No. 98-1288

IN THE SUPREME COURT OF THE UNITED STATES

VILLAGE OF WILLOWBROOK, *et al.*,
Petitioner

v.

GRACE OLECH,
Respondent

BRIEF OF THE ACLU AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Filed December 13, 1999

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE ACLU AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights.[1] The ACLU of

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.3. Under Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Illinois is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amici curiae*. In particular, the ACLU has established equality of treatment by government for all persons as one of its primary concerns and therefore has participated in many of the Court's equal protection cases. Because this case will decide whether the Equal Protection Clause tolerates a public official singling out an individual for discriminatory treatment, its proper resolution is a matter of concern to the ACLU and its members.

STATEMENT OF THE CASE

Respondent Grace Olech and her now-deceased husband Thaddeus Olech lived for many years at 6440 Tennessee Avenue in Willowbrook, Illinois. App. 6. Their neighbors on Tennessee Avenue were Howard Brinkman to the north and Rodney and Phyllis Zimmer (the Olechs' daughter and son-in-law) to the south. *Id.* at 7. On August 8, 1989, the Olechs, Zimmers, and Mr. Brinkman filed a lawsuit in state court against the Village of Willowbrook, seeking damages for flooding that resulted from improper drainage of storm water. *Id.* at 5. The lawsuit received local press coverage that made Petitioners "look bad." *Id.* at 6. Although Mr. Brinkman's suit was dismissed for want of prosecution, the Olechs and the Zimmers won their lawsuit. *Id.*

For years, the Olechs, Mr. Brinkman, and the Zimmers obtained their water from private wells on their respective properties. In the spring of 1995, the Olechs' well broke and could not be repaired, and on May 23, 1995, the Olechs, along with their Tennessee Avenue neighbors, asked Willowbrook to connect their homes to the municipal water supply "right away." App. 5-6. At this time the municipal water main extended as far south on Tennessee Avenue as the northern boundary of the northern edge of Mr. Brinkman's property, *i.e.*, the northernmost property of the

three neighbors. *Id.* at 7. When the Olechs made their May 1995 request their lawsuit against Willowbrook was pending.

Willowbrook refused to connect them, even though the residents had already paid the cost of doing so as required by law, unless each of them granted Willowbrook an easement to a 33-foot strip alongside their property and Tennessee Avenue. *Id.* at 12. This demand was contrary to, in Willowbrook's own words, Willowbrook's "policy regarding all other property in the Village" of a 15-foot easement for connection to the water main. *Id.* at 10. The Olechs refused to accede to this demand; Willowbrook eventually withdrew it in November 1995. *Id.* at 11.

Willowbrook had earlier requested that the Olechs grant the Village drainage easements for a stormwater drainage project, but the Olechs had refused then too. *Id.* at 6. Thus Willowbrook took advantage of the opportunity presented by the Olechs' request to be connected to the water supply by again demanding an easement that would allegedly be used to create a dedicated public street and "to control stormwater drainage . . . by the use of ditches and swales along Tennessee Avenue." *Id.* at 10. Ms. Olech contends that Willowbrook made this unprecedented easement demand in order to "get back" at her and her Tennessee Avenue neighbors for the lawsuit and its accompanying embarrassment for the officials. *Id.*

Because of Willowbrook's unprecedented demand for an easement, the Olechs were forced to obtain water from Mr. Brinkman's well using an overground hose. *Id.* at 8. The Olechs told Petitioner Philip Modaff, Willowbrook's Director of Public Services, that their temporary water supply would not work in the winter when the hose froze. *Id.* In November 1995 the hose did in fact freeze, and the Olechs' home was thereafter without water until weather conditions allowed the project to be completed in March 1996. *Id.* at 12.

Ms. Olech filed suit in the United States District Court for the Northern District of Illinois, claiming that Petitioners had violated her rights under the Equal Protection Clause. The district court granted Petitioners' motion to dismiss, but the Seventh Circuit reversed. The Seventh Circuit held that Ms. Olech's claim that she was treated differently from other Willowbrook residents as a result of Petitioners' vindictiveness adequately stated a claim.

SUMMARY OF ARGUMENT

There is no dispute that if Ms. Olech's allegations are true, what Willowbrook did was wrong. The whim of one or two vindictive public officials should not dictate whether a resident obtains access to her municipal water supply. As this Court has already recognized, singling out an individual can constitute a denial of equal protection under the Fourteenth Amendment to the Constitution.

Moreover, the predictable "public policy" arguments raised by Petitioners as a basis for denying Ms. Olech's claim have already been rejected by this Court. This Court has already held, for example, that a person denied equal protection in executive action need not seek redress in state court before claiming an equal protection violation. And it has failed to preclude equal protection claims simply because proving the claim may involve the task of demonstrating the government actor's motive. Finally, it has not surrendered to Petitioners' fear that interpreting the Constitution in a way that allows redress for victims of constitutional violations places an unacceptable burden on our governmental and legal systems. Because Petitioners do not and can not provide any meaningful distinctions between the equal protection claims previously allowed by the Court and the present one, the Court should not re-evaluate Petitioners' policy arguments in this context.

Petitioners' last ditch effort to preclude Ms. Olech's relief is a weak attempt to justify their decision to treat her unequally. But the Court has consistently recognized that even under its most deferential standard of review, governmental action should be taken only for a legitimate purpose. If Ms. Olech proves her allegations, she will have established that even this most fundamental requirement has not been satisfied and thus no further review of Petitioners' actions will be necessary.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE PROTECTS ALL CITIZENS FROM VINDICTIVE UNEQUAL TREATMENT.

The Equal Protection Clause prohibits the government from "deny[ing] to *any person* . . . the equal protection of the laws." U.S. Const. amend. XIV (emphasis added). Ms. Olech asks a federal court to enforce her right to be given a benefit enjoyed by all other Willowbrook residents—the right to be supplied with water from Willowbrook's municipal water supply—on the ground that Willowbrook treated her differently and denied her this municipal service simply out of a desire to cause her harm. Willowbrook defends these actions by blithely claiming that unequal treatment based upon sheer vindictiveness is totally outside the reach of the Equal Protection Clause. (Pet. Brf. at 20.) According to Willowbrook, the Equal Protection Clause is reserved exclusively for such broad classes as racial minorities and women. Neither the text of the Clause nor this Court's jurisprudence warrants such a crabbed reading.

The idea that the Equal Protection Clause prohibits government officials from treating citizens differently without regard to whether the victim is a member of an objectively definable class (*i.e.*, a so-called "class of one") did not originate with the lower court. In *McFarland v.*

American Sugar Refining, 241 U.S. 79, 86-87 (1916), the Court invalidated on equal protection grounds a statute that "bristle[d]" with "severeties that touch[ed] the plaintiff alone." Approximately thirty years later, in *Snowden v. Hughes*, 321 U.S. 1 (1944), the Court recognized that an individual could claim that a public official had violated the Equal Protection Clause by purposely singling him out. Shortly thereafter Learned Hand, writing for the Second Circuit in *Burt v. City of New York*, 156 F.2d 791 (1946), upheld an equal protection claim alleging that an individual had been treated differently by public officials because they disliked him.[2]

In more recent years, the Court has recognized explicitly that a "class of one" deserves constitutional scrutiny. *See Nixon v. Administrator of General Serv.*, 433 U.S. 425 (1977). In *Nixon*, the Court held that legislation directed at President Nixon was not an unconstitutional Bill of Attainder even though it disfavored him as an individual, because he "constituted a *legitimate* class of one." *Id.* at 472 (emphasis added). The Court also has acknowledged the parity between the Bill of Attainder Clause and the Equal Protection Clause. *See, e.g., id.* at 471 n.33 (explaining that the same result would be reached under either the Bill of Attainder Clause or the Equal Protection Clause); *McFarland*, 241 U.S. 79 (analyzing what is, in actuality, a Bill of Attainder claim under the Equal Protection Clause); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (pointing to the Bill of Attainder decision in *United States v. Brown*, 381 U.S. 437 (1965), in discussing equal protection "strict scrutiny"). *See also Falls v. Town of Dyer*, 875 F.2d 146 (7th Cir. 1989) (suggesting that executive action is properly analyzed under the Equal Protection Clause if as legislative

[2] In addition, the Court has long had no trouble holding that individual taxpayers have claims under the Equal Protection Clause when they are intentionally singled out to pay higher taxes. *See, e.g., Allegheny Pittsburgh Coal v. Webster County, W. Va.*, 488 U.S. 336 (1989); *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441 (1923).

action it would constitute a Bill of Attainder); Akhil R. Amar, *Essay: Attainder and Amendment 2: Romer's Rightness*, 95 Mich. L. Rev. 203 (1996). A "class of one" deserves scrutiny under the Equal Protection Clause.

As Judge Posner acknowledged in rejecting an argument that the Equal Protection Clause only protects large, objectively definable classes: a class "can consist of a single member, or of one member at present; and it can be defined by reference to the discrimination itself. To make 'classification' an element of a denial of equal protection would therefore be vacuous. There is always a class." *Indiana State Teachers Ass'n v. Board of School Comm'n of Indianapolis*, 101 F.3d 1179, 1181 (7th Cir. 1996) (citations omitted) (citing *Nixon*).[3] Other circuit courts have similarly recognized the "class of one" as sufficient to state an equal protection claim. *See, e.g., Batra v. Board of Regents of the Univ. of Neb.*, 79 F.3d 717, 721 (8th Cir. 1996) (relying on *Snowden* and holding that "the relevant prerequisite is unlawful discrimination, not whether plaintiff is part of a victimized class"); *Smith v. Eastern N.M. Medical Ctr.*, No. 94-2213, 1995 U.S. App. Lexis 35920, at *15-25 (10th Cir. Dec. 19, 1995) (reversing district court dismissal of equal protection claim where plaintiff alleged individually-based purposeful discrimination); *Yerardi's Moody Street Rest. & Lounge v. Board of Selectmen of Randolph*, 878 F.2d 16, 21 (1st Cir. 1989) (holding that an individual can claim a denial of equal protection if he was treated differently out of "malicious or bad faith intent to injure"); *Zeigler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981) (finding violation of Equal Protection Clause where plaintiff had individually been singled out); *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d. Cir. 1980) (allowing equal protection claim where plaintiff

[3] Were it otherwise, a legislature could avoid the prohibition on Bills of Attainder simply by passing a law that purported to govern a "class," where the "class" was defined so narrowly as to encompass only one individual.

alleges "selective treatment" based on "malicious or bad faith intent to injure").

Ms. Olech is a victim, just as much as members of other unpopular groups, of differential treatment at the hands of a governmental actor for reasons patently offensive to traditional notions of fairness and justice. The Equal Protection Clause exists to protect citizens from precisely such improperly motivated governmental action. Differential treatment in government action motivated by the desire to punish one based on personal animus should not be countenanced any more than race or sex-based discrimination when it comes to the Equal Protection Clause. Indeed, one wonders why government—at least, good government—would want to argue otherwise. "If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court." *Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995). *See also Yick Wo v. Hopkins*, 118 U.S. 356, 369-70 (1886) ("When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."). Here Willowbrook officials injured Ms. Olech by denying her water because they did not like her, which created the same practical harm as if they had denied her water because she is female. But the Equal Protection Clause "state[s] a commitment to the law's neutrality where the rights of persons are at stake." *Romer*, 517 U.S. at 623.

Moreover, the human experience tells us that one need not be a member of a "suspect class" (or any type of typical class) to be politically disfavored or singled out for unfair treatment. Indeed, governmental action that burdens only a few persons may require special scrutiny because it likely

carries fewer political consequences. As Judge Posner has explained, "classifications should be scrutinized more carefully the smaller and more vulnerable the class is. A class of one is likely to be the most vulnerable of all . . . ." *Esmail*, 53 F.3d at 180. As this Court has recognized, "a status-based [governmental action] divorced from any factual context from which [the Court can] discern a relationship to legitimate state interests . . . is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer*, 517 U.S. at 635.

II. THE COURT HAS ALREADY REJECTED WILLOWBROOK'S "PUBLIC POLICY" ARGUMENTS.

A. Federal Courts Should Hear Equal Protection Claims.

Petitioners contend that Ms. Olech must go to state court for relief. Petitioners answer their own argument, however, by noting that the Equal Protection Clause was enacted, in part, because "there was significant concern that state governments would be unable or unwilling to safeguard a citizen's civil rights." (Pet. Brf. at 19.) Or as the Seventh Circuit has observed: "Although the courts of Illinois seem to have been perfectly ready, willing, and able to protect [the plaintiff] against Mayor Macrane, powerful state or local officials are not infrequently able to overawe state or local courts." *Esmail*, 53 F.3d at 180.

Moreover, this Court has steadfastly rejected the assertion that a plaintiff should be required to ask a state court for relief before asserting a constitutional claim in federal court. *See Patsy v. Board of Regents of Fla.*, 457 U.S. 496 (1982). The Court has done so for good reason. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from

unconstitutional action under color of state law, *whether that action be executive, legislative, or judicial.*" *See Patsy*, 457 U.S. at 503 (internal quotation marks omitted) (emphasis added).

Petitioners' argument that Ms. Olech's equal protection claim should be shoehorned into a due process analysis that would require exhaustion of state remedies is unpersuasive. (Pet. Brf. at 31.) ("Respondent's failure to avail herself of state remedies precludes a denial of equal protection.") This Court has held that a citizen cannot claim that a state did not provide him procedural "due process" until he has availed himself of the process provided by the state. *See Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990). It makes no sense, however, to find that an "equal protection violation does not occur until the claimant shows that the state apparatus sustained or otherwise failed to rectify the equal protection denial." (Pet. Brf. at 32.) Indeed, Petitioners' argument is nothing more than an indistinguishable species of the exhaustion argument rejected in *Patsy*. No principled distinction can be drawn between Petitioners' proposal for equal protection claims and a requirement that all constitutional claims be first exhausted through the state court system, the argument rejected in *Patsy*, 457 U.S. at 516.

The shallowness of Willowbrook's argument is further illustrated by the state court remedies they say Ms. Olech has at her disposal: mandamus and substantive due process. (Pet. Brf. at 29-30.) Mandamus is of course a remedy rarely afforded even though it almost always involves egregious conduct. State court mandamus is no doubt theoretically "available" for all kinds of constitutional violations; it is not, however, a substitute for relief in the federal courts. As to substantive due process, Ms. Olech should not be relegated to that route any more than any other equal protection claimant. *Esmail*, 53 F.3d at 180.

B. Vindictiveness Is No More Impossible To Discern Than Racial Bias.

Petitioners also protest that vindictiveness is "easy to allege and impossible to discern." (Pet. Brf. at 7.) Not true. The Court has already rejected Petitioners' notion that the task of ascertaining the motives of a government actor for purposes of adjudicating an equal protection claim is too difficult for courts to manage. *See, e.g., Washington v. Davis*, 426 U.S. 229, 238-46 (1976);[4] *Batson v. Kentucky*, 476 U.S. 79 (1986); *Castaneda v. Partida*, 430 U.S. 482 (1977). *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). This Court has recognized that courts can and should ascertain legislative motive when adjudicating an equal protection claim. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev.*, 429 U.S. 252, 266-268 (1977). Moreover, most claims in the nature of Ms. Olech's will involve *ad hoc* actions by one or a few government agents. In these circumstances a factfinder's task in ascertaining motive will be much *easier* than ascertaining the motives of a legislative body, which may have divergent motives among the individual members. *Id.* at 265; *see also Kassel v. Consolidated Freightways*, 450 U.S. 662, 702-03 (1981) (noting difficulty with belief that a legislative body's motive can be ascertained because "it assumes that individual legislators are motivated by one discernible 'actual' purpose, and ignores the fact that different legislators may vote for a single piece of legislation for widely different reasons") (Rehnquist, J., dissenting). Again, however, Petitioners point to no distinguishing feature of Ms. Olech's claim that would make a court's task of determining Petitioners' motive here more burdensome. *See Smith v. Wade*, 461 U.S. 30, 56 (1983) (allowing

[4] Petitioners' lengthy discussion of *Palmer v. Thompson*, 403 U.S. 217 (1971), is unavailing. As the Court noted in *Washington v. Davis*, courts routinely look at the actor's motivation in assessing an equal protection claim. *See* 426 U.S. at 242-46.

punitive damages under § 1983 where claimant proves that defendants' conduct was "motivated by evil motive or intent").

All equal protection plaintiffs, even those belonging to suspect classes, bear the burden of proving the governmental actor's illicit motives. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 465-66 (1996); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974). Ms. Olech's burden is no different, and if she does not satisfy it, she will not prevail.

C. Allowing Ms. Olech To Prosecute Her Claim Will Not Open The Floodgates For Meritless Equal Protection Claims.

As the companion to their argument that Ms. Olech's equal protection claim is novel, Petitioners make the predictable argument that recognition of her claim will burden the "system" with "legions of claims." (Pet. Brf. at 24.) First, this "opening of the floodgates" kind of argument has never provided—and should never provide—a basis for sacrificing important constitutional rights. *Hudson v. McMillian*, 503 U.S. 1, 15 (1992) (explaining that "judicial overload" is an "inherently self-interested concern [that] has no appropriate role in interpreting the contours of a substantive constitutional right") (Blackmun, J. concurring). After all, to the extent the preservation of civil liberties entails costs, the judgment was made long ago that the costs were justified by the benefits.

In any event, Petitioners grossly exaggerate the costs likely to flow from vindication of Ms. Olech's equal protection rights. Petitioners would have one believe that affirmance of the Seventh Circuit will result in a rush on the federal courts of new (and, Petitioner's imply, frivolous) claims. Scrutiny of these dire premonitions, however, shows them to be hollow. Consider the exceptional set of facts that

will support a claim like Ms. Olech's. Such a claim requires proof that governmental action was the product of a spiteful effort to cause harm "wholly unrelated to any legitimate state objective." *Esmail*, 53 F.3d at 180. As long as government officials make legitimate choices, their decisions are unlikely to lead to a deluge of lawsuits. *See O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 724-25 (1996).

In addition, the Court has already created a framework to balance the burden of constitutional litigation against the rights of victims. Municipalities, for example, are not held strictly liable for the constitutional torts committed by their officials. *Monell v. Department of Social Serv.*, 436 U.S. 658, 692 (1978). In the context of the claim at issue here, a municipality is likely to be liable only when it either had an explicit policy authorizing the discrimination, *id.* at 690-94 or indiscriminately delegated authority to an official who, without standards to govern his execution of that authority, vindictively discriminated, *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 482 (1986). In this way, the Court has defined liability so as to adequately protect government while deterring governmental actors from engaging in invidious discrimination. Public officials who abuse their power by treating a citizen unequally in an effort to "get back" at him do not deserve protection from liability any more than those who discriminate based upon race, sex, ethnicity, or religion. And while *Burt* has been around since 1946, the paucity of reported cases on this form of claim belies Petitioners' contention that allowing Ms. Olech to proceed with her claim will cause the federal courts to be awash in similar claims. *See Esmail*, 53 F.3d at 179.

In the final analysis though, whether claims like Ms. Olech's remain rare or not is not really the point. Whenever a governmental actor either is given unbridled discretion to single one out for spiteful treatment or acts wholly outside his delegated authority, the law ought to have no interest in shielding that person from equal protection liability.

Petitioners argue that "compelling public policy" requires rejection of Ms. Olech's claim. (Pet. Brf. at 24.) But the exact opposite is true. Rejection of Ms. Olech's claim provides unwanted protection for patently vindictive governmental conduct; recognition of her claim promotes good government.

III. WHERE THE DISPARATE TREATMENT SERVES NO LEGITIMATE PURPOSE, NO LEVEL OF SCRUTINY CAN BE SATISFIED.

Governmental action "must bear a rational relationship to a legitimate governmental purpose." *Romer*, 517 U.S. at 635. Ms. Olech's claim is that Petitioners acted not to fulfill any such legitimate purpose but instead to harm her because they disliked her. "[I]f the constitutional conception of 'equal protection of laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) ("To withstand equal protection review, legislation that distinguishes between [people] must be rationally related to a *legitimate* governmental purpose.") (emphasis added). Here, Petitioners allegedly acted only out of a desire to harm the Olechs; *i.e.*, an illegitimate purpose. Therefore Petitioners' conduct by definition cannot satisfy even a rational relationship test, since it sought to advance an *illegitimate* governmental purpose. "[S]ome objectives—such as 'a bare desire to harm a politically unpopular group'—are not legitimate state interests." *Cleburne*, 473 U.S. at 446-47 (*quoting Moreno*, 413 U.S. at 534).[5]

[5] Even if Petitioners could articulate a more legitimate purpose for their actions, it would be difficult for them to show that the means they chose to fulfill their purpose were rational once Respondent proves that Petitioners acted out of vengeance, an inherently irrational circumstance.

The post-hoc and non-record contentions of Petitioners and their *amici* that there were valid reasons after all for conditioning Ms. Olech's access to water on receiving an easement from her and her neighbors do not warrant reversal of the Seventh Circuit. As that court held, to affirmatively prevail Ms. Olech must prove "that the cause of the differential treatment of which [she] complains was a totally illegitimate animus toward [her] . . . . If [Petitioners] would have taken the complained-of action anyway, even if [they] didn't have the animus, the animus would not condemn the action." Pet. App. at 174. *See also Texas v. Lesage*, No. 98-1111, 1999 U.S. Lexis 8014, at *5 (Nov. 29, 1999) ("Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983.") (per curiam). Affirmance of the Seventh Circuit leaves Petitioners free to present proof of what they contend is the "real" reason for their actions at the appropriate time. If, however, Ms. Olech succeeds in showing that Petitioners' actions were based on vindictiveness rather than a rational attempt to serve a legitimate government objective, the Equal Protection Clause should afford her a remedy. *See Bankers Life & Cas. v. Crenshaw*, 486 U.S. 71, 83 (1988) ("[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review.").

CONCLUSION

Recognizing the existence of claims such as Ms. Olech's is important. There are instances when government officials seek to "get back" at a person or to retaliate for reasons that are reprehensible and illegitimate but not related to the person's exercise of a protected right. In such circumstances, no other federal claim will lie for the denial of equal treatment. The Equal Protection Clause "has long been understood to provide a kind of last-ditch protection

against governmental action wholly impossible to relate to legitimate governmental objectives." *Esmail*, 53 F.3d at 180.

Similarly, irrational and vengeful discrimination against an individual may in reality be class-based discrimination that is simply not immediately self-evident. The victim may, for example, just happen to be the first member of a vulnerable group to suffer the discriminatory treatment. Or the person may be the applicant for a government job whose employment would violate the silent quota limiting women or racial or ethnic minorities to existing numbers in the workforce. In either instance it might be difficult to plead or prove traditional class-based animus but still be possible to show treatment that departs so dramatically from the norm as to show, at the very least, personal vindictiveness that cries out for redress by the federal courts.

In short, "[i]f the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court." *Id.* at 179. For all of these reasons, the judgment of the United State Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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