjective ill-will requirement, consider the Tenth Circuit's decision in *Bartell v. Aurora Public Schools*.<sup>111</sup> In *Bartell*, Richard Bartell, a former school employee, brought an equal protection claim as a result of the school district's investigation of sexual harassment charges against Mr. Bartell.<sup>112</sup> After recognizing the Supreme Court's decision in *Olech*, the *Bartell* court required that Mr. Bartell show that the alleged disparate treatment by the government "was a spiteful effort to 'get' [Bartell] for reasons wholly unrelated to any legitimate state objective."<sup>113</sup> The court denied Mr. Bartell's claim by reasoning that even if the allegations of differential treatment were true, the evidence was insufficient to demonstrate that the school district was out to "get" Mr. Bartell.<sup>114</sup> Why did the court in *Bartell* require the plaintiff to show subjective ill-will<sup>115</sup> when this element was expressly discarded by the Supreme Court in *Olech*?<sup>116</sup> The analysis by the *Bartell* court suggests more than mere confusion and instead, reflects an effort by lower federal courts to discourage claims which could cause over-interference with everyday governmental functions, while still allowing a rule to prevent irrational and bad-spirited governmental conduct. To recall, Justice Breyer, concurring in *Olech*, recommended that the added requirement of "subjective ill-will" would relieve "any concern about transforming run-of-the-mill zoning cases into cases of constitutional right."<sup>117</sup>

Under *Olech*, to state a class of one equal protection claim, a plaintiff was required to show that he had been "intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment."<sup>118</sup> Seven years later while operationalizing the *Olech* class of one claim, courts require class of one plaintiffs to show that the government, possessing a specific intent coupled with subjective ill-will, treated the plaintiff differently from other(s) who were "*prima facie* identical in all relevant respects."<sup>119</sup> As discussed next, the Supreme Court has

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quirement of subjective ill-will. *Id.* at 1008. For a recent case requiring subjective ill-will, see *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007).

<sup>111</sup> 263 F.3d 1143 (10th Cir. 2001), *overruled by* *Pignanelli v. Pueblo Sch. Dist. No. 60*, No. 07-1251, 2008 WL 4149656 (10th Cir. Sept. 10, 2008) (recognizing that the Supreme Court's decision in *Engquist* would have precluded Mr. Bartell, a public employee, from bringing his initial claim against his employer).

<sup>112</sup> *Id.* at 1144.

<sup>113</sup> *Id.* at 1149 (quoting *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995)).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000).

<sup>117</sup> *Id.* at 566 (Breyer, J., concurring).

<sup>118</sup> *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

<sup>119</sup> *Purze v. Vill. of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002). This rule was derived by the author by following the advice of Judge Reinhardt and employing all three techniques used to limit a class of one equal protection claim. See *Engquist*, 478 F.3d at 1013 (Reinhardt, J., dissenting).

confirmed that there is yet another limitation—that is, the plaintiff may not be a public employee bringing a claim against his public employer.<sup>120</sup> As outlined *supra* in the Introduction, Part III argues that the *Engquist* Court’s latest limitation on a class of one claim has failed to clarify the contours of the class of one theory.

#### B. *Engquist v. Oregon Department of Agriculture: The Facts*

Plaintiff Anup Engquist was hired as an international food standards specialist for the Export Service Center (ESC) which is a laboratory in the Laboratory Services Division (LSD) housed within the Oregon Department of Agriculture (ODA).<sup>121</sup> Ms. Engquist made several complaints to her supervisor, Norma Corrigan, about Joseph Hyatt, a named defendant and LSD employee.<sup>122</sup> Ms. Corrigan responded to Ms. Engquist’s complaints by requiring that Mr. Hyatt attend anger management and diversity training.<sup>123</sup>

Mr. Hyatt and John Szczepanski, an assistant director of the ODA, allegedly developed a plan to “get rid of” both Corrigan and Engquist by restructuring the ESC.<sup>124</sup> After state-wide budget cuts, Mr. Szczepanski eliminated Ms. Corrigan’s and Ms. Engquist’s positions.<sup>125</sup> Before Ms. Engquist’s trial, Ms. Corrigan successfully sued the ODA, Mr. Szczepanski, and Mr. Hyatt ending in a jury verdict finding that Mr. Hyatt discriminated against Ms. Corrigan on the basis of race or gender violating her equal protection rights.<sup>126</sup> Ms. Engquist subsequently sued the same three parties but instead of claiming membership in a protected class, Ms. Engquist proceeded under a class of one theory of equal protection.<sup>127</sup> Among other findings, the jury found for Ms. Engquist on her class of one equal protection claim and entered judgment in favor of Ms. Engquist awarding her \$350,000 in damages plus attorney’s fees and costs.<sup>128</sup> The defendants appealed on several grounds, one of which was defendant’s contention that Ms. Engquist’s class of one claim should fail at its inception because the doctrine should be inapplicable to claims brought by public employees against their employer.<sup>129</sup>

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<sup>120</sup> *Engquist v. Or. Dept. of Agric.*, 128 S. Ct. 2146, 2157 (2008).

<sup>121</sup> *Engquist*, 128 S. Ct. at 2149.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Engquist v. Or. Dept. of Agric.*, 478 F.3d 985, 991 (9th Cir. 2007).

<sup>127</sup> *Engquist*, 128 S. Ct. at 2149.

<sup>128</sup> *Id.* at 2149-50.

<sup>129</sup> *Engquist*, 478 F.3d at 992.

C. *The Ninth Circuit's Decision*

While the limitations discussed above have restricted successful claims, the Ninth Circuit decided that the uncertainty among the federal courts provided an opportunity to further limit the class of one equal protection claim.<sup>130</sup> In a 2-1 decision, the Ninth Circuit reversed the judgment of the lower court holding that the class of one theory was inapplicable to public employers.<sup>131</sup> The majority began by summarizing the rule in *Olech*, but as a sign of things to come, the court immediately followed by raising the concerns mentioned by Justice Breyer that “*Olech* would transform ordinary violations of state or local law into constitutional cases.”<sup>132</sup> The court recognized that it had applied the class of one theory in regulatory contexts, but had not decided on whether the class of one theory should be “extended” to the public employment context.<sup>133</sup> The court’s use of the word “extended” further revealed the direction that the majority planned to take. As noted by the majority themselves, no other court prior to the Ninth Circuit, including the Supreme Court in *Olech*, has drawn any distinction between the theory’s application in a regulatory context versus an employment context.<sup>134</sup> The word “extended” presupposes that such distinctions have been drawn by other courts. The majority indicated that although other courts have applied the class of one theory in the context of public employment, almost no claim has ever prevailed leaving “Engquist’s thus-far successful claim . . . a unique case.”<sup>135</sup> The court then made several arguments for why the class of one theory should not be applied to public employment decisions.<sup>136</sup>

First, the court recognized that a different approach must be taken in reviewing the government’s decisions as an employer as opposed to a regulator.<sup>137</sup> Quoting the Supreme Court, the Ninth Circuit wrote that “the government as an employer indeed has far broader powers than does the government as a sovereign.”<sup>138</sup> The court further argued that the government has limited the constitutional rights of its employees in the First Amendment context and the Fourth Amendment context to “balance the govern-

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<sup>130</sup> *Id.* at 996.

<sup>131</sup> *Id.* at 990.

<sup>132</sup> *Id.* at 992-93. (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565-66 (2000)).

<sup>133</sup> *Id.* at 993.

<sup>134</sup> *Id.*

<sup>135</sup> *Engquist*, 478 F.3d at 994 & n.2.

<sup>136</sup> *Id.* at 994-96.

<sup>137</sup> *Id.* at 994.

<sup>138</sup> *Id.* at 994 (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (O’Connor, J., plurality opinion) (discussing the government’s ability to limit free speech of its employees to efficiently carry out public services)).

ment employer’s legitimate interest in its mission.”<sup>139</sup> Consistent with this notion, the *Engquist* court stated that “[t]he class-of-one theory of equal protection is another constitutional area where the rights of public employees should not be as expansive as the rights of ordinary citizens.”<sup>140</sup> Secondly, the *Engquist* majority reasoned that allowing judicial review of the actions of public employers frustrated the idea of government at-will employment.<sup>141</sup> Third, the majority stated that “when a public employee is subjected to unequal treatment at work for arbitrary reasons, the need for federal judicial review under equal protection is ‘especially thin’ given the number of other legal protections that public employees enjoy.”<sup>142</sup> Fourth, the majority warned against the “flood of new cases” that would arise if federal courts were required to review everyday decisions made by government employers.<sup>143</sup> Lastly, the majority closed by stating that “*Olech* is too slender a reed on which to base such a transformation of public employment law.”<sup>144</sup>

Judge Reinhardt raised three basic arguments in his dissenting opinion: (1) the majority’s holding created inter-circuit conflict; (2) the holding is inconsistent with Supreme Court precedent; and (3) the majority’s policy concerns did not justify the holding.<sup>145</sup> Justice Reinhardt argued that neither the Ninth Circuit nor any other circuit has placed a categorical restriction on the application of the class of one theory or limited the Fourteenth Amendment rights of public employees.<sup>146</sup> Also, he commented that the majority was “needlessly concerned that the class of one rule would eliminate at-will employment.”<sup>147</sup> Judge Reinhardt contended that regardless of the class of one theory, the decisions of public employers have always been insulated by the rational basis test and as a result, the review of decisions made in regards to at-will employees would not change.<sup>148</sup> Finally, the dissenting judge recommended that the best approach to decide class of one claims was to apply three overlapping limitations previously applied by the federal courts: (1) identically situated comparators, (2) a high burden of disproving

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<sup>139</sup> *Engquist*, 478 F.3d at 994-95 (citing *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006)).

<sup>140</sup> *Id.* at 995.

<sup>141</sup> *Id.* (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 273-74 (1975); *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 324 (1972)). To further support this proposition, the *Engquist* court quoted the Supreme Court stating “an at-will government employee . . . generally has no claim based on the Constitution at all.” *Engquist*, 278 F.3d at 995 (quoting *Waters v. Churchill*, 511 U.S. 661, 679 (1994) (O’Connor, J., plurality opinion)).

<sup>142</sup> *Id.* (quoting *Lauth v. McCollum*, 424 F.3d 631, 633 (7th Cir. 2005)).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 996.

<sup>145</sup> *Engquist*, 478 F.3d at 1010-14 (Reinhardt, J., dissenting).

<sup>146</sup> *Id.* at 1011-12.

<sup>147</sup> *Id.* at 1012-13.

<sup>148</sup> *Id.*

any rational basis or mistake, and (3) an illegitimate animus or malice.<sup>149</sup> However, Judge Reinhardt added that in cases involving malice, the employee need not provide a comparator identical in all relevant respects because “the government does not ordinarily treat people maliciously, and, thus, is obviously treating individuals unequally under such circumstances.”<sup>150</sup>

#### D. *The Supreme Court’s Decision*

On January 11, 2008, the Supreme Court granted certiorari to review the Ninth Circuit’s holding in *Engquist*.<sup>151</sup> In a 6-3 decision issued on June 9, 2008, the Court affirmed the Ninth Circuit’s decision holding that a class-of-one equal protection claim is not cognizable in the context of public employment.<sup>152</sup> The Court did not “quarrel with the premises of Engquist’s argument. . . . [that] [i]t is well settled that the Equal Protection Clause ‘protect[s] persons, not groups, and that the Clause’s protections apply to administrative as well as legislative acts.’”<sup>153</sup> But, the Court reasoned that its “traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications, combined with the unique considerations applicable when the government acts as employer as opposed to sovereign” yields that a class of one theory of equal protection does not apply in the context of public employment.<sup>154</sup>

The majority echoed many of the arguments made by the Ninth Circuit focusing on two main reasons to support its holding: (1) the “government has significantly greater leeway in its dealing with citizen employees than it does when it brings its sovereign power to bear on citizens at large”;<sup>155</sup> and (2) employment decisions are inherently subjective unlike legislative or regulatory classifications such as was the case in *Olech*.<sup>156</sup> The Court stated that “[i]t is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.”<sup>157</sup> Also, similar to the Ninth Circuit’s reasoning, the Court recognized that allowing Engquist’s claim to move forward was at odds with the basic principle of at-will employment “that an employee may be terminated for a ‘good rea-

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<sup>149</sup> *Id.* at 1013. *See also* discussion *supra* II.A.

<sup>150</sup> *Engquist*, 478 F.3d at 1013.

<sup>151</sup> *Engquist v. Oregon Dept. of Agric.*, 478 F.3d 985 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 977 (2008).

<sup>152</sup> *Engquist v. Oregon Dept. of Agric.*, 128 S. Ct. 2146, 2150 (2008).

<sup>153</sup> *Id.* at 2150 (internal citations omitted) (citing *Adarand Constructor, Inc. v Peña*, 515 U.S. 200, 227 (1995)).

<sup>154</sup> *Engquist*, 128 S. Ct. at 2151.

<sup>155</sup> *Id.* at 2151.

<sup>156</sup> *Id.* at 2153-54.

<sup>157</sup> *Id.* at 2154.

son, bad reason, or no reason at all. . . . [A] government’s decision to limit the ability of public employers to fire at will is an act of legislative grace, not constitutional mandate.”<sup>158</sup>

Justice Stevens, with whom Justices Souter and Ginsburg joined dissenting, argued that it was incorrect and unnecessary to carve out this exception from a public employees’ constitutional rights.<sup>159</sup> The dissent argued that the outcome of *Olech* “was not determined by the size of the disadvantaged class . . . [or] the fact that the Village was discriminating against a property owner rather than an employee . . . [and] [r]ather, the outcome of *Olech* was dictated solely by the absence of a rational basis for the discrimination.”<sup>160</sup> Further, to negate the importance the majority placed on preserving “at will” employment, the dissent recognized that “recent constitutional decisions and statutory enactments have all but nullified the significance of the doctrine . . . . [so that] preserving the remnants of ‘at-will’ employment provides a feeble justification for creating a broad exception to a well-established category of constitutional protections.”<sup>161</sup> Finally, similar to Judge Reinhardt’s opinion, Justice Stevens points out that class of one claims are brought infrequently, and usually unsuccessfully, so that there is no threat of a multitude of these claims suddenly coming into federal court.<sup>162</sup>

### III. AND THE WRONG RULE BEGINS TO CREATE MORE WRONG RULES

Even Judge Posner, a principal architect of the class of one theory,<sup>163</sup> has stated that “the fact that the post-*Olech* cases are all over the map suggests a need for the Court to step in and clarify its ‘cryptic’ per curiam decision [in *Olech*].”<sup>164</sup> *Engquist* provided the Court with this opportunity but instead of clarification, we received a misplaced effort that approaches the class of one doctrine from the wrong direction. In his dissent in *Engquist*, Justice Stevens wrote that “[e]ven if some surgery were truly necessary to prevent governments from being forced to defend a multitude of equal protection ‘class of one’ claims, the Court should use a scalpel rather than a meat-axe.”<sup>165</sup> Analyzing three cases decided immediately after the Supreme Court’s decision in *Engquist*, Part III.A sets out to illustrate that lower courts have followed the Court’s lead by using the same meat-axe to incor-

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<sup>158</sup> *Id.* at 2155-56.

<sup>159</sup> *Id.* at 2157 (Stevens, J., dissenting).

<sup>160</sup> *Engquist*, 128 S. Ct. at 2158 (Stevens, J., dissenting).

<sup>161</sup> *Id.* at 2160.

<sup>162</sup> *Id.* at 2160-61; *Engquist v. Or. Dept. of Agric.*, 478 F.3d 985, 1013 (9th Cir. 2007) (Reinhardt, J., dissenting).

<sup>163</sup> See Farrell, *supra* note 2, at 385.

<sup>164</sup> *Bell v. Duperrault*, 367 F.3d 703, 711-12 (7th Cir. 2004).

<sup>165</sup> *Engquist*, 128 S. Ct. at 2158 (Stevens, J., dissenting).

rectly expand per se exclusions to class of one claims. Next, Part III.B concludes by arguing that while courts may be correct in surrendering relatively large leeway to governmental conduct in certain contexts, the rational basis test has always shielded review of highly discretionary government conduct. For that reason, although we should expect continued evolution of the rational basis test as applied to class of one equal protection claims, it's unnecessary and incorrect to continue creating a plethora of new substantive rules excluding certain plaintiffs from the Fourteenth Amendment's protection against irrational and unequal treatment by the government.

A. *Life After Engquist*

1. *Siao-Pao v. Connolly*

In *Siao-Pao v. Connolly*,<sup>166</sup> a case from the Southern District of New York, Leopold Siao-Pao, incarcerated for second-degree murder and first-degree robbery, sought habeas relief following a denial of parole.<sup>167</sup> Siao-Pao challenged the Parole Board's decision on several grounds, one of which was that the Parole Board violated his equal protection rights.<sup>168</sup> To support his equal protection claim, Siao-Pao offered three comparators.<sup>169</sup> Particularly, Siao-Pao compared himself to Kathy Boudin who received a similar sentence for a similar conviction but was granted parole.<sup>170</sup> After analyzing Siao-Pao's equal protection claim under the test of selective enforcement and the class of one doctrine, the *Siao-Pao* court found that his claim failed under both theories.<sup>171</sup>

As to the class of one claim, the *Siao-Pao* court recognized that the Second Circuit "interpreted the *Olech* standard to require that differential treatment be both intentional and irrational to satisfy the class of one standard."<sup>172</sup> Citing *Engquist*, the *Siao-Pao* court goes on to state that "the Supreme Court recently clarified the *Olech* holding by limiting class of one claims in contexts characterized by individualized and subjective determinations where '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 . . . . [The Parole Board's decision] is discretionary, as was the decision in *Engquist*, where the Supreme Court rejected a class of one argument and accorded deference to the state's determination

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<sup>166</sup> 564 F. Supp. 2d 232 (S.D.N.Y. 2008).

<sup>167</sup> *Id.* at 240.

<sup>168</sup> *Id.* at 244.

<sup>169</sup> *Id.* at 245-46.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Siao-Pao*, 564 F. Supp. 2d at 246.

based on the subjective and individualized nature of the decision.”<sup>173</sup> So, less than a month after the Supreme Court’s decision in *Engquist*, a new test appears to be emerging.<sup>174</sup> Now, at least in the Southern District of New York, the court will look first to whether the government’s decision is the type that is individualized and subjective.<sup>175</sup> If so, the court warns potential claimants like Siao-Pao that “[g]iven the numerous factors considered by the Parole Board,” it is doubtful that any claimant will be able to demonstrate irrational and wholly arbitrary acts and intentional disparate treatment.<sup>176</sup> Thus, the *Siao-Pao* court quickly took *Engquist* as a sign that the Supreme Court may not object to further categorical restrictions to the application of the class of one theory—outside of the public employment context—so long as the decision can be characterized as individualized and subjective.

## 2. *Douglas Asphalt, Co. v. Qore, Inc.*

Soon after *Engquist*, in *Douglas Asphalt, Co. v. Qore, Inc.*,<sup>177</sup> the Eleventh Circuit quickly adopted and expanded the reasoning of *Engquist* to place another categorical restriction on class of one equal protection claims.<sup>178</sup> In *Douglas Asphalt*, a government contractor brought a class of one claim against Georgia Department of Transportation (“GDOT”) officials alleging that he was intentionally treated differently than other paving contractors in violation of the Equal Protection Clause.<sup>179</sup> After asserting that Douglas’s performance on two previous repaving projects was inadequate, the GDOT awarded a third contract to the second lowest bidder instead of Douglas who was the lowest bidder.<sup>180</sup> Douglas countered the GDOT’s charge by claiming that the test utilized by the GDOT finding

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<sup>173</sup> *Id.* at 245 (quoting *Engquist v. Or. Dept. of Agric.* 128 S. Ct. 2146, 2154 (2008)).

<sup>174</sup> *Siao-Pao* was decided on June 25, 2008. The Supreme Court decided *Engquist* on June 9, 2008.

<sup>175</sup> An unpublished decision from the Eastern District of New York reveals similar reasoning. *Analytical Diagnostics Labs, Inc. v. Kusel*, No. 07-3908, slip op. at \*\*3-5 (E.D.N.Y. Sept. 15, 2008).

Regardless of the other serious factual issues raised by plaintiff as to different treatment and defendants’ motivations, the undisputed fact remains that [Department of Health] officials possess discretion to subjectively evaluate laboratories and make licensing decisions, and any differential treatment of [Analytical Diagnostics Labs] stemmed from these discretionary activities. *As the Engquist Court noted, a plaintiff cannot raise a federal constitutional challenge to a necessarily subjective and individualized decision made by state officials.* Plaintiff has failed to allege a federal equal protection violation based on defendants’ exercise of discretion as [Department of Health] employees.

*Id.* at \*5 (internal citation omitted) (emphasis added).

<sup>176</sup> *Siao-Pao*, 564 F. Supp. 2d at 245..

<sup>177</sup> 541 F.3d 1269 (11th Cir. 2008).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 1271-72.

<sup>180</sup> *Id.*

Douglas’s work inadequate was inaccurate and false.<sup>181</sup> In dismissing Douglas’s class of one claim, the *Douglas Asphalt* court relied heavily on the Supreme Court’s decision in *Engquist*.<sup>182</sup> The court extensively quoted the *Engquist* majority and had “little trouble applying the reasoning in *Engquist*, directed at [sic] the government-employment relationship, to the circumstances in this case involving a government-contractor relationship. . . . Just as in the employee context, and in the absence of a restricting contract or statute, decisions involving government contractors require broad discretion that may rest ‘on a wide array of factors that are difficult to articulate and quantify.’”<sup>183</sup>

### 3. *Vassallo v. Lando*

As the last example, in *Vassallo v. Lando*,<sup>184</sup> school administrators, following a bathroom fire, claimed that they had reason to believe that the eleventh grade plaintiff started the fire. With this belief, the administrators interviewed the plaintiff and sought consent from the plaintiff to conduct a search.<sup>185</sup> Following this activity by the administrators, the plaintiff brought a class of one claim, among other claims, asserting that the administrators improperly singled out the plaintiff for questioning without a rational basis for doing so in violation of his right to equal protection.<sup>186</sup> In granting summary judgment for the defendants on the class of one claim, the court held that “[a]s a threshold matter, this Court concludes that the Supreme Court’s recent decision in *Engquist v. Or. Dep’t of Agric. County Comm’n of Webster County* would foreclose a ‘class of one’ claim by plaintiff in connection with the discretionary decision by school administrators in this case as to whether a student should be interviewed and searched for evidence of criminal activity.”<sup>187</sup> The *Vasallo* court likened the facts in the case to the traffic ticket hypothetical offered by the *Engquist* majority and concluded that “[the school administrators] must have the *leeway* to single out certain students for questioning when a disciplinary situation arises.”<sup>188</sup> Therefore,

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<sup>181</sup> *Id.* at 1272.

<sup>182</sup> *Id.* at 1271-72.

<sup>183</sup> *Douglas Asphalt, Co.*, 541 F.3d at 1274 (quoting *Engquist v. Or. Dept. of Agric.*, 128 S. Ct. 2146, 2154 (2008)). The *Douglas* court also agreed with the alternative argument of the GDOT officials that Douglas had failed to sufficiently allege similarly situated comparators as required for a class of one claim. *Id.*

<sup>184</sup> No. 06-CV-2520, 2008 WL 4855826 (E.D.N.Y. Oct. 31, 2008).

<sup>185</sup> *Id.* at \*\*2-4.

<sup>186</sup> *Id.* at \*8.

<sup>187</sup> *Id.* at \*8 (internal citations omitted).

<sup>188</sup> *Id.* at \*10 (emphasis added). The *Vasallo* court, because the Second Circuit had not yet ruled whether *Engquist* applied outside the public employment context, also proceeded to analyze the merits

under *Vasallo*, it appears that school administrators in a large part of New York need not worry that their “discretion” may at times be subject to rational basis review by the courts.

### B. *The Scalpel and Not the Meat-axe*

In *Engquist*, not only did the State fail to offer any explanation for why Ms. Engquist was terminated, the State also “explicitly *disclaimed* the existence of any workplace or performance-based rationale.”<sup>189</sup> The State likely took this stance because, as the jury ultimately determined, the State *could not* come up with a rational justification for terminating Ms. Engquist. In fact, the State entered this case with a slight disadvantage given that a separate jury had already found that Mr. Hyatt, also Ms. Engquist’s supervisor, unlawfully discriminated against Ms. Corrigan, a friend and co-worker of Ms. Engquist.<sup>190</sup> Although this finding of unlawful discrimination was based on gender or ethnicity, the State and Mr. Hyatt entered the *Engquist* case with something less than clean hands. So rather than argue this case on the merits, the State sought and obtained an exception for decisions made by public employers. Now, the *Engquist* rule and its subsequent expansion threatens to improperly weaken rational basis review while failing to offer sufficient justification for doing so.

Judge Reinhardt, dissenting in the Ninth Circuit, wrote that “[t]he rational basis test has always been used to insulate government decisions from searching review that would interfere with governmental functions, while still protecting individuals against heinous governmental conduct.”<sup>191</sup> Similarly, Justice Stevens’s dissent reminds us that “[o]ur decision in *Village of Willowbrook v. Olech*, applied a rule that had been an accepted part of our equal protection jurisprudence for decades: Unless state action that intentionally singles out an individual, or a class of individuals, for adverse treatment is supported by some rational justification, it violates the Fourteenth Amendment’s command that no state shall ‘deny to any person within its jurisdiction the equal protection of the laws.’”<sup>192</sup> Here, Justice Stevens and Judge Reinhardt are simply reciting the relatively unremarkable proposition that the Fourteenth Amendment applies to *all* treatment at the hands of the State, and should protect individuals against unequal and irrational governmental conduct. The question is then how does the *Engquist* majority, in finding an exception to rational basis review for public employers,

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of the plaintiff’s class of one claim finding that the plaintiff, regardless of a per se exclusion, had failed to meet the relatively robust similarly situated element of a class of one claim. *Id.* at \*11.

<sup>189</sup> *Engquist v. Oregon Dept. of Agric.*, 128 S. Ct. 2146, 2159 (2008) (Stevens, J., dissenting).

<sup>190</sup> *See Engquist v. Oregon Dept. of Agric.*, 478 F.3d 985, 991 (9th Cir. 2007).

<sup>191</sup> *Id.* at 1012 (Reinhardt, J., dissenting).

<sup>192</sup> *Engquist*, 128 S. Ct. at 2158 (Stevens, J., dissenting) (internal citations omitted).

sidestep this central premise of the Fourteenth Amendment. In fact, consistent with Justice Stevens and Judge Reinhardt, the majority stated:

When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being “treated alike, under like circumstances and conditions.”

Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a “rational basis for the difference in treatment.”<sup>193</sup>

However, the majority goes on to recognize that “although government employees do not lose their constitutional rights when they accept their positions, those rights must be *balanced* against the realities of the employment context.”<sup>194</sup> In reality though, the balance ultimately struck by *Engquist* was to deny a constitutional right to rational basis review when a public employee accepts their position. In addition to the three traditional levels of review afforded by the courts—i.e., strict scrutiny, intermediate scrutiny, and rational basis review<sup>195</sup>—*Engquist* creates a fourth level of “non-review” for decisions made by government employers. And, the negative effects of *Engquist* don’t end there.

The *Engquist* majority stated that “[i]t is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.”<sup>196</sup> This language has been taken as an opportunity by the lower federal courts to characterize an increasing amount of governmental conduct as “subjective and individualized.”<sup>197</sup> In just four short months after the *Engquist* decision, we are witnessing how courts are less worried with the public employment exclusion per se, and rather the courts need only find that the government’s decision was more like a public employment decision and less like the regulatory decision found in *Olech*. Now, under *Engquist*, a grant of broad discretion to the government in a certain context equates to endless discretion as it relates to class of one equal protection analysis. In order to avoid rational basis review, the government appears to have every incentive to both characterize its discretion as overly broad as well as develop less standards by which to assess its conduct.

Mentioned by Judge Reinhardt and expanded upon here, rational basis review has always contained a mechanism to prevent “searching review that

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<sup>193</sup> *Id.* at 2153 (majority opinion) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

<sup>194</sup> *Id.* at 2152.

<sup>195</sup> See 16B AM. JUR. 2D *Constitutional Law* §§ 813-15 (1964).

<sup>196</sup> *Engquist*, 128 S. Ct. at 2154.

<sup>197</sup> See *supra* text accompanying notes 166-188.

would interfere with governmental functions.”<sup>198</sup> In determining the rationality of a certain decision, the court must necessarily look at the discretion the government was initially afforded to make that decision. The majority’s trouble with the insulation already provided to government decisions under rational basis review is captured by the majority’s grim prediction that by “allowing class-of-one claims to go forward . . . governments will [still] be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack.”<sup>199</sup> First, the Court should have been more careful in limiting an otherwise valid constitutional claim merely because plaintiffs may have a tough time proving that a certain government decision was arbitrary. For example, the defense of selective prosecution, based upon equal protection considerations, is extremely difficult to prove given that prosecutors have traditionally enjoyed almost unfettered discretion in deciding whom to charge.<sup>200</sup> However, unlike *Engquist* which created a categorical exception to the application of the class of one theory, courts that have analyzed selective prosecution claims have heightened the burden that defendants must meet to sustain a successful claim.<sup>201</sup> Before *Engquist*, as discussed in depth *supra* Part II.A, courts took a similar approach to that in selective prosecution claims by implementing broad limitations that applied to any class of one claim regardless of its context. Second, the evidence simply doesn’t support the Court’s dismal prediction that the federal docket will soon become overcrowded with class of one claims brought by public employees or any other plaintiffs for that matter. The majority does not offer any specific evidence that would suggest an astronomical increase in class of one claims since *Olech*, but Justice Stevens does provide evidence to the contrary:

Prior to the Ninth Circuit’s decision in this case, “class of one” claims arising in the public-employment context were permitted by every court that was presented with one. Yet there have been only approximately 150 cases-both in district courts and the courts of appeals-addressing such claims since *Olech*.<sup>202</sup>

And finally, as to the Court’s discontent with searching for the “proverbial needle in a haystack,”<sup>203</sup> *Engquist* may have been just that needle in a haystack consistent with the jury’s finding that Plaintiff Anup Engquist was deserving of relief.<sup>204</sup> Instead and as it stands currently, at least government employers, government contractors, public school students, and those pos-

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<sup>198</sup> *Engquist*, 478 F.3d at 1012 (Reinhardt, J., dissenting).

<sup>199</sup> *Engquist*, 128 S. Ct. at 2157 (Stevens, J., dissenting).

<sup>200</sup> See generally Melissa L. Jampol, *Goodbye to the Defense of Selective Prosecution*, 87 J. CRIM. L. & CRIMINOLOGY 932 (1997).

<sup>201</sup> *Id.*

<sup>202</sup> *Engquist*, 128 S. Ct. at 2161 n.4 (Stevens, J., dissenting).

<sup>203</sup> *Id.* at 2157.

<sup>204</sup> *Engquist v. Oregon Dept. of Agric.*, 478 F.3d 985, 992 (9th Cir. 2007).

sibly facing parole hearings can expect to be precluded from having a hearing on the merits for a class of one equal protection claim.<sup>205</sup> The list of those immune from a class of one equal protection claim is sure to expand without further guidance from the Court. For now, at least some government actors are free to make discretionary decisions without offering any reasonably conceivable rational justification for doing so.

#### CONCLUSION

What makes *Engquist* a big case is the fact that subsequent application of the *Engquist* holding has revealed that the effect of the decision will have a much greater, and possibly unanticipated, effect on equal protection jurisprudence in its entirety. Taking into account how much discretion a particular government actor has been granted, this Article set out to demonstrate that certain State actors should not be excluded from providing at least *some* conceivable explanation for the course of action taken. The *Engquist* Court's unwarranted focus on judicial economy unnecessarily chipped away at the protection afforded by the Fourteenth Amendment—namely, that plaintiffs such as Anup Engquist, at a minimum, should be able to obtain recovery where the State's actions are shown to be completely arbitrary and irrational.

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<sup>205</sup> See *supra* text accompanying notes 166-188.