No. 98-1288

In the Supreme Court of the United States

VILLAGE OF WILLOWBROOK, ET AL., PETITIONERS

v.

GRACE OLECH

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING THE JUDGMENT

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

MARK B. STERN
DANA J. MARTIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" where the plaintiff does not allege discrimination based on membership in a vulnerable group, but alleges that ill will motivated the government to treat her differently from others similarly situated.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution:

Miscellaneous: Page

In the Supreme Court of the United States

No. 98-1288

VILLAGE OF WILLOWBROOK, ET AL., PETITIONERS

v.

GRACE OLECH

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING THE JUDGMENT

INTEREST OF THE UNITED STATES

The question presented in this case is whether the Equal Protection Clause of the Fourteenth Amendment gives rise to a cause of action on behalf of a "class of one" where the plaintiff does not allege discrimination based on membership in a vulnerable group, but alleges that ill will motivated the government to treat her differently from others similarly situated. The United States has a substantial interest in the resolution of that question because federal employees are frequently sued for alleged constitutional violations under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

STATEMENT

1. Respondent Grace Olech lives in the Village of Willowbrook, Illinois. J.A. 4, 6. Respondent, her husband, and three of their neighbors filed suit in state court against the Village seeking monetary relief for damage to their property caused by stormwater flooding. J.A. 5. One of the plaintiffs failed to prosecute the action, but respondent and the other state court plaintiffs ultimately prevailed in the litigation against the Village and obtained damage awards. *Ibid.*

While the state court litigation was pending, the well on respondent's property became damaged beyond repair. J.A. 7. As a temporary solution, respondent obtained water from the well of one of her neighbors. Because that solution left respondent without a reliable source of water, however, respondent asked Village officials to hook her up to the municipal water system. J.A. 8. The other state court plaintiffs made a similar request. *Ibid.* Village officials told respondent and the other state court plaintiffs that the Village would not accede to that request unless respondent, the other state court plaintiffs, and the property owners on the other side of the street from them each dedicated a 33-foot easement for the construction and maintenance of a 66-foot dedicated street. J.A. 9. Respondent and the other state court plaintiffs refused to grant the 33-foot easement. J.A. 10-11.

After a three-month delay, the Village withdrew its request for a 33-foot easement and instead asked for a 15-foot easement. J.A. 11. In a letter, the Village's attorney stated that the request for a 15-foot easement was "consistent with Village policy regarding all other property in the Village." J.A. 10. Respondent and the

other state court plaintiffs agreed to grant the 15-foot easement. J.A. 11.

Before work on the water project could be completed, the hose respondent had used to obtain water from her neighbor's well froze. J.A. 12. Respondent and her husband went without water for more than four months. *Ibid.*

2. In 1997, respondent filed suit in federal district court against the Village and several of its officials (petitioners), alleging that petitioners had violated her rights under the Equal Protection Clause. J.A. 1-13. In particular, respondent alleged that, by demanding a 33-foot easement as a condition for receiving water from the Village, petitioners had treated respondent and the other state court plaintiffs differently from all other Village property owners. J.A. 10. Respondent further alleged that the difference in treatment was motivated by "ill will generated by the state court lawsuit." *Ibid.* In particular, the complaint alleged that the suit received substantial press coverage that made petitioners "look bad." J.A. 6. Respondent also alleged that petitioners' treatment of the state court plaintiffs was "irrational and wholly arbitrary." J.A. 10. Respondent sought damages for the harm suffered during the period she and her husband were without water. J.A. 12-13.

The district court granted petitioners' motion to dismiss the complaint for failure to state a claim upon which relief could be granted. J.A. 60-67. The district court ruled that, under the Seventh Circuit's decision in *Esmail* v. *Macrane*, 53 F.3d 176 (1995), respondents' allegations were insufficient to establish a violation of the Equal Protection Clause, because respondent had failed to allege that petitioners had engaged in an

"orchestrated campaign of official harassment" against her. J.A. 66-67.

3. The court of appeals reversed. J.A. 170-175. The court noted that the Equal Protection Clause "is most commonly invoked on behalf of a person who either belongs to a vulnerable minority or is harmed by an irrational difference in treatment." J.A. 170. The court held, however, that, under *Esmail*, the Equal Protection Clause "can also be invoked * * * by a person who can prove that 'action taken by the state * * * was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective.'" J.A. 170-171 (quoting *Esmail*, 53 F.3d at 180). The court concluded that respondent had adequately alleged such a violation. J.A. 172-173. The court specifically held that respondent's allegations that she and her husband had been treated differently from all other property owners only because their suit against the Village had angered Village officials were sufficient to state a claim under *Esmail*. J.A. 172.

The court of appeals rejected the district court's view that *Esmail* required proof of an orchestrated campaign of harassment. J.A. 173-174. The court concluded that such a requirement has no basis in either the language or the policy of the Equal Protection Clause. J.A. 174.

SUMMARY OF ARGUMENT

I. The question presented by petitioners is whether a person in a "class of one" can state an equal protection claim by alleging that ill will motivated the government to treat her differently from others who are similarly situated. Respondent's complaint, however, does not present that question. Respondent's complaint alleges that she is a member of a *class of five persons* who filed

a state court suit against the Village for property damage, and that ill will *generated by the lawsuit* motivated the Village to impose on the state court plaintiffs a condition for obtaining access to water not imposed on any other property owner. Accordingly, the question presented by respondent's complaint is whether a person can state a constitutional claim by alleging that she is a member of a class of persons subjected to retaliation for having filed a lawsuit.

This Court's cases provide a clear answer to that question. Under the First Amendment, the government may not retaliate against persons because they have filed a lawsuit against the government. And when the government singles out a class of persons for differential treatment based on the exercise of rights protected by the First Amendment, it violates the Equal Protection Clause as well.

Because respondent's complaint does not raise the question presented by petitioners, and because it so clearly states a claim for relief independent of the question presented, the Court may wish to dismiss the writ of certiorari as improvidently granted. In the alternative, the Court should affirm the judgment reinstating respondent's complaint without reaching the question presented.

II. If the Court reaches the question presented, it should hold that a "class of one" claim is subject to the same analysis as other equal protection claims. Thus, unless a person in a "class of one" is singled out on the basis of a suspect classification or for exercising a fundamental right, the sole inquiry is whether there is a conceivable rational basis for treating the person in the "class of one" differently from others. Once a plausible rational basis for differential treatment is identified, judicial inquiry is at an end. A court may not probe

further into the actual subjective motivation for the decision.

The court of appeals held that, even when there is not a suspect classification or a fundamental right involved, a person in a class of one can establish an equal protection violation by demonstrating that a difference in treatment was actually motivated by ill will. That actual motive analysis cannot be reconciled with the objective inquiry required by this Court's rational basis cases. The court of appeals' approach also permits any person adversely affected by a governmental decision at any level to transform an objectively legitimate decision into a potential equal protection violation. And it sanctions highly intrusive inquiries into the motivations for official action.

At the same time, petitioners err in contending that the Equal Protection Clause only protects persons who are members of identifiable groups. The text of the Equal Protection Clause focuses on the protection of individuals, not groups. Consistent with the constitutional text, this Court's cases make clear that the Equal Protection Clause affords protection to persons who are in a "class of one." We agree with petitioners that "class of one" claims have the potential to disrupt effective government. The proper response to those concerns, however, is to apply deferential rational basis review to "class of one" claims, not to constrict the reach of the Equal Protection Clause in a way that is not justified by its text or this Court's cases interpreting it.

ARGUMENT

I. THE COMPLAINT IN THIS CASE DOES NOT PRESENT THE QUESTION RAISED BY PETITIONERS

A. The Court May Wish To Consider Dismissing The Writ Of Certiorari As Improvidently Granted

Petitioners contend that the Equal Protection Clause does not protect a person who is in a "class of one." In particular, petitioners contend that a person cannot state an equal protection claim by alleging that ill will motivated the government to treat her differently from others who are similarly situated, in the absence of an allegation that the ill will was motivated by membership in a vulnerable group. Because this case arises on a motion to dismiss respondent's complaint, the allegations in the complaint must be accepted as true. *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984). For reasons that may not have been apparent to the Court when it granted certiorari, the complaint in this case does not present the question raised by petitioners. The Court therefore may wish to consider dismissing the writ as improvidently granted.

1. One serious obstacle to review of the question presented is that respondent's complaint does not allege that she is a member of a "class of one." Instead, her complaint alleges that she is a member of the class of five persons who filed suit against the Village seeking monetary relief for stormwater damage to their property. J.A. 10. Respondent's complaint specifically alleges that petitioners treated the class of state court plaintiffs differently from other property owners in the Village by demanding a 33-foot easement as a condition for obtaining water from the Village. *Ibid.* Given that

allegation, respondent's complaint does not present the question whether the Equal Protection Clause protects a person who is in "a class of one."

2. The other significant obstacle to review of the question presented is that respondent's complaint does not simply allege that general ill will motivated the government to treat the state court plaintiffs differently from other property owners in the Village. Rather, her complaint alleges that petitioners treated the state court plaintiffs differently from other property owners because of ill will *generated by the state court lawsuit*. J.A. 10. According to respondent's allegations, the state court suit received substantial local press coverage that made petitioners "look bad," J.A. 6, and petitioners retaliated by imposing a condition for access to the Village water supply that petitioners did not impose on any other property owner in the Village, J.A. 10.

The question presented by respondent's complaint is therefore not whether differential treatment based on general ill will is sufficient to state a constitutional claim, but whether differential treatment based on the filing of a lawsuit is sufficient to state a constitutional claim. That latter question does not warrant this Court's review. This Court's cases already firmly establish that the government may not impose adverse treatment on individuals because they have filed a lawsuit against the government.

Specifically, the Court has held that one component of the First Amendment right "to petition the Government for a redress of grievances" is a right to file suit in court for a redress of alleged wrongs. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984); *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 741 (1983); *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S.

508, 510 (1972). That First Amendment right is protected not only against direct government restraint, but also against government conduct that deters or chills its exercise. *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972). Thus, under the doctrine of unconstitutional conditions, the government may not deny a benefit to a person based on that person's exercise of a First Amendment right, even when the person has no entitlement to the benefit. *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 674-675 (1996). For the same reason, the government may not "retaliate" against a person for having engaged in conduct protected by the First Amendment. *Crawford-El* v. *Britton*, 523 U.S. 574, 588 & n.10, 592 (1998).

Impermissible motive is a crucial element in such a First Amendment claim. Plaintiff must demonstrate that conduct protected by the First Amendment was a substantial motivating factor in the government's decision to treat the plaintiff adversely. Once such a showing is made, the burden shifts to the government to show that it would have reached the same decision in the absence of the protected conduct. *Mount Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977).

Under those settled First Amendment principles, respondent's complaint plainly states a claim for relief. The First Amendment prohibits the government from retaliating against a class of persons because they have filed a lawsuit, and that is precisely what respondent has alleged in this case. Because respondent's complaint states a claim for relief under settled First Amendment law, this case is not an appropriate vehicle for resolving the quite different question presented by petitioners.

3. In sum, because respondent's complaint alleges that she is in a class of five, rather than a "class of one," and because her complaint alleges that the persons in

her class were treated adversely based on their having filed a lawsuit, not because of general ill will, respondent's complaint does not squarely present the question on which this Court granted certiorari. The Court may therefore wish to dismiss the writ of certiorari as improvidently granted.[1]

B. If The Court Does Not Dismiss The Writ, It Should Affirm The Court Of Appeals' Judgment Reinstating Respondent's Complaint On Grounds Independent Of The Question Presented

If the Court does not dismiss the writ as improvidently granted, it should affirm the judgment of the court of appeals reinstating respondent's complaint on the ground that respondent's allegations of retaliation for the filing of a lawsuit state a claim for relief. While respondent's complaint refers only to the Equal Protection Clause and not the First Amendment, J.A. 4, under the Federal Rules of Civil Procedure, "a complaint should not be dismissed merely because plain-

---

[1] Petitioners sought review based on an asserted conflict between the decision below and the Sixth Circuit's decision in *Futernick* v. *Sumpter Township*, 78 F.3d 1051, cert. denied, 519 U.S. 928 (1996), but in fact there is no conflict. In *Futernick*, the Sixth Circuit held only that an allegation of malice is insufficient to state a claim of *selective prosecution*. *Id.* at 1057-1059. *Futernick* does not purport to govern a claim like respondent's, both because it arises outside the context of selective prosecution, and because it involves the special case of malice motivated by the filing of a lawsuit. Indeed, the Sixth Circuit held that an allegation that the government has acted in order to deter or punish the exercise of a constitutional right states a claim for relief. *Id.* at 1057. Thus, even if respondent's complaint were analogized to a selective prosecution claim, respondent's allegation of retaliation for the filing of a lawsuit would be sufficient to state a claim under *Futernick*.

tiff's allegations do not support the legal theory he intends to proceed on." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 336 (1989); *id.* at 337 n.40 (citing cases); *id.* at 354 n.40 (Supp. 1999) (same). A court is "under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Ibid.* Because respondent's allegations so clearly state a claim for relief under the First Amendment, respondent's failure to mention the First Amendment in her complaint is not fatal.

Moreover, while a claim like respondent's is best analyzed as a First Amendment claim, this Court has held that dissimilar treatment that is based on the exercise of a First Amendment right also violates the Equal Protection Clause. *Wayte* v. *United States*, 470 U.S. 598, 608-609 (1985); cf. *Police Dep't* v. *Mosley*, 408 U.S. 92, 95 (1972). Respondent's complaint therefore states a claim for relief under the Equal Protection Clause as well.

II. A "CLASS OF ONE" EQUAL PROTECTION CLAIM IS GENERALLY SUBJECT TO ORDINARY RATIONAL BASIS REVIEW

If the Court reaches the question presented, it should hold that a "class of one" claim is subject to analysis under traditional equal protection standards. In the ordinary "class of one" case, therefore, in which—unlike in this case—no fundamental right is at stake, the relevant inquiry is whether the alleged difference in treatment is supported by a conceivable rational basis. The court of appeals erred in sanctioning a more probing inquiry into actual motive. At the same time, petitioners' contention that the Equal Protection

Clause affords no protection to a person who is in a "class of one" is incorrect.

A. Classifications That Are Not Suspect And That Do Not Affect A Fundamental Right Are Subject To Rational Basis Review

1. The Court has only recently reiterated that "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose." *Central State Univ.* v. *American Ass'n of Univ. Professors*, 119 S. Ct. 1162, 1163 (1999). Under that highly deferential standard, the government need not "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger* v. *Hahn*, 505 U.S. 1, 15 (1992). Instead, a classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Thus, once a conceivable rational basis supporting a difference in treatment is identified, judicial inquiry "is at an end." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). It is "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." *Ibid.* A classification fails rational basis review only in the relatively rare case in which "the facts preclude[] any plausible inference" that a legitimate basis underlies the difference in treatment. *Nordlinger*, 505 U.S. at 16.

That highly deferential standard is firmly grounded in separation-of-powers considerations. Drawing lines is inherent in the legislative process, and the practical problems of government often require rough accom-

modations that may seem illogical, unfair, or improperly motivated. See *Heller* v. *Doe*, 509 U.S. 312, 321 (1993). If courts condemned all classifications that appeared to have one of those characteristics, government could not function. Under rational basis review, a court therefore may not "judge the wisdom, fairness, or logic of legislative choices." *Beach*, 508 U.S. at 313.

The price for observance of those fundamental limitations on the scope of judicial review is that some improperly motivated differences in treatment will escape judicial condemnation. Here, as elsewhere, the remedy for improperly motivated exercises of lawful power "lies * * * in the people, upon whom, * * * reliance must be placed for the correction of abuses committed in the exercise of a lawful power." *McCray* v. *United States*, 195 U.S. 27, 55 (1904). Unless a classification proceeds along suspect grounds or affects a fundamental right, "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

Nor is there anything extraordinary about a court refraining from inquiring into whether a decision that is objectively reasonable has been undertaken with a malicious intent. That is precisely the rule that is followed in Fourth Amendment cases. *Graham* v. *Conner*, 490 U.S. 386, 397 (1989) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force."). There is no reason that a court should engage in a more probing inquiry when it undertakes rational basis review under the Equal Protection Clause.[2]

---

[2] Because the extent to which a court must defer to legislative choices is grounded in separation-of-powers considerations, the

2. Most of this Court's rational basis cases have involved judicial review of legislative decisions. This Court's cases make clear, however, that the same basic standard of review applies to judicial review of administrative decisions. *Nordlinger*, 505 U.S. at 15-16 & n.8 (explaining that rational basis review applies to administrative decisions and that the standard of review is no different from the one applied to legislative classifications); *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U.S. 350, 352 (1918) ("The purpose of the equal protection clause of 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.").

The Equal Protection Clause does not prohibit negligent or inadvertent errors in the administration of the law; it is only implicated when there is an intentional difference in treatment. *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944); *Sunday Lake*, 247 U.S. at 353. Once such an intentional difference in treatment is shown, however, the inquiry is the same as that applicable to legislative classifications: absent proof of a suspect classification or interference with a fundamental right, the relevant

---

highly deferential standard set forth above does not constrain Congress when it exercises its authority under Section 5 of the Fourteenth Amendment to enforce equal protection guarantees. Under Section 5, Congress has considerable latitude to independently examine the facts underlying a state legislative classification and decide whether, in light of those facts, the classification satisfies the basic standard of rationality or instead rests on impermissible bias. See Brief for the United States at 22-28 (discussing cases) in *United States* v. *Florida Bd. of Regents* and *Kimel* v. *Florida Bd. of Regents*, Nos. 98-796 & 98-791.

inquiry is whether the administrative classification is rationally related to a legitimate public end. *Nordlinger*, 505 U.S. at 15-16 & n.8.

Consistent with that analysis, the courts of appeals have generally upheld administrative classifications against equal protection challenge as long as they have been supported by a conceivable rational basis, regardless of the official's actual motivation for the classification. See, *e.g.*, *Reid* v. *Rolling Fork Pub. Util. Dist.*, 854 F.2d 751, 753 (5th Cir. 1988) (refusal of utility district to grant a sewage treatment commitment does not violate equal protection "if there is any basis for a classification or official action that bears a debatably rational relationship to a conceivably legitimate governmental end," even if some other nonsuspect but irrational factors may have been considered); *Front Royal & Warren County Indus. Park Corp.* v. *Town of Front Royal*, 135 F.3d 275, 289-290 (4th Cir. 1998) (in evaluating an equal protection claim based on town's refusal to provide sewer service, court considers not actual motivation for the decision but rather whether town officials "reasonably *could have* believed that the action was rationally related to a legitimate governmental interest") (emphasis added); *Wroblewski* v. *City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992) (noting in challenge to administrative action that "[t]he rational basis standard requires the government to win if any set of facts reasonably may be conceived to justify its classification"); *Mahone* v. *Addicks Util. Dist.*, 836 F.2d 921, 935, 936-937 (5th Cir. 1988) (local utility board's refusal to provide water service to plaintiff's land must be upheld if the court finds "any conceivable factual basis" for the action).

That rational basis analysis does not preclude inquiry to determine the classification on which the official

actually relied, which might be a class of vulnerable persons, such as persons with disabilities, or a class of persons who are not vulnerable, such as real estate developers. Once a court determines the classification, the inquiry then shifts to whether a rational basis exists for using that classification. At that stage, ordinary rational basis analysis precludes a direct inquiry into a government official's subjective reasons for using a particular classification, and instead sustains the governmental action if a rational basis for using that classification can be found.

3. The equal protection principles discussed above are directly applicable when a person in a "class of one" claims that a difference in treatment violates the Equal Protection Clause. Unless the person in the "class of one" is being singled out on the basis of a suspect classification, or for exercising a fundamental right, ordinary rational basis review is applicable.

For example, if a town council enacted an ordinance providing that persons generally would have to give a 15-foot easement for obtaining access to the town's water supply, but that a 33-foot easement would be required from a particular homeowner, and no suspect classification or fundamental right were involved, the relevant question would simply be whether there was a rational basis for treating that particular homeowner differently from others. If there were a conceivable rational basis for the difference in treatment, judicial inquiry would be at an end. A court would have no authority to probe further into the actual motive for the town council's decision.

The same basic approach would apply to a claim that a town's water administrator required a 33-foot easement from one particular homeowner but not others. The person in the "class of one" would first have to

show that the administrator made a deliberate decision to treat him differently from others, and that the decision was not simply the result of an inadvertent, mistaken, or negligent application of the law. Once such a showing was made, the question would be the same as in the legislative example—whether there was a conceivable rational basis for treating that particular homeowner differently from others. As long as such a conceivable rational basis could be identified, a court could not probe further into the actual basis underlying the water administrator's decision.

B. The Court Of Appeals Erred In Approving An Inquiry Into Actual Motive

1. The court of appeals in this case failed to apply those settled equal protection principles. Applying its prior decision in *Esmail* v. *Macrane*, 53 F.3d 176 (1995), the court held that a plaintiff could establish an equal protection violation by proving that a difference in treatment was actually motivated by ill will. J.A. 170-171, 173. As *Esmail* makes clear, the Seventh Circuit has concluded that a plaintiff can establish a malicious-intent equal protection claim without showing that the government has proceeded along suspect lines, affected a fundamental right, or acted without a plausible rational basis. 53 F.3d at 178-179.

The court of appeals' analysis cannot be reconciled with the decisions of this Court discussed above holding that, unless a classification is suspect or affects a fundamental right, the sole equal protection inquiry is whether there is a plausible rational basis for the classification. As we have discussed, once such a plausible basis is identified, the case is at an end. A court is not free to undertake an additional inquiry into

whether the decision was actually motivated by a malicious intent.

2. The court in *Esmail* sought to draw support for its equal protection theory from this Court's decision in *Cleburne*. *Esmail*, 53 F.3d at 179. In the Seventh Circuit's view, *Cleburne* implied that malicious intent violates equal protection "when it pointed out that some objectives of state action simply are illegitimate and will not support actions challenged as denials of equal protection." *Id.* at 179-180. The court of appeals' reliance on *Cleburne* is misplaced. While *Cleburne* makes clear that certain government objectives, such as a bare desire to harm a politically unpopular group, or a desire to accommodate private bias, are not legitimate state interests, 473 U.S. at 446-448, it does not support the court of appeals' analysis here.

In *Cleburne*, the Court held that a city that generally permitted the operation of multiple dwelling facilities violated the Equal Protection Clause when it failed to permit the operation of a group home for persons with mental retardation. Applying rational basis review, the Court held that the record failed to reveal any rational basis for the city's decision to treat the group home differently from other multiple dwelling facilities. 473 U.S. at 448. The Court examined each of the four grounds for differential treatment suggested by the city, and it concluded in each case that the asserted rationale did not afford a basis for distinguishing between the group home at issue and other multiple dwelling facilities. *Ibid.* Having failed to identify any rational basis for the city's decision, the Court concluded that the decision could only be explained as resting on irrational prejudice against persons with mental retardation, an illegitimate basis for government action. *Id.* at 450; see also *id.* at 448.

Cleburne therefore does not hold that a plaintiff can bypass rational basis review merely by producing evidence that a decision was in fact motivated by a malicious intent. Rather, it holds that a decision that is not supported by a rational basis, and therefore can only be understood as resting on an impermissible motive, violates equal protection. The Seventh Circuit therefore erred in extrapolating its equal protection theory from *Cleburne*.[3]

3. The court of appeals' holding that proof of malicious intent can establish an equal protection violation in a "class of one" case threatens important governmental interests. The court of appeals itself recognized that its decision created "the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case." J.A. 174. The court of appeals, however, understated the dimensions of the problem. Under the court of appeals' approach, virtually any objectively legitimate decision by any government actor at any level can be transformed into a potential equal protection violation if a person affected by the decision alleges that the government acted with a malicious motive.

---

[3] It is possible to read *Cleburne* as applying a more rigorous form of rational basis review than the one the Court ordinarily applies. The rationale for that more rigorous application of rational basis review would be that persons who are mentally retarded satisfy some, but not all, the conditions necessary for application of heightened scrutiny. See also *Romer* v. *Evans*, 517 U.S. 620 (1996) (invalidating classification singling out persons who are gay for differential treatment). That rationale for a more rigorous form of rational basis review would not apply in the ordinary "class of one" case.

This Court has previously made clear that the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul* v. *Davis*, 424 U.S. 693, 701 (1976). It has rejected constitutional theories that "would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983." *Parratt* v. *Taylor*, 451 U.S. 527, 544 (1981). The court of appeals' decision conflicts with those admonitions.

4. The court of appeals' decision is particularly troubling because it invites highly intrusive inquiries into the motivations that underlie official action. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court specifically addressed the unique harms of motive inquiries like those sanctioned by the court of appeals. There, the Court explained that "it is now clear that substantial costs attend the litigation of the subjective good faith of government officials." *Id.* at 816. In particular, "[n]ot only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Ibid.* In addition, there are "special costs to 'subjective' inquiries of this kind." *Ibid.* Because "the judgments surrounding discretionary action almost inevitably are influenced by the decision-maker's experiences, values, and emotions," questions of subjective intent "rarely can be decided by summary judgment." *Ibid.* Moreover, when malicious intent is the ultimate issue, "there often is no clear end to the relevant evidence." *Id.* at 817. For that reason, an inquiry into malicious intent "may entail broad-ranging discovery and the deposing of numerous persons,

including an official's professional colleagues." *Ibid.* Such inquiries "can be peculiarly disruptive of effective government." *Ibid.* Based on those considerations, the Court in *Harlow* held that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-ranging discovery." *Id.* at 817-818. The court of appeals' equal protection theory, however, would have precisely that effect.

5. We do not suggest that judicial inquiries into actual motive are never justified. Specific constitutional provisions contemplate an inquiry into actual motive. See *Farmer* v. *Brennan*, 511 U.S. 825, 835-840 (1994) (Eighth Amendment); *Mount Healthy*, 429 U.S. at 287 (First Amendment). Indeed, the Equal Protection Clause itself demands such an inquiry when a classification is suspect. See *Village of Arlington Heights* v. *Metropolitan Housing Auth.*, 429 U.S. 252, 264-266 (1977) (racial discrimination). When a court is reviewing official action under the Equal Protection Clause, however, and there is no suspect classification or fundamental right involved, the costs of an actual motive inquiry outweigh any possible benefit.

Moreover, as this Court recently explained in *Crawford-El*, there is an important distinction between bare allegations of malice and the allegations of intent that are essential elements of certain constitutional claims. 523 U.S. at 592. A general allegation of malice permits "an open-ended inquiry into subjective motivation." *Ibid.* In contrast, in the contexts in which the Court has approved a motive inquiry, "the primary focus is not on any possible animus directed at the plaintiff; rather, it is more specific, such as an intent to disadvantage all members of a class that includes the plaintiff * * * or to deter public comment on a specific

issue of public importance." *Ibid.* It is therefore not surprising that the Court in *Crawford-El* expressed its understanding that "[i]t is obvious, of course, that bare allegations of malice would not suffice to establish a constitutional claim." *Id.* at 588. The court of appeals therefore erred in holding that an allegation of malicious intent is sufficient to state an equal protection claim.

C. The Equal Protection Clause Affords Protection To Persons Who Are In A "Class Of One"

At the same time, petitioners err in contending (Br. 15-16) that the Equal Protection Clause only protects individuals who are members of an identifiable group. While the "central purpose" of the Equal Protection Clause "is the prevention of official conduct discriminating on the basis of race," *Washington* v. *Davis*, 426 U.S. 229, 239 (1976), and "the abolition of all caste-based and invidious class-based legislation," *Plyler* v. *Doe*, 457 U.S. 202, 213 (1982), its protections also extend to those who are in a "class of one."

1. The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is "essentially a direction that all persons similarly situated should be treated alike." *Cleburne*, 473 U.S. at 439; *Plyler*, 457 U.S. at 216; *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). The unmistakable focus of the constitutional text is on protection for the individual. As the Court has emphasized, a "basic principle" of the Equal Protection Clause is that it "protect[s] persons, not groups." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995) (emphasis omitted).

2. Consistent with the constitutional text and that basic principle, this Court's cases do not suggest that

the Equal Protection Clause protects only persons who are members of an identifiable group. To the contrary, as early as 1879, the Court made clear that the Equal Protection Clause "means that *no person or class of persons* shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *Missouri* v. *Lewis*, 101 U.S. 22, 31 (1879) (emphasis added).

The Court has on several occasions confirmed that the Equal Protection affords protection to a person in a "class of one." For example, in *Atchison, Topeka & Santa Fe Railroad* v. *Matthews*, 174 U.S. 96, 104 (1889), the Court stated that "the equal protection guaranteed by the constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney's fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule."

In *McFarland* v. *American Sugar Refining Co.*, 241 U.S. 79 (1916), state legislation provided that any company engaged in the business of refining sugar within the State which paid less for sugar in the State than outside the State would be presumed to be a party to a monopoly and would be subject to fines, license revocation, ouster from the State, and sale of its property. *Id.* at 81. The State defended the law on the ground that it applied only to the American Sugar Refinery and was designed to combat that company's conduct. *Id.* at 85. The Court held the law unconstitutional, explaining that the law contained a "classifi-

cation, which if it does not confine itself to the American Sugar Refinery, at least is arbitrary beyond possible justice." *Id.* at 86. The Court added that "[i]f the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it and that therefore the plaintiff should be *prima facie* presumed guilty upon proof that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws." *Id.* at 86- 87.

More recently, in *Wade* v. *United States*, 504 U.S. 181, 185 (1992), the Court held that a prosecutor's decision to withhold a motion to reduce a sentence based on substantial assistance is subject to the same constitutional limitations that apply to selective prosecution claims. The Court went on to state that a single individual who alleged that the prosecutor acted arbitrarily and in bad faith in withholding a motion would be entitled to a remedy "if the prosecutor's refusal to move was not rationally related to any legitimate Government end." *Id.* at 186 (citing *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976)).

The Equal Protection Clause therefore is not wholly inapplicable to a person in a "class of one." As Justice Frankfurter explained, "the Fourteenth Amendment does not permit a state to deny the equal protection of its laws because such denial is not wholesale." *Snowden*, 321 U.S. at 15 (Frankfurter, J., concurring). A violation of equal protection can occur when "conscious discrimination by a state touches the plaintiff alone." *Ibid.*

3. Petitioners argue (Pet. 24) that compelling public policy considerations justify a ruling that the Equal Protection Clause affords no protection to a person who

is in a "class of one." In particular, they argue (Pet. 24-25) that recognition of a "class of one" claim "will invite legions of claims into federal courts," since anyone who has had a bad experience with a government official can "claim that any adverse act undertaken by that public official was done with improper motivation and therefore in violation of the Equal Protection Clause."

As our previous discussion shows, we share petitioners' concerns. The proper response to those concerns, however, is to apply deferential rational basis review to "class of one" claims, not to constrict the reach of the Equal Protection Clause in a way that is not justified by its text or this Court's cases interpreting it. Thus, a person who is in a "class of one" can establish an equal protection violation, but only by showing that there is no plausible rational basis for treating the "class of one" plaintiff differently from others.[4]

---

[4] As the courts of appeals have recognized, such claims can often be resolved on a motion to dismiss or a motion for summary judgment without highly intrusive discovery into an official's actual motive. See, *e.g.*, *Mahone*, 836 F.2d at 936-937 (challenge to regulatory action under rational basis test may be resolved on motion to dismiss because "using discovery procedures to develop facts showing the state's true reason for its actions could be, for all practical purposes, both inefficient and unnecessary"); *Wroblewski*, 965 F.2d at 460 (where rational basis for challenged administrative action is plausible and directly supported by the allegations in the complaint, dismissal for failure to state a claim is warranted); *E & T Realty* v. *Strickland*, 830 F.2d 1107, 1115-1116 (11th Cir. 1987) (Kravitch, J., concurring in part and dissenting in part) (arguing that because there were legitimate, rational, and identifiable grounds to justify differential treatment of plaintiffs, there was no need to remand claim for inquiry as to defendants' actual intent), cert. denied, 485 U.S. 961 (1988); see also *Crawford-El*, 523 U.S. at 597-600 (suggesting several means for a trial court to exercise its

CONCLUSION

The Court may wish to dismiss the writ of certiorari as improvidently granted. In the alternative, for the reasons stated in Part IB, the judgment of the court of appeals reinstating respondent's complaint should be affirmed. If the Court reaches the question presented, it should hold that a "class of one" claim is subject to rational basis review.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

MARK B. STERN
DANA J. MARTIN
Attorneys

DECEMBER 1999

---

discretion to protect government officials from unnecessary and burdensome discovery or trial proceedings).