No. 98-1288

IN THE SUPREME COURT OF THE UNITED STATES

VILLAGE OF WILLOWBROOK, *et al.*,
Petitioner

v.

GRACE OLECH,
Respondent

BRIEF OF RESPONDENT GRACE OLECH

Filed December 13, 1999

QUESTION PRESENTED

Whether the Equal Protection Clause is violated when the government treats an individual differently from others similarly situated as a result of ill will or other illegitimate animus on the part of the government toward that individual, as opposed to ill will or other illegitimate animus on the part of the government toward some group or class of which the individual is a part?

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STATEMENT OF THE CASE

I. Nature of the Case

The Respondent, Grace Olech ("Olech" or "Mrs. Olech"), filed this action against the Petitioners, the Village of Willowbrook, an Illinois municipal corporation ("Willowbrook"), Gary Pretzer, individually and as President of Willowbrook ("Pretzer"), and Philip J. Modaff, individually and as Director of Public Services of Willowbrook ("Modaff"). The action was filed under 42 U.S.C. §1983 and sought damages based on the violation of Mrs. Olech's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution. (App. 3-13) The Petitioners filed a motion to dismiss Mrs. Olech's Amended Complaint under Fed.R.Civ.P. 12(b)(6) (App. 14-26), and the district court granted that motion (App. 122-124) and entered judgment for the Petitioners (App. 133). The Court of Appeals for the Seventh Circuit reversed. (App. 170-175)

II. Statement of Facts

This action was commenced on July 11, 1997, when Grace Olech filed her Complaint (Record, Document 1-1, App. 1) in the United States District Court for the Northern District of Illinois, Eastern Division, against the Village of Willowbrook, Pretzer, and Modaff. On October 8, 1997, Mrs. Olech filed an Amended Complaint (App. 3-13), having received leave of court to do so. (App. 1)

In her Amended Complaint, Mrs. Olech alleged that she was a citizen of the United States and a resident of Willowbrook. (App. 4) Mrs. Olech brought the lawsuit

under 42 U.S.C. §1983 to redress the violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution. (App. 4)

According to the Amended Complaint, on August 8, 1989, Mrs. Olech and her since deceased husband, Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Willowbrook and other defendants in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 ("the state court lawsuit"), in which the plaintiffs sought money damages from Willowbrook and the other defendants as a result of the flooding of the plaintiffs' property by stormwater. (App. 5) Howard Brinkman's claims in the state court were dismissed for want of prosecution on April 1, 1991. (App. 5) The Olechs' claim against Willowbrook in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Mrs. Olech, individually and as special administrator of the estate of Thaddeus Olech, and against Willowbrook in the amount of $20,000.00, and judgment was entered on the verdict. (App. 5) The claim of Rodney C. Zimmer and Phyllis S. Zimmer against Willowbrook in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of the Zimmers and against Willowbrook in the amount of $135,000.00, and judgment was entered on that verdict. (App. 5) Grace Olech is Phyllis Zimmer's mother. (App. 4)

According to the Amended Complaint, the state court lawsuit against Willowbrook, which was ultimately

determined to be meritorious, was the subject of substantial coverage in the local press, was bitterly contested by Willowbrook, and generated substantial ill will toward the plaintiffs in the state court lawsuit on the part of Willowbrook and its officers and employees, including Modaff and Pretzer. (App. 6) The Amended Complaint alleged that said ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Willowbrook and its officers and employees look bad, from the erroneous belief on the part of Willowbrook's officers and employees that the state court lawsuit was frivolous and meritless, and from the fact that, prior to the filing of the state court lawsuit, Grace and Thaddeus Olech and Howard Brinkman had refused to grant certain drainage easements for a storm water drainage project favored by Willowbrook. (App. 6)

From a long time prior to the filing of the state court lawsuit and until the death of Thaddeus Olech on November 24, 1996, Grace Olech and Thaddeus Olech were the joint owners of and resided in a single family home at 6440 Tennessee Avenue in Willowbrook, Illinois, on the west side of Tennessee Avenue. (App. 6-7) Since the death of Thaddeus, Grace Olech has been the sole owner of this property ("the Olech property") and has continued to reside there. (App. 7) In the spring of 1995 the private well on the Olech property, which provided potable water for the Olech home, broke down and was beyond repair. (App. 7) The Olechs then implemented a temporary solution to the problem by hooking up to the well of their neighbors to the south on Tennessee Avenue, Rodney and Phyllis Zimmer, via an overground hose.

(App. 7) At that time Willowbrook's water main on Tennessee Avenue extended approximately as far south as the northern boundary of the property of Howard Brinkman, the neighbor to the north of the Olechs on Tennessee Avenue. (App. 7)

By the spring of 1995 Willowbrook had developed a plan which was to be implemented within two years of the spring of 1995 and which was going to require all of the homeowners on Tennessee Avenue, who were not hooked up to Willowbrook's municipal water system, to hook up to the system. (App. 7) There is nothing in the record to suggest that this plan contemplated dedication of Tennessee Avenue to Willowbrook or its paving or the installation of sidewalks.

On May 23, 1995, while the state court lawsuit was pending, Grace Olech and Thaddeus Olech, along with Howard Brinkman, and Rodney and Phyllis Zimmer, made a request to Willowbrook that their homes be hooked up right away to Willowbrook's municipal water supply system. At or about that time Modaff was informed that the well on the Olech property had broken down, and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, a temporary solution which would not work in the winter when the temperature fell below freezing. (App. 8) As required by law, Willowbrook undertook to extend the water main and hook up the homes as requested, conditioned on the payment by the owners of each of the three parcels of property involved of one-third of the estimated cost of the project. (App. 8) On July 11, 1995, Grace and Thaddeus Olech paid to Willowbrook $7,012.67, representing their share of the estimated cost of the project,

and by July 12, 1995, Willowbrook had received the required payments from Howard Brinkman and the Zimmers. (App. 8)

According to the Amended Complaint, the portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the Zimmer property is not, and never has been a dedicated public street, and no easements had been granted to any governmental body for the use of any portion of Tennessee Avenue adjacent to the Brinkman, Olech, or Zimmer properties. (App. 8-9)

In August of 1995 Modaff told Phyllis Zimmer that Willowbrook would not proceed with the project unless all of the property owners involved granted Willowbrook a 33-foot easement along Tennessee Avenue, and in that same month Pretzer told Phyllis Zimmer that the 33-foot easement would be required for the project. (App. 9) On September 21, 1995, Modaff sent to Grace and Thaddeus Olech and to the other property owners involved a Plat of Easement whereby they and the property owners on the other side of Tennessee Avenue would each dedicate to Willowbrook a 33-foot strip of their property along Tennessee Avenue for public roadway purposes and grant to Willowbrook a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities, which would result in a 66-foot wide dedicated street. (App. 9)

According to the Amended Complaint, the defendants' demands for 33-foot easements and a 66-foot dedicated street as a condition of the extension of the water main were not consistent with the policy of Willowbrook

regarding other property in Willowbrook. (App. 9-10) The Village Attorney, Gerald M. Gorski, eventually admitted as much in a letter dated November 10, 1995, in which he stated as follows:

> "[A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."

(App. 10)

The Amended Complaint alleges that the Petitioners treated Grace and Thaddeus Olech, Howard Brinkman, and Rodney and Phyllis Zimmer differently from other property owners in Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit *and in an attempt to control stormwater drainage in the vicinity to the detriment of the Olechs and the other plaintiffs in the state court lawsuit by the use of ditches and swales along Tennessee Avenue.* (App. 10) The Amended Complaint alleges that the Petitioners' decision to treat the Olechs and the other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main was irrational and wholly arbitrary, and was made by the appropriate policy-making official or employee of Willowbrook. (App. 10)

According to the Amended Complaint, because the 33-foot easements and the 66-foot dedicated street

demanded by the Petitioners were not consistent with what the Petitioners required in relation to other property in the Village of Willowbrook, Grace and Thaddeus Olech and the other property owners involved declined to grant the 33-foot easements and the 66-foot street dedication. (App. 10-11) And from the time that Modaff first demanded the 33-foot easements in August of 1995 until on or about November 10, 1995, no progress was made on the project. (App. 11)

On November 10, 1995, Willowbrook relented and withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Willowbrook were granted a 15-foot easement for the water main and for related water service lines used to connect the homes. (App. 11) The easement demanded by Willowbrook in its attorney's letter of November 10, 1995, was consistent with what was required by Willowbrook in relation to other property in Willowbrook, and, therefore, Grace and Thaddeus Olech, and the other property owners involved agreed to grant that easement. (App. 11)

The Amended Complaint alleged that the initial refusal of the Petitioners to proceed with the project unless Willowbrook was granted the 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, a delay which proved critical as a result of the approaching winter weather. (App. 11) In November of 1995 the overground hose used by Grace and Thaddeus Olech to connect to their neighbor's well froze, and, therefore, Grace and Thaddeus Olech were without running water from November of 1995 until the project was completed on

March 19, 1996. (App. 12) The Amended Complaint alleges that "as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication, Plaintiff GRACE OLECH and Thaddeus Olech, who were 72 and 76 years old, respectively, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress." (App. 12) The Amended Complaint alleges that the initial refusal of the Petitioners to proceed with the project unless Willowbrook was granted the 33-foot easements and 66-foot street dedication "and the concomitant and resulting delay in the project" deprived Grace Olech of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution, and the actions and inactions of the Petitioners in that regard were undertaken either with the intent to deprive Grace Olech and others of those rights, or in reckless disregard of those rights. (App. 12) Finally, the Amended Complaint alleged that the actions and inactions of the Petitioners set forth therein were undertaken under color of state law. (App. 12) Grace Olech sought compensatory and punitive damages as well as an award of her reasonable attorney's fees under 42 U.S.C. §1988. (App. 13)

The Petitioners filed a Motion To Dismiss Plaintiff's Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6) (App. 14-26), along with a Memorandum Of Law In Support Of Motion To Dismiss (App. 27-35). Mrs. Olech filed Plaintiff's Response To Defendants' Motion To Dismiss

The Amended Complaint (App. 36-48), and the Petitioners filed a Reply (App. 49-59).

The district court issued a Memorandum Opinion And Order (App. 60-67) on April 13, 1998, granting the Petitioners' motion to dismiss, and on the same date issued a minute order granting the Petitioners' motion to dismiss (App. 68-70), and a Judgment In A Civil Case which dismissed the action in its entirety. (App. 71)

Grace Olech filed a timely Notice Of Appeal (Record, Document 23, App. 2), and, following briefing (App. 72-169) and oral argument, the Court of Appeals for the Seventh Circuit reversed. (App. 170-175) *Olech v. Village of Willowbrook*, 160 F.3d 386 (7th Cir. 1998).

Willowbrook's Statement of Facts is incorrect insofar as it implies that the plan developed by Willowbrook in the spring of 1995, which was going to require all of the homeowners on Tennessee Avenue, who were not hooked up to municipal water system of Willowbrook, to hook up to the system, contemplated a dedication of Tennessee Avenue and improvements with sidewalks and public utilities, and insofar as it implies that the homes of Howard Brinkman, Grace Olech, and the Zimmers were hooked up pursuant to that plan. (Willowbrook's brief, p. 4.) The only reference to Willowbrook's plan in the Amended Complaint is in paragraph 18 where it is alleged that by the spring of 1995 Willowbrook had developed a plan, which was to be implemented within two years of the spring of 1995, and which was going to require all of the homeowners on Tennessee Avenue, who were not hooked up to the municipal water supply system, to hook up to the system. (App. 7) That allegation

explains why the Olechs did not drill a new well when, in the spring of 1995, their well broke down and was beyond repair because they were going to have to hook up within two years anyway. But the Amended Complaint does not allege that Willowbrook's plan contemplated a dedicated street, including sidewalks and public utilities, or that the homes of Brinkman, the Olechs, and the Zimmers were hooked up pursuant to that plan. (In fact, if Willowbrook's plan had included dedication of the street, it would have required Willowbrook to pay the property owners for the easement rights involved because private property may not be taken for public purposes without just compensation. (U.S. Const., Amend V.)) The issue of a street dedication did not come up until shortly after Howard Brinkman, the Olechs, and the Zimmers, the plaintiffs in the state court lawsuit, notified Willowbrook of the Olechs' problem and requested that their homes be hooked up right away. (App. 8-9) The homes of Brinkman, the Olechs, and the Zimmers were not hooked up pursuant to Willowbrook's two-year plan. Brinkman, the Olechs, and the Zimmers requested the extension of the water main right away in the spring of 1995, and the homeowners, themselves, paid for the project. (App. 8)

Amici curiae supporting Willowbrook state that "[a]t no time did Mrs. Olech seek injunctive relief under state law." (*Amici's* brief, p. 6, n. 5.) There is nothing in the record to support that statement.

SUMMARY OF ARGUMENT

This Court should decline to consider the question on which this Court granted certiorari and should dismiss the writ of certiorari as improvidently granted because the Village of Willowbrook, Gary Pretzer, individually and as President of the Village of Willowbrook, and Philip J. Modaff, individually and as Director of Public Services of the Village of Willowbrook (hereinafter referred to collectively as "Willowbrook"), did not raise that question in the district court or the Court of Appeals for the Seventh Circuit.

In the alternative, this Court should affirm the judgment of the Court of Appeals for the Seventh Circuit, and should reject Willowbrook's argument that the Equal Protection Clause of the Fourteenth Amendment should be applied unequally, protecting persons against whom the State purposely discriminates because of an illegitimate animus against a "class" or "group" of which the persons are a part, but not protecting persons against whom the government purposely discriminates because of ill will or other illegitimate animus against the particular person involved. There is nothing in the language of the Equal Protection Clause to suggest such a restriction in its application, or even to create an ambiguity in that regard. In fact, this Court has already held the Equal Protection Clause to be violated by purposeful discrimination against a "class of one." (*Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923).) Judge Posner's opinion for the Court of Appeals in the instant case, which required Mrs. Olech to prove that Willowbrook's purposeful unequal treatment of her was " 'wholly unrelated to any

legitimate State objective' " (160 F.3d 386, 387), was consistent with this Court's prior decisions, and prior decisions of the Courts of Appeals.

This Court should decline to consider Willowbrook's arguments relating to exhaustion of state remedies because those arguments were not presented to or addressed by the courts below, nor were those arguments raised by Willowbrook in its Petition For A Writ Of Certiorari. In any event, this Court has held that a person need not exhaust his state remedies to state a claim for violation of his rights under the Equal Protection Clause.

This Court should decline to consider the arguments of Willowbrook and its *amici curiae* to the effect that, assuming that the Equal Protection Clause protects "classes of one," the Amended Complaint in this case fails to state a cause of action for violation of the Equal Protection Clause because this Court explicitly denied certiorari on that question, and because the specific arguments advanced by Willowbrook and its *amici* in that regard were not included in Willowbrook's Motion To Dismiss Plaintiff's Amended Complaint (App. 14-26) or Willowbrook's Memorandum Of Law In Support Of Motion To Dismiss (App. 27-35)

In any event, Mrs. Olech's Amended Complaint in this particular case adequately alleges that her rights under the Equal Protection Clause were violated by Willowbrook.

ARGUMENT

This Court should decline to consider the question on which certiorari was granted because that question was not raised by Willowbrook in the district court or the Court of Appeals.

The Petitioners seek to have this Court decide the following question:

> "Whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the claimant does not allege membership in a class or group, but asserts that vindictiveness motivated the government to treat her differently than others similarly situated."

(Petitioners' Brief, p. i.)

The Petitioners did not present that question to the district court in their Motion To Dismiss Plaintiff's Amended Complaint (App. 14-26) or in their Memorandum Of Law In Support Of Motion To Dismiss (App. 27-35).

In fact, in their Memorandum Of Law In Support Of Motion To Dismiss, the Petitioners explicitly acknowledged that a violation of the Equal Protection Clause may occur when the unequal treatment involved is not based on membership in a vulnerable group, but rather where a powerful public official picked on "a person" out of sheer vindictiveness and where there was an orchestrated campaign of official harassment directed at "the individual" out of sheer malice. (App. 33) The Petitioners wrote:

> "The Plaintiff seeks to impose §1983 liability on the Defendants under what has been colloquially known as 'Category Three' discrimination. Within the general rubric of equal protection law, a plaintiff must show disparate treatment based on membership in a vulnerable group, racial or otherwise, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985), or based upon the application of laws or policies which make irrational distinctions. *Lindsey v. Normet*, 405 U.S. 56, 74-79, 92 S.Ct. 862, 874-77, 31 L.Ed.2d 36 (1972). 'Category Three' discrimination, however, occurs where 'a powerful public official picked on a person out of sheer vindictiveness,' and where there is 'an orchestrated campaign of official harassment' directed at the individual 'out of sheer malice.' *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995)."

(App. 32-33)

In other words, the position taken by Willowbrook in the district court was the opposite of the position that it is taking in this Court. And, while it is true that the district court was bound to follow the decision of the Court of Appeals for the Seventh Circuit in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), which had recognized a violation of the Equal Protection Clause in the context of intentional discrimination against a "class of one," there would have been no procedural obstacle in the district court to Willowbrook in arguing that *Esmail* was not correctly decided in order to preserve the question for review.

The only issues raised in Willowbrook's Memorandum Of Law In Support Of Motion To Dismiss were the

following: "1. The Amended Complaint Lacks Sufficient Allegations of Malice on the Part of the Defendants" (App. 33), and "2. The Plaintiff Has Pled Herself Out of an Action By Alleging that Other Homeowners Were Asked to Grant a 33-Foot Easement" (App. 34).

In the Petitioners' Reply to Plaintiff's Response To Defendants' Motion To Dismiss The Amended Complaint, in connection with its argument that Mrs. Olech had failed sufficiently to allege malicious conduct, Willowbrook did state in a footnote, citing *Sarantakis v. Village of Winthrop Harbor*, 969 F.Supp. 1095 (N.D.Ill. 1997), that the Olech case involved the denial of government services rather than the refusal of a license, and that "[w]here the claim involves the denial of governmental services, according to *Sarantakis*, equal protection claims must be based on discrimination directed at groups, rather than individuals." (App. 50) This footnote did not properly raise any issue because of the rule in the district court that arguments in support of a motion to dismiss not raised in the district court until the reply are waived. (*Lockrey v. Leavitt Tube Employees' Profit Sharing Plan*, 748 F.Supp. 662, 667 (N.D.Ill. 1990).) Moreover, Willowbrook's footnote in its Reply did not purport to raise the broad question that the Petitioners are attempting to raise in this Court.

In the Court of Appeals for the Seventh Circuit, Willowbrook again failed to argue that the Equal Protection Clause is not violated when the government intentionally discriminates against a "class of one." The Petitioners' brief in the Court of Appeals had three argument headings: "I. Plaintiff's First Amended Complaint Fails to State a Cause of Action Under Principles Set

Forth in the Case of *Esmail v. Macrane*," "II. Plaintiff Has Not Alleged That Similarly-Situated Individuals Were Treated Differently," and "III. Defendants' Conduct Was Not the Cause of Plaintiff's Injury." (App. 137) In the course of their argument that Mrs. Olech's Amended Complaint failed to state a cause of action under the principles set forth in *Esmail v. Macrane*, the Petitioners did elaborate as follows on the contention from the footnote of their Reply that the "class of one" analysis which applies to the denial of licenses does not apply to the denial of government services:

> "*Sarantakis* is also noteworthy because it, like the instant case, involved the denial of governmental services, as opposed to the refusal of a business license at issue in *Esmail*. *Sarantakis* holds that where the claim involves the denial of governmental services, the equal protection claim must be based upon discrimination directed at groups, rather than individuals. 969 F.Supp. at 1105. It is submitted by Defendants that *Sarantakis*, rather than *Esmail*, controls this case and Plaintiff's alleged 'classification of one' does not state a claim for equal protection. Indeed, the *Esmail* doctrine has not been accepted at all in the Fourth or Sixth Circuits. *Edwards v. City of Goldsboro* (E.D.N.C. 1997) 981 F.Supp. 406, 410; *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996); and *Dubuc v. Green Oak Township*, 958 F.Supp. 1231, 1236-37 (E.D.Mich. 1997)."

(App. 149-150)

The Petitioners did not, however, argue what they are attempting to argue in this Court, that the Equal Protection Clause is not violated when the government

intentionally discriminates against a "class of one," nor did the Petitioners urge the Court of Appeals for the Seventh Circuit to overrule its decision in *Esmail*.

Under these circumstances, the issue should not be addressed on the merits in this Court. As this Court stated in *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986):

> "Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals. [Citations omitted.]"

Moreover, in *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981), this Court held that, although the petition for certiorari presented a certain question on which the petitioner was seeking a decision, "that question was not raised in the Court of Appeals and is not properly before us." And in *United States v. Ortiz*, 422 U.S. 891, 898 (1975), this Court declined to consider the government's argument regarding retroactive applicability of a certain constitutional decision because an "[e]xamination of the Government's brief in the Ninth Circuit indicates that it did not raise this question below." This Court should dismiss the writ of certiorari in this case as improvidently granted.

The Equal Protection Clause is violated when the government purposely treats a person differently from others similarly situated as a result of ill will or other animus on the part of the government toward that person, and for reasons wholly unrelated to any legitimate state objective.

The contention of Willowbrook is that the Equal Protection Clause should be applied unequally, protecting persons against whom the government purposely discriminates because of an illegitimate animus against a "class" or "group" of which the persons are a part, but not protecting persons against whom the government purposely discriminates because of ill will or illegitimate animus against the particular person involved. There is nothing, however, in the language of the Equal Protection Clause to suggest such an interpretation. The Equal Protection Clause states, "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., Amend XIV, §1.) By its terms, the clause applies to denials of the equal protection of the laws by a State "to any person." There is nothing in the language to suggest that the provision protects persons only insofar as they are members of some "class" or "group," nor does the language even create an ambiguity in that regard. In *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326 (1816), this Court, in an opinion by Justice Story construing the language of the constitution, stated:

> "The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged."

Justice Story wrote, "If the text be clear and distinct, no restriction upon its plain and obvious import ought to be

admitted, unless the inference be irresistible." (1 Wheat. 304, 338-339.) Moreover, as this Court state in *United States v. Sprague*, 282 U.S. 716, 731-732 (1931):

> "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition."

Accordingly, it would be improper to engraft onto the Equal Protection Clause a limitation on its application to persons who are members of disfavored "classes" or "groups."

This conclusion is especially compelling when one compares the language of the Equal Protection Clause of the Fourteenth Amendment to §1 of the Fifteenth Amendment. The Fifteenth Amendment provides as follows:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

(U.S. Const., Amend. XV, §1.)

The Fifteenth Amendment includes specific language limiting its application to denials or abridgements of the right to vote because of membership in a group. There appears to be no reason why similar language would not have been included in the Equal Protection Clause if it had been the intention of the framers of that provision to limit its application to denials of the equal protection of the laws based on membership in a "class" or "group."

As this Court stated in *United States v. Sprague*, 282 U.S. 716, 732 (1931), in a discussion regarding article 5 of the constitution, "The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase . . . is persuasive evidence that no qualification was intended." A consideration of the language of the Equal Protection Clause, therefore, compels the conclusion that it applies to a denial of the equal protection of the laws by a State to a person irrespective of that person's membership in a "class" or "group," or, in the words chosen by Willowbrook, to a "class of one." But there is more than the language, itself, to compel that conclusion, however, because this Court has already construed the Equal Protection Clause to apply to purposeful discrimination by a State against a "class of one."

In *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, the question before this Court was "whether the taxing authorities of the state of Nebraska and of Dakota county in assessing taxes against the petitioner, the Sioux City Bridge Company, upon that part of its bridge across the Missouri river at South Sioux City, which is in the jurisdiction of Nebraska, deprived the Bridge Company of due process of law and denied it the equal protection of the laws in violation of the Fourteenth Amendment." (260 U.S. 441, 441-42.) The Sioux City Bridge Company maintained that, although state law called for uniform assessments on all property, the county assessor and the county board of equalization "intentionally and arbitrarily assessed the Bridge Company's property at 100 per cent. of its true value and *all the other real estate and its improvements in the county* at 55 per cent." (Emphasis added.) (260

U.S. 441, 445.) The Sioux City Bridge Company did not maintain that it was part of a "class" or "group" that was treated differently from other taxpayers. In fact, it is clear from the Sioux City Bridge Company's contention that "all the other real estate and its improvements in the county" were assessed at 55 per cent that the Sioux City Bridge Company was asserting its claim as a "class of one."

This Court accepted the case on writ of certiorari to the Supreme Court of Nebraska. The Supreme Court of Nebraska did not make it clear whether the discrimination charged had been proved or not, but assuming the discrimination, that court had held that the Sioux City Bridge Company had no remedy except " 'to have the property assessed below its true value raised rather than to have property assessed at its true value reduced.' " (260 U.S. 441, 445-46.) This Court reversed the judgment of the Supreme Court of Nebraska and remanded the case for further proceedings not inconsistent with this Court's opinion. In reversing the Supreme Court of Nebraska, this Court first quoted the following language from this Court's decision in *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 352-353 (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. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional

> right of *one* taxed upon the full value of his property. Raymond v. Chicago Union Traction Co., 207 U.S. 20, 35, 37." (Emphasis added.)

(260 U.S. 441, 445.)

This Court then addressed the decision of the Supreme Court of Nebraska as follows:

> "The dilemma presented by a case where *one or a few* of a class of taxpayers are assessed at 100 per cent. of the value of their property in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage in violation of the law, has been often dealt with by courts and there has been a conflict of view as to what should be done. *There is no doubt, however, of the view taken of such cases by the federal courts in the enforcement* of the uniformity clauses of state statutes and constitutions and *of the equal protection clause of the Fourteenth Amendment.* The exact question was considered at length by the Circuit Court of Appeals of the Sixth Circuit in the case of Taylor v. Louisville & N. R. Co., 88 Fed. 350, 364, 365, 31 C. C. A. 537, and the language of that court was approved and incorporated in the decision of this court in Greene v. Louisville & Interurban R. Co., 244 U.S. 499, 516, 517, 518, 37 Sup.Ct. 673, 61 L.Ed. 1280. The conclusion in these and other federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of underassessed property in the taxing district. *This court holds* that the right of the taxpayer whose property *alone* is taxed at

> 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. This conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect the decision of the Nebraska Supreme Court in this case upholds the violation of the Fourteenth Amendment to the injury of the Bridge Company." (Emphasis added.)

(260 U.S. 441, 446-447.)

It is clear, based on the foregoing language from this Court's opinion in *Sioux City Bridge Co.*, that the opinion was based on the Equal Protection Clause of the Fourteenth Amendment, and that this Court held that such clause prohibited intentional discrimination against a "class of one." The Court described the object of the purposeful discrimination as "*one* taxed upon the full value of his property" (emphasis added) (260 U.S. 441, 445), "*one* or a few of a class of taxpayers" (emphasis added) (260 U.S. 441, 446), and "the taxpayer whose property *alone* is taxed at 100 per cent. of its true value" (emphasis added) (260 U.S. 441, 446). And, of course, in *Sioux City Bridge Co.* the alleged facts were that only one taxpayer was purposely treated differently from the others.

The principle recognized in *Sioux City Bridge Co.* was reaffirmed as recently as 1989 in *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989), in which

this Court held that the method of assessing property values by the tax assessor of Webster County, Virginia, denied the petitioners the equal protection of the laws guaranteed to them by the Fourteenth Amendment. In the course of the opinion in *Allegheny Pittsburgh Coal Co.*, this Court quoted as follows from the opinion in *Hillsborough Township v. Cromwell*, 326 U.S. 620, 623 (1946):

> " 'The equal protection clause . . . protects *the individual* from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.' " (Emphasis added.)

(488 U.S. 336, 345.)

In light of the foregoing authorities, it is rather too late in the day to argue, as Willowbrook does, that the Equal Protection Clause protects individuals from purposeful discrimination by the government only if that purposeful discrimination is based on the individual's membership in a "class" or "group."

And, of course, many lower federal courts have recognized that the Equal Protection Clause is violated when a state purposely discriminates against a "class of one." One of the first such decisions was authored by the eminent jurist, Learned Hand, in *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946), a case in which an architect alleged that building officials of the City of New York intentionally treated him differently from all other architects as a result of "personal hostility." (156 F.2d 791, 791.) Judge Hand considered the complaint to allege adequately the denial of equal protection of the laws, and Judge Hand considered that this Court's decision in

Snowden v. Hughes, 321 U.S. 1 (1944), "definitely settled it, that, if a complaint charges a state officer, not only with deliberately misinterpreting a statute against the plaintiff, but also with purposely singling out him alone for that misinterpretation, it is good against demurrer." (156 F.2d 791, 792.) See also *LeClair v. Saunders*, 627 F.2d 606, 609-610 (2d Cir. 1980), *cert denied*, 450 U.S. 959 (1981); *Ziegler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981); *Ciechon v. City of Chicago*, 686 F.2d 511, 522 (7th Cir. 1982); *Yerardi's Moody Street Restaurant & Lounge, Inc. v. Board of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989); *Rubinovitz v. Rogato*, 60 F.3d 906, 911-912 (1st Cir. 1995); *Esmail v. Macrane*, 53 F.3d 176, 179-180 (7th Cir. 1995).

Amici curiae supporting Willowbrook cite *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), for the proposition that the Equal Protection Clause is not violated if the unequal treatment is "rationally related to a legitimate state interest." (*Amici's* brief, p. 11.) *Amici* have argued that Judge Posner's opinion in this case ruled that "otherwise perfectly rational government conduct that does not affect suspect classifications or fundamental rights violates the Equal Protection Clause if it is in fact motivated by some 'illegitimate animus.' " (*Amici's brief*, p. 9.) *Amici's* characterization of the opinion of the Court of Appeals for the Seventh Circuit in this case is blatantly false. The Court of Appeals in this case, quoting from its decision in *Esmail*, stated that the equal protection clause can be invoked by a person who can prove that " 'action taken by the State, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him *for reasons wholly unrelated to any legitimate state objective.*' " (Emphasis added.) (160 F.3d 386, 387.) The court stated

that the Amended Complaint in this case alleged that "ill will [was] the *sole* cause of the action of which the plaintiff complains." (Emphasis added.) (160 F.3d 386, 388.) The court also stated:

> "If the defendant would have taken the complained-of action anyway, even if it did not have the animus, the animus would not condemn the action; a tincture of ill will does not invalidate governmental action."

The Court of Appeals opinion, thus, clearly indicated that the plaintiff must prove that the action taken by the State was taken "for reasons wholly unrelated to any legitimate state objective," and, if the State action is taken "for reasons wholly unrelated to any legitimate state objective," it cannot be said to be "rationally related to a legitimate state interest." The Court of Appeals opinion unequivocally stated that an animus would not render state action unconstitutional if the state would have taken the action anyway. Judge Posner's opinion was completely consistent with this Court's decision in *City of New Orleans v. Dukes*, and how *amici* can argue to the contrary under these circumstances is unclear.

Willowbrook has similarly mischaracterized Judge Posner's opinion in this case to argue that, under the opinion, all that a person needs to show in order to establish a violation of his right to equal protection of the laws "is differential treatment and vindictiveness." (Willowbrook's brief, p. 27.) As noted above, however, the opinion also requires that the difference in treatment from others similarly situated be " 'wholly unrelated to any legitimate state objective.' " *Olech v. Village of Willowbrook*, 160 F.3d 386, 387.

Willowbrook argues that "[r]ecognition of the class-of-one equal protection claim will invite legions of claims into federal courts." (Willowbrook's brief, p. 24.) Willowbrook then presents to this Court a "parade of horribles" which it contends will follow from the "recognition" of this "new" cause of action. Willowbrook's arguments in this regard are not persuasive for several reasons. First, Willowbrook's arguments are based on Willowbrook's own mischaracterization of the opinion of the Court of Appeals in this case. More important, however, is the fact that this Court recognized the applicability of the Equal Protection Clause to a "class of one" in 1923 (*Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923)), and the Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, recognized the validity of the type of claim being asserted here in 1946 (*Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946)), and the unfortunate results predicted by Willowbrook have not occurred, and the Republic has managed to survive since then.

The choice of words used by Willowbrook to describe this Court's decision-making is troubling and somewhat enlightening in this regard. For example, Willowbrook refers to certain prior decisions of this Court as "this Court's recent attempts to limit access to the federal courts for redress" in certain types of cases. (Willowbrook's brief, p. 27.) One would think that this Court would be surprised to learn that in the prior cases, it had been "attempting to limit access to the federal courts," as opposed to discerning and explicating what the constitution and statutes require and applying them to the particular disputes that came before it. Willowbrook has cited

no case holding that it is a rule of constitutional interpretation that the constitution should be construed in a way that would limit access to the federal courts, or that would reduce litigation. It would be a surprise, indeed, to the framers of our constitution should that great charter of our liberties be subject to such a rule of construction.

Willowbrook has also argued that ill will or improper animus is not relevant to a claim of denial of the equal protection of the laws. That argument is without merit, at least outside the area of legislative classification. In order for a State to "deny" to a person the equal protection of the laws, the discrimination must be "intentional" or "purposeful." (*Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923); *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 353.) Unequal treatment which is not intentional or purposeful is not a "denial" of the equal protection of the laws. As Judge Posner stated in this case, "uneven law enforcement," without more, is "constitutionally innocent." (160 F.3d 386, 388.) Accordingly, ill will or illegitimate animus, such as vindictiveness, is relevant to show that the unequal treatment is not accidental, but rather is intentional or purposeful. In arguing that ill will or illegitimate animus is not relevant to a claim of denial of the equal protection of the laws, Willowbrook has cited decisions in which claims have been made that classifications in *legislation* violated the Equal Protection Clause. Legislation, however, notwithstanding the claims of some humorists, is always volitional, purposeful, and intentional. Laws providing for classifications of people do not get passed by accident. Accordingly, in the field of legislation, the particular

motives or reasons animating the votes of particular legislators is constitutionally irrelevant because legislation is presumptively intentional and purposeful.

Judge Posner's opinion in the instant case was no innovation, but rather was required by long-standing precedent, and it should be affirmed.

This Court should decline to consider Willowbrook's arguments that Mrs. Olech was required to exhaust her state remedies in order to state a claim for the denial of her rights under the Equal Protection Clause, and that she failed to do so.

In its brief, Willowbrook has argued that Mrs. Olech failed "to avail herself of state remedies," and that this alleged failure "precludes a denial of equal protection." (Willowbrook's brief, p. 31.) Willowbrook never previously raised this issue in this case in the district court, in the Court of Appeals for the Seventh Circuit, or even in Willowbrook's Petition For A Writ Of Certiorari filed in this Court. Willowbrook's attempt to raise this question now is just one example of its approach to this case, which has been to attempt to raise new issues and arguments when it is procedurally improper to do so, and at each new stage of the proceedings. This Court should decline to consider Willowbrook's "exhaustion of state remedies" question because it is not the question on which certiorari was granted, nor is it a subsidiary question fairly included therein. (*Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30-31 (1993).) The question on which this Court granted certiorari is as follows:

> "A. Whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the Respondent did not allege membership in a vulnerable group, but that ill will motivated the government to treat her differently than others similarly situated."

(Petition For A Writ Of Certiorari, p. i.)

At best the issue of "exhaustion of state remedies" is complementary or related to the question on which this Court granted certiorari, and, as this Court stated in *Izumi*, "A question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not ' "fairly included therein." ' [Citation omitted.]." 510 U.S. 27, 31-32.

This Court should also decline to consider Willowbrook's "exhaustion of state remedies" question because it was not raised in or considered by either of the courts below. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970).

Another reason why this Court should decline to consider Willowbrook's "exhaustion of state remedies" question is that, because Willowbrook failed to present this question at any point below, the facts bearing on the question were never developed, and there is no way to conclude, if there were a requirement of exhaustion of state remedies, whether Mrs. Olech did or did not exhaust her state remedies, or whether any particular state remedy would or would not have been effective under the particular facts and circumstances of this case. Mrs. Olech's Amended Complaint did not allege that she had failed to exhaust her state remedies, and because the district court decided this case pursuant to a motion to

dismiss under Fed.R.Civ.P. 12(b)(6), there are no facts in the record relating to the parties' dispute other than those alleged in the Amended Complaint. As stated in *GAF Corp. v. Transamerica Insurance Co.*, 665 F.2d 364, 368 (1981):

> "It is well established that appellate courts should avoid the consideration of defenses never raised in the trial court, [footnote omitted] for any such decision would be without the benefits of a developed factual record. [Footnote omitted.]"

Accordingly, this Court should decline to consider Willowbrook's argument that Mrs. Olech failed "to avail herself of state remedies," and that this alleged failure "precludes a denial of equal protection." (Willowbrook's brief, p. 31.)

A suitor under 42 U.S.C. §1983 alleging a violation of his rights under the Equal Protection Clause need not exhaust state remedies.

Should this Court elect to consider Willowbrook's "exhaustion of state remedies" question, it need not detain the Court long because this Court has already ruled at least three times that a person claiming a violation of his rights to equal protection of the laws need not exhaust his state remedies. (*McNeese v. Board of Education*, 373 U.S. 668, 674 (1963) (school desegregation); *Damico v. California*, 389 U.S. 416 (1967); *Patsy v. Board of Regents*, 457 U.S. 496 (1982).

The cases relied on by Willowbrook involved, not claims of denial of equal protection of the laws, but rather claims of denial of due process of law. As stated in

Simmons v. Chemung County Department of Social Services, 770 F.Supp. 795, 799 (W.D.N.Y. 1991), *aff'd*, 948 F.2d 1276 (2d Cir. 1991), the rule that state remedies are generally irrelevant to the existence of a cause of action under §1983 "is inapplicable and exception exists . . . where . . . the plaintiffs allege claims based on violations of *procedural* due process." (Emphasis in original.) The court in *Simmons* continued, "For these claims, the existence of state remedies *is* relevant because the constitutional violation actionable under §1983 – the deprivation of a protected interest *without due process of law* – does not occur 'until and unless the State fails to provide due process.' [Citation omitted.]" (Emphasis in original.) (770 F.Supp. 795, 799.) The court in *Simmons* continued, "To determine whether a constitutional violation has occurred in these cases, 'it is [therefore] necessary to ask what process the State provided, and whether it was constitutionally adequate.' [Citation omitted.]" (770 F.Supp. 795, 799.) These considerations are not applicable to Mrs. Olech's claim that her rights under the Equal Protection Clause were violated.

This Court should decline to consider the arguments made by Willowbrook and *amici curiae* on its behalf to the effect that, even if the Equal Protection Clause protects a "class of one" from purposeful discrimination, the Amended Complaint in this case failed sufficiently to allege that the state action had no rational basis related to a legitimate state interest, and failed sufficiently to allege that Mrs. Olech was subject to unequal treatment which was intentional or purposeful, because this Court limited its grant of certiorari in this case to exclude the question of whether the conduct alleged in the Amended Complaint in this case is sufficient to state a cause of action on behalf of a "class of one," assuming that the Equal Protection Clause protects such individuals. In addition, Willowbrook waived these contentions by failing to raise them in its motion to dismiss and memorandum in support thereof in the district court where any alleged defect in the Amended Complaint might have been corrected by amendment.

In *Missouri v. Jenkins*, 495 U.S. 33 (1990), this Court considered, *inter alia*, a petition for certiorari filed by the State of Missouri in a school desegregation case. The State's petition "argued that the remedies imposed by the District Court were excessive in scope and that the property tax increase [ordered by the district court] violated Article III, the Tenth Amendment, and principles of federal/state comity." (495 U.S. 33, 45.) This Court granted the State's petition "limited to the question of the property tax increase." (495 U.S. 33, 45.) In its brief on the merits, the State argued that the funding ordered by the district court violated principles of equity and comity because the remedial order, itself, was excessive. This Court refused to consider the State's argument to that effect, stating:

> "We think this argument aims at the scope of the remedy rather that the manner in which the remedy is to be funded and thus falls outside our limited grant of certiorari in this case. As we denied certiorari on the first question presented by the State's petition, which did challenge the scope of the remedial order, we must resist the State's efforts to argue that point now."

(495 U.S. 33, 53.)

This case presents a similar situation. The Petition For A Writ Of Certiorari filed in this case presented the following two questions for review:

> "A. Whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the Respondent did not allege membership in a vulnerable group, but that ill will motivated the government to treat her differently than others similarly situated.
>
> B. Whether the government conduct alleged in Respondent's First Amended Complaint meets the standard to state a cause of action on behalf of a 'class of one,' assuming the Equal Protection Clause protects such individuals."

(Petition For A Writ Of Certiorari, p. i.)

It was in the Petitioners' argument on Question B that the Petitioners argued that a complaint cannot survive a motion to dismiss "[w]here a rational basis for the government conduct emerges from the allegations of the complaint," and that "[h]ere, the allegations of Respondent's Amended Complaint reveal there to be a rational basis for Petitioners' conduct." (Petition For A Writ Of Certiorari, p. 18.) In the instant case, this Court granted

the petition for a writ of certiorari, but the grant was limited to the first question presented by the petition. Under these circumstances, this Court, as in *Missouri v. Jenkins*, should resist the Petitioners and *amici's* attempt to argue the question on which this Court denied certiorari and should decline to consider the arguments that the allegations of the Amended Complaint in this particular case failed sufficiently to allege that the government conduct was not rationally related to a legitimate government interest. This Court should also decline to consider for this reason Willowbrook's argument that the Amended Complaint in this case failed sufficiently to allege that Mrs. Olech was subject to unequal treatment which was intentional or purposeful. (Willowbrook's brief, pp. 17-18)

This Court should also decline to consider the foregoing arguments because they were not made in the Petitioners' Motion To Dismiss Plaintiff's Amended Complaint (App. 14-26) or their Memorandum Of Law In Support Of Motion To Dismiss (App. 27-35) in the district court where, had they been raised, Mrs. Olech might have sought to amend her pleading to correct any alleged defect in that regard. *See GAF Corp. v. Transamerica Insurance Co.*, 665 F.2d 364, 368 (D.C.Cir. 1981) (appellate courts should avoid consideration of defenses not raised in the trial court because decision would be without the benefit of developed factual record).

The Amended Complaint in the instant case adequately alleged that there was no rational basis related to a legitimate state interest for the unequal treatment of Mrs. Olech, and that Mrs. Olech was subject to unequal treatment which was intentional or purposeful.

Should this Court decide to consider the arguments of Willowbrook and its *amici* to the effect that the Amended Complaint in the instant case failed sufficiently to allege that the unequal treatment of Mrs. Olech had no rational basis related to a legitimate State interest, those arguments should be rejected. Grace Olech's Amended Complaint was dismissed under Fed.R.Civ.P. 12(b)(6) for "failure to state a claim upon which relief can be granted." As this Court stated in *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984):

> "At this stage of the litigation, we must accept petitioner's [the plaintiff's] allegations as true. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."

Accordingly, dismissal under this theory, which Willowbrook did not raise in its Motion To Dismiss Plaintiff's Amended Complaint (App. 14-26) or its Memorandum Of Law In Support Of Motion To Dismiss (App. 27-35), would have been proper only if there was no set of facts consistent with the allegations of the Amended Complaint under which it could be concluded that there was no rational basis related to a legitimate state interest for the unequal treatment of Mrs. Olech.

The Amended Complaint alleges that in the state court lawsuit, the plaintiffs, including Mrs. Olech, sought

damages from Willowbrook as a result of the flooding of the plaintiffs' property by stormwater. (App. 5) The Amended Complaint alleges that the unequal treatment occurred while that state court lawsuit was pending. (App. 5, 9) The Amended Complaint alleges "[t]hat the Defendants treated Plaintiff GRACE OLECH and Thaddeus Olech, Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer differently from other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the *detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit*, by the use of ditches and swales along Tennessee Avenue." (Emphasis added.) (App. 10) The Amended Complaint alleges that Willowbrook demanded the 33-foot easements and the 66-foot street dedication as a condition of the extension of the water main (App. 9) for which the Olechs and the other plaintiffs in the state court lawsuit had already paid. (App. 8) Willowbrook did not propose to pay anything for the private property rights which Willowbrook was demanding. (See U.S. Const., Amend. V.) The Amended Complaint alleges "[t]hat the decision by the Defendants to treat Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot street dedication as a condition for the extension of the water main *was irrational and wholly arbitrary*, and, on information and belief,

was made by the appropriate policy-making official or employee of Defendant VILLAGE OF WILLOWBROOK." (Emphasis added.) (App. 10) All of the foregoing allegations must be accepted as true.

In light of the foregoing allegations, it is difficult to understand how Willowbrook and its *amici* can argue that there was a rational basis related to a legitimate state interest for the unequal treatment of Mrs. Olech. Is it a legitimate state interest to extort private property rights from a homeowner as a condition of receiving running water, which private property rights are not required of others as a condition of receiving running water? What if Willowbrook, instead of demanding the private property rights that it did, had simply chosen to charge Mrs. Olech twice as much per gallon of water as it charged everybody else? Would that have been rationally related to a legitimate state interest? In this regard, it should be borne in mind that if Willowbrook had taken the private property rights by eminent domain, it would have had to pay the owners for those rights. (U.S. Const., Amend V.) Is it rationally related to a legitimate State interest for the government to demand private property rights as a condition of receiving running water that are not demanded of others so that the government can control stormwater drainage "to the detriment" of citizens who had the temerity to sue the government for flooding their properties? It seems rather clear that, in the instant case, it can be concluded in a manner consistent with the allegations of the Amended Complaint, that the unequal treatment of Mrs. Olech was not supported by a rational basis related to a legitimate state interest.

Willowbrook and its *amici* argue that Willowbrook's desire to improve the roadway provides a rational basis for its conduct. This argument is without merit, however. The question is not whether it was rational in the abstract for Willowbrook to demand the 33-foot easements and 66-foot street dedication for public purposes. The question is whether it was rationally related to a legitimate state interest for Willowbrook to demand those private property rights as a condition of Mrs. Olech and the other plaintiffs in the state court lawsuit receiving running water when such property rights were not demanded as a condition of others receiving running water, and where the easements and dedication were not required for installation and maintenance of the water main. This proposed rationalization of Willowbrook's conduct in this case would be similar to the taxing authorities in *Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441 (1923), claiming that there was a rational basis related to a legitimate State interest to assess the bridge company's property at 100 percent of its value because that is what the property was worth. What is required is not a rational basis related to a legitimate state interest for the government action in the abstract, but a rational basis related to a legitimate state interest for the unequality in treatment. Willowbrook has suggested no such rational basis consistent with the allegations of the Amended Complaint. In this regard, it should be noted that the letter which Willowbrook included in the Appendix to its brief is not part of the court record, and, therefore, cannot be considered by this Court. See *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 157, n. 16 (1970).

Willowbrook also argues that "[a]t worst, Respondent was a random victim of governmental error," and that a violation of equal protection will not lie when the governmental action was taken out of error, neglect, or mistake. (Petitioners' brief, p. 34.) The problem with Willowbrook's argument in this regard is that it is contradicted by the allegations of the Amended Complaint, which must be accepted as true, and which state that the reason for the disparate treatment was ill will resulting from the state court lawsuit. (App. 10) If something is done out of "ill will," it is done purposely and intentionally, and not by mistake.

Willowbrook has also argued, without citing any authority, that "[t]he plaintiff should also be held to a pleading standard that would require factual support of allegations that similarly situated persons were treated differently," and that Mrs. Olech's Amended Complaint was somehow deficient in that regard. (Willowbrook's brief, pp. 34-35.) First, it is submitted that the Amended Complaint adequately alleged that Mrs. Olech and the other state court plaintiffs were treated differently from others similarly situated. (App. 9-10.) The Village Attorney as much as admitted that fact. (App. 10) But, more importantly, at some point in the appellate process, Willowbrook must be stopped from offering new theories and arguments. Even if this Court had not explicitly denied certiorari on Willowbrook's second question presented in its Petition For A Writ Of Certiorari, this argument would not be a subsidiary question to the question on which certiorari was granted, nor would it be fairly

included therein. Accordingly, it should not be considered. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30-31 (1993).

Willowbrook's *amici*, as did Willowbrook, argue that Willowbrook's desire to construct and maintain a roadway, including pavement, sidewalks, and public utilities, provides a rational basis related to a legitimate State interest for its conduct. (*Amici's* brief, pp. 16-17.) That argument was addressed above. The question is not whether the government's conduct had a rational basis related to a legitimate State interest in the abstract, but whether the unequality in treatment was rationally related to a legitimate State interest. *Amici* argue that Willowbrook might have believed that the additional improvements were necessary and desirable for any number of reasons, and that it was less disruptive to the residents of Tennessee Avenue and other users of the road, and more cost effective, to install water main connections, pave the road, and install sidewalks at one time rather than sequentially. (*Amici's* brief, p. 17.) While that statement is certainly true, and would have justified Willowbrook in commencing eminent domain proceedings to take the private property for public use (U.S. Const., Amend. V), it would not have justified Willowbrook in demanding the private property rights that it did as a condition of the plaintiffs in the state court lawsuit receiving running water when such private property rights were not demanded as a condition of others receiving running water, and where the easements were not required for installation and maintenance of the water main.

Amici argue that Willowbrook's desire to control stormwater drainage in the vicinity provides a rational basis related to a legitimate State interest for Willowbrook's conduct. (*Amici's* brief, pp. 16-17.) That argument is subject to the same infirmity as that discussed above. It should be noted in this regard, however, that the Amended Complaint did not just allege that Willowbrook desired to control stormwater drainage in the vicinity, but rather that Willowbrook was attempting "to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue." (App. 10) *Amici* have not explained how directing additional storm water onto the properties of the plaintiffs in the state court lawsuit was rationally related to a legitimate State interest.

Amici also argue that Mrs. Olech's Amended Complaint failed to allege that she was treated differently from others similarly situated because it alleged that Willowbrook demanded a 33-foot easement, not just from her and the other plaintiffs in the state court lawsuit, but also from the property owners on the east side of Tennessee Avenue. (*Amici's* brief, pp. 18-19.) What this argument has to do with the question on which this Court granted certiorari is, to put it charitably, very obscure, and this Court should decline to consider it on that basis alone. (*See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30-31 (1993).) In any event, *amici's* argument in this regard is without merit. There are no homes on the east side of Tennessee Avenue across from Mr. Brinkman, the Olechs, and the Zimmers, nor does the

Amended Complaint allege that there are. The homes to the east of the Olechs, the Zimmers, and Mr. Brinkman are not on Tennessee Avenue but are all the way over on the next street to the east, Clarendon Hills Road, and in the spring of 1995, those homes already had municipal water. (App. 47.) The Amended Complaint is not to the contrary. What the Amended Complaint alleged was that the defendants demanded the 33-foot easements and 66-foot street dedication as a condition of extending the water main at the request of the Olechs, the Zimmers, and Howard Brinkman, all plaintiffs in the state court lawsuit, that *their* homes be hooked up to the municipal water supply. (App. 8-9) In effect, Willowbrook told the Olechs, the Zimmers, and Howard Brinkman that they would not get municipal water unless and until they granted the 33-foot easements and obtained such easements from the property owners across the street who already had municipal water. Willowbrook's unequal treatment was of the plaintiffs in the state court lawsuit, and not anyone else.

Willowbrook has also argued that the Amended Complaint in this case failed sufficiently to allege that Mrs. Olech was subject to unequal treatment which was intentional or purposeful. (Willowbrook's brief, pp. 17-18.) In this regard, Willowbrook relies on this Court's decision in *Snowden v. Hughes*, 321 U.S. 1 (1944). Willowbrook's argument is not well taken. In *Snowden*, the plaintiff had alleged that he had been denied the equal protection of the laws when the State Primary Canvassing Board failed to follow a state law requiring the board to certify for the general election two Republican candidates and one Democratic candidate. The plaintiff in *Snowden*

was the Republican candidate who came in second. The plaintiff in *Snowden* did not allege that the law requiring two Republican candidates to be certified had been followed in all other cases. As this Court stated, "So far as appears the Board's failure to certify petitioner was unaffected by and unrelated to the certification of any other nominee." (321 U.S. 1, 10.) The petitioner in *Snowden* had alleged that the Board's failure to certify him was "willful" and "malicious," but this Court held that, although that was enough to allege an intentional deprivation of the plaintiff's right to be certified under State law, it was not enough to allege "purposeful discrimination." (321 U.S. 1, 10.) This Court stated:

> "If the action of the Board is official action it is subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature. . . . A state statute which provided that one nominee rather than two should be certified in a particular election district would not be unconstitutional on its face and would be open to attack only if it were shown, as it is not here, that the exclusion of one and the election of another were invidious and purposely discriminatory."

(321 U.S. 1, 11.)

Snowden does not support Willowbrook's claim that the Amended Complaint in the instant case is insufficient to allege that Mrs. Olech was subjected to unequal treatment which was intentional or purposeful. Here, the Amended Complaint alleged that Willowbrook's demands for the 33-foot easements and the 66-foot street dedication "as a condition of the extension of the water main were not consistent with the policy of Defendant

VILLAGE OF WILLOWBROOK regarding other property in the Village of Willowbrook" (App. 9-10), that "Defendant VILLAGE OF WILLOWBROOK and its officers and employees, including PHILIP J. MODAFF, and, on information and belief, Defendant GARY PRETZER," harbored ill will against the plaintiffs in the state court lawsuit as a result of that lawsuit and the prior refusal of the Olechs and Howard Brinkman to provide Willowbrook with certain drainage easements (App. 6), and that "the Defendants treated Plaintiff GRACE OLECH and Thaddeus Olech, Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer differently from other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue" (App. 10). The foregoing allegations do much more than state that Willowbrook's demands were "willful" and "malicious" as in *Snowden;* here the allegations clearly and unequivocally allege "purposeful discrimination." Accordingly, Willowbrook's argument in this regard should be rejected.

CONCLUSION

For the reasons stated herein, the Respondent, Grace Olech, respectfully requests that this Court dismiss the writ of certiorari in this case as improvidently granted,

or, in the alternative, affirm the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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