GRANTED

No. 98-1288

In The
Supreme Court of the United States

VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, 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,

Petitioners,

v.

GRACE OLECH,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF OF THE PETITIONERS

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QUESTION PRESENTED

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

ARGUMENT

Respondent Chose to Bring Her Action Pursuant to the Class-of-One Equal Protection Theory

The Solicitor General argues that Respondent's Amended Complaint states a claim under the First Amendment, but cites for support of this proposition case law concerning First Amendment claims raised by public employees punished for speaking out on matters of public concern. *See, e.g., Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). In none of the cases cited by the Solicitor General was the First Amendment the basis for a claim of retaliation for filing a lawsuit. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), involved punishment of an employee for engaging in union-related activities. *Wayte v. United States*, 470 U.S. 598 (1985), was a selective enforcement case and such cases have always been analyzed according to equal protection standards, *see Oyler v. Boles*, 368 U.S. 448 (1962). *Police Department v. Mosley*, 408 U.S. 92 (1972), merely holds that differential treatment of picketers can violate the Equal Protection Clause.

Bill Johnson's Restaurant, Inc. v. NLRB, 461 U.S. 731 (1983), held that an employer's filing of a state court libel suit against its employees was not an enjoinable unfair labor practice unless the suit was filed for retaliatory purposes and lacked a reasonable basis. If the same rationale were applied to this case, Respondent would have to establish the lack of a "reasonable basis" for Petitioners' alleged retaliatory conduct. The reasonable basis for Petitioners' request for the easement is found in Respondent's allegation that the Village held no rights over

Tennessee Avenue and therefore without the easement had no right to install the water main requested by the Respondent. J.A. 8-9.

California Motor Transport Company v. Trucking Unlimited, 404 U.S. 508 (1972), involved allegations that petitioners used their power, strategy and resources to deny respondent's access to administrative and judicial proceedings. 404 U.S. *at* 511. Here, Respondent was not denied access to the state court; rather, she prevailed in her action there. J.A. 5.

If Respondent's claim of retaliation for filing a lawsuit is indeed a First Amendment based claim, it is of a breed not yet endorsed by this Court. If this Court is to give its approval to a First Amendment claim for retaliation for filing a lawsuit, it should not do so in a case where the plaintiff has never asserted the First Amendment as a basis for recovery and the parties have not presented the issue to the Court.

The Respondent never asserted the First Amendment claim as a basis for recovery in any of the complaints filed in this case and has never, in any court, requested leave to amend the Complaint to add such a claim. Respondent chose to proceed pursuant to the *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), doctrine which, the Solicitor General agrees, allows allegations of improper motive to overcome a "rational basis" defense. (Brief of *Amicus Curiae*, Solicitor General, *at* pp. 12-13.) The Respondent is the master of her Complaint and as such has chosen not to proceed under the First Amendment. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 409 (1988). Since the case has proceeded through the

District Court and the Circuit Court of Appeals on the equal protection theory, it would serve no purpose at this point to render the efforts of those courts meaningless by allowing a shift in theories. Permitting such an amendment would also prejudice the Petitioners since Respondent had been in possession of facts which theoretically gave rise to what the Solicitor General believes to be a First Amendment claim since the inception of this case. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387-88 (9th Cir. 1990) (affirming the denial of a motion for leave to amend the complaint to add new legal theories because of prejudice to defendants since plaintiff had been in possession of facts giving rise to new legal theory for eight months). The denial of a motion to amend a complaint is not an abuse of discretion where the movant presents no new facts, but only new theories and provides no satisfactory explanation for his failure to fully develop his contentions in the original complaint. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). The denial of a motion to amend is also appropriate where, as here, a plaintiff previously has been granted leave to amend the complaint. *Griggs v. Pace American Group, Inc.*, 170 F.3d 877, 879 (9th Cir. 1999).

In *Albright v. Oliver*, 510 U.S. 266, 275 (1994), this Court was presented with a malicious prosecution complaint which alleged a violation of substantive due process under the Fourteenth Amendment. This Court concluded that substantive due process could not support a malicious prosecution claim, but recognized the potential applicability of the Fourth Amendment to petitioner's claim. Despite such recognition, this Court expressed no view as to whether petitioner's claim would have succeeded under the Fourth Amendment. It is true that in

the instant case the Plaintiff is the Respondent, not, as in *Albright*, the petitioner who failed to raise the Fourth Amendment issue in the petition for writ of certiorari. Yet, as the master of the Complaint, the Respondent has chosen not to proceed on a First Amendment theory and has not asked this Court to consider whether she may do so. Thus, this Court need express no opinion in this case as to whether the Respondent's claim would succeed under the First Amendment.

The same is true for the Solicitor General's contention that Respondent could claim membership in a class of persons who had sued the Village of Willowbrook in the 1989 lawsuit. Respondent chose to proceed under the *Esmail* doctrine, asserting that ill will motivated Petitioners to treat Respondent differently. The case was analyzed by the lower courts under the *Esmail* doctrine and this Court granted the Petition for Writ of Certiorari to consider the viability of the class-of-one theory. Respondent has neither raised the multiple-member-class issue before this Court nor sought leave to amend her Complaint to do so. This Court may decline the Solicitor General's invitation to analyze the Complaint under a theory never advanced by the Respondent. *Albright v. Oliver*, 510 U.S. 266, 275 (1994).

Moreover, the "class" from whom Petitioners sought property for the easement included members not alleged to have sued the Village. Paragraph 25 alleges that "property owners on the other side of Tennessee Avenue" were asked for a thirty-three-foot easement to create a sixty-six-foot wide dedicated street. J.A. 9. There is no allegation in the Amended Complaint that the "property owners on the other side of Tennessee Avenue" sought

connection to the municipal water system. The allegation that property owners who had not previously sued the Village were asked for thirty-three feet of property to dedicate the road establishes that Petitioners did not seek to take action solely against a class whose members sued the Village, and demonstrates the rational nondiscriminatory basis for Petitioners' request: to dedicate an existing road so that it could secure the right to install a public improvement along it. Even if the facts are analyzed under a multiple-member-class approach, dismissal of the Complaint is justified by the rational basis defense. *Central State University v. American Association of University Professors*, 119 S.Ct. 1162, 1163 (1999).

Dismissal of the Writ of Certiorari, as Urged by the Solicitor General, Would Allow the Erroneous Decision of the Seventh Circuit Court of Appeals to Stand as Precedent

The Respondent's Amended Complaint and the opinion of the Seventh Circuit Court of Appeals provide this Court the necessary framework to analyze the class-of-one equal protection theory. It was the theory asserted by the Respondent in the lower courts and the Court of Appeals applied the *Esmail* precedent to the facts set forth in the Amended Complaint.

While the Solicitor General argues in favor of dismissal of the Writ of Certiorari, such dismissal would leave in place an opinion which, the Solicitor General agrees, is clearly erroneous. Even if this case did not present the proper framework for consideration of the class-of-one issue, the Court of Appeals' erroneous application of equal protection law is ample reason for this

Court to consider this case. The Solicitor General correctly observes that the existence of any conceivable rational basis for Petitioners' attempt to obtain a thirty-three-foot easement for the dedication of the road would defeat Respondent's equal protection claim. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Such a rational basis is found in the fact that the Village needed the easement to dedicate an existing road over which it had no right to construct a public improvement. Yet, as pointed out by the Solicitor General, "under the Court of Appeals' approach, virtually any objectively legitimate decision by any government actor at any level can be transformed into a potential equal protection violation if a person affected by the decision alleges that the government acted with a malicious motive." (Brief of *Amicus Curiae*, Solicitor General, *at* p. 19.) Such an approach clearly contradicts this Court's decisions that improper motivation will not salvage an equal protection claim where a rational basis supports the government's action. *United States R.R. Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980); and *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Irrespective of the Solicitor General's claim that Respondent was a member of an identifiable class, the facts alleged in the Amended Complaint provide this Court with a sufficient basis to analyze and reverse the decision of the Court of Appeals.

Petitioners Did Not Waive the Fourteenth Amendment Class-of-One Issue Since It Was Presented in the Petition for Writ of Certiorari and this Court Granted the Writ on That Issue

This Court granted the Petition for Writ of Certiorari on the issue of whether the Equal Protection Clause of the Fourteenth Amendment protected a class of one. Respondent cites *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1981) and *United States v. Ortiz*, 422 U.S. 891 (1975) for the proposition that issues not raised before the Court of Appeals are not properly before this Court following the granting of a petition for writ of certiorari. In the cases cited by Respondent, however, the issue which this Court declined to consider was not the issue upon which it granted review. In *Delta Airlines, Inc.*, the Court granted certiorari on the issue of whether the words "judgment finally obtained by the offeree" as used in Rule 68 should be construed to encompass a judgment against the offeree as well as a judgment in favor of the offeree. This Court then declined to consider the question of whether the district judge abused his discretion in denying defendants' costs under Rule 54(d) because that issue had not been raised in the Court of Appeals. Similarly, in *Ortiz*, the issue which this Court declined to consider concerned the alleged retroactive application of the precedential case, an issue upon which this Court did not grant certiorari.

The fact that the issue of the propriety of a class-of-one cause of action was not raised in the courts below does not preclude this Court's consideration of the issue. This court has decided cases on grounds that were not only not raised in the courts below, but not presented in

the petition for writ of certiorari. *See, e.g., Teague v. Lane*, 489 U.S. 288, 300 (1989). In *Arcadia v. Ohio Power Co.*, 498 U.S. 73 (1990), the Court decided a case on an issue that was not only not raised in the lower courts, but never mentioned in the petition for writ of certiorari or during oral argument before the Court. In *McCleskey v. Zant*, 499 U.S. 467 (1991), this Court decided a case on a question which the parties had not argued in the courts below.

In the Petition for Writ of Certiorari, Petitioners identified the conflict among the Courts of Appeals on the issue of whether the Equal Protection Clause of the Fourteenth Amendment protected a class of one. (Petition for Writ of Certiorari, pp. 6-8.) Petitioners submit that where the basis for this Court's review is the resolution of a conflict between or among the Circuit Courts of Appeals, the fact that a specific request to overrule an earlier decision was not made in the lower courts should not foreclose this Court's review of the issue. It is reasonable for parties to accept the law of the circuit and proceed within the framework of the existing law before petitioning this Court to resolve a conflict between the circuits. Indeed, the District Court in this case was bound by *stare decisis* to follow the Seventh Circuit Court of Appeals' decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995). In their brief to the Seventh Circuit Court of Appeals, however, Petitioners did bring to the attention of the Court the fact that the *Esmail* doctrine had been considered and rejected in other circuits. J.A. 149-150. *Edwards v. City of Goldsboro*, 981 F.Supp. 406, 410 (E.D.N.C. 1997); *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).

The Courts of Appeals Continue to Interpret the Equal Protection Clause to Require Allegations of Class Membership to Support Claims Brought Thereunder

Petitioners acknowledge this Court's holdings in *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 366 (1989), and *McFarland v. American Sugar Refining Co.*, 241 U.S. 79 (1916), and the application of the Equal Protection Clause to those claims. None of those cases, however, involved a direct challenge to the assumption that an equal protection claim need not be supported by class membership. Those holdings stem from the long-standing recognition that corporations fall within the scope of the Equal Protection Clause. *See, e.g. Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394, 396 (1886). Implicit in those holdings was the recognition that corporations are a class subject to differential treatment by governments.

Amicus Curiae the ACLU cites *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) in support of its argument that the Equal Protection Clause recognizes a class of one. *Nixon*, however, did not involve a class-of-one claim brought under the Equal Protection Clause. When this Court spoke of a class of one in *Nixon*, it did so in the context of the specificity element of the bill of attainder law. It concluded that the specificity needed to constitute a bill of attainder was not satisfied because, given the unique circumstances jeopardizing the preservation of President Nixon's records, he fell into a legitimate class of one thereby providing Congress a proper basis for enacting a law designed to protect those records. Petitioners assert that *Nixon* does not stand as precedent for the recognition of a class of one under the Equal Protection Clause.

Respondent's assertion that this Court resolved the class-of-one equal protection issue in *Sioux City* and *Allegheny* cannot be reconciled with this Court's more recent observation in *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) that:

> 'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.

This explanation was again expressed by Justice Brennan in his concurring opinion in *Clements v. Fashing*, 457 U.S. 957, 979 (1982):

> And it has always been my understanding that " '[e]qual protection' . . . emphasizes disparity in treatment by a State between classes of individuals," in contrast to " '[d]ue process,' " which "emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated." *Ross v. Moffitt*, 417 U.S. 600, 609, 94 S.Ct. 2437, 2443, 41 L.Ed.2d 341 (1974). Accordingly, our equal protection cases have always assessed the legislative purpose in light of the class as the legislature has drawn it, rather than on the basis of some judicially drawn subclass for which it is possible to posit some legitimate purpose for discriminatory treatment. 457 U.S. *at* 979.

The Circuit Courts of Appeals have interpreted this Court's observations regarding the Equal Protection Clause as requiring that class membership be established

to state an equal protection claim. *Barren v. Harrington*, 152 F.3d 1193, 1194-95 (9th Cir. 1998) (to state a claim under 42 U.S.C. §1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class); *Bass v. Robinson*, 167 F.3d 1041, 1050 (6th Cir. 1999) (because plaintiff failed to allege invidious discrimination based upon his membership in a protected class, his equal protection claim fails at the inception); and *Herro v. City of Milwaukee*, 44 F.3d 550, 552 (7th Cir. 1995). The lack of uniformity in interpretation of the Equal Protection Clause, particularly in light of *Sioux City* and *Allegheny*, emphasizes the need for this Court's review and resolution of the issue. Such review will be this Court's first on the issue of the correct application of the Equal Protection Clause to claimants constituting a class of one.

The Rational Basis and Exhaustion Issues are Subsumed by the Equal Protection Issue Upon Which This Court Granted the Writ of Certiorari

Respondent correctly asserts that this Court granted the Petition for Writ of Certiorari on the issue of whether the Equal Protection Clause protected a class of one. It is submitted by Petitioners, however, that this Court's exploration of that issue may lead to a comprehensive definition of such a cause of action, including the effect, if any, that a rational basis for the government conduct may have on the claim. Should this Court recognize a class-of-one cause of action, a demonstrated rational basis for Petitioners' conduct may be deemed by this Court as a

complete defense to such a claim. Thus, the rational basis issue is subsumed by the equal protection issue upon which this Court granted certiorari. *See, e.g., Teague v. Lane*, 489 U.S. 288, 300 (1989).

The issue of exhaustion is also properly before this Court as it is related to the issue upon which the Petition for Writ of Certiorari was granted. If the Court fashions a cause of action for a class of one under the Equal Protection Clause, exhaustion of state remedies may play a role in such a claim.

Petitioners acknowledge that this Court's current decisions do not require an exhaustion of state remedies as a prerequisite to the filing of an equal protection claim. The same was true, however, for procedural due process claims before *Hudson v. Palmer*, 468 U.S. 517 (1984) and Fifth Amendment takings cases before *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Petitioners submit that the same rationale supporting *Hudson* and *Williamson* applies to equal protection claims. Ample remedies exist in the state court to redress the grievances of class-of-one claimants.

Respondent sees Petitioners' characterization of recent decisions by this Court as a reflection of its "attempts to limit access to the federal courts for redress of certain types of cases" as offensive. (Respondent's Brief, p. 27.) There can be no doubt, however, that this Court's decisions in *Hudson v. Palmer*, 468 U.S. 517 (1984) and *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), have had the effect of barring from federal court claims which previously had been brought there. Indeed, the body of

law falling under the label "our federalism" clearly reflects this Court's recognition that state courts are appropriate forums for claims previously confined to federal court. *See, e.g., Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981).

Respondent's attempt to characterize Petitioners' actions as unsupported by a rational basis is unpersuasive. It is argued that the Village had no rational reason 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." (Respondent's Brief, p. 38.) This characterization loses sight of the crucial fact that distinguishes this case from any typical request for municipal water. Paragraph 22 of the Amended Complaint alleges that the Village had no rights or authority of any kind over Tennessee Avenue. J.A. 8-9. Thus, the Village of Willowbrook could not deliver water to the Respondent, or her neighbors, over land it did not own and had no right to possess or maintain. Hence, the request was made for sufficient land to dedicate a road which was already in existence, but over which the Village had no right of any kind.

The Village's lack of ownership of the road is a fact which defeats Respondent's equal protection claim for two reasons. First, it places the Respondent in the unique position of requesting a water main to be placed along a road over which the municipality had no ownership right. Respondent has not alleged that others who lived adjacent to non-dedicated roads and who made requests for municipal water were also not asked for an easement of sufficient width to dedicate the road. Secondly, the lack

of ownership of the road rendered Petitioners' request for the thirty-three feet rational; it was to dedicate an existing road and establish the government's right to install a water main along that road. Obtaining a full dedication of the road would also allow the municipality to maintain the road by plowing it and filling in potholes. Such efforts are clearly related to legitimate government objectives. Dedication and maintenance of the road would not be for the benefit of the municipality, but for those who would use the road, most often, it would seem, the Respondent herself. Petitioners did not request the easement to create a road and fulfill a municipal need; the road was already in existence and Petitioners simply desired to establish the Village's right to install the water line and then keep the road in proper repair.

The request for a thirty-three-foot easement was also rational and can be easily explained. In Illinois, the dedication for a road is typically sixty-six feet. *See, e.g., Tucker v. Bunger*, 108 Ill.App.3d 227, 229, 439 N.E.2d 488, 489 (1992); *People Ex. Rel Thomas v. Village of Sleepy Hollow*, 94 Ill.App.3d 492, 418 N.E.2d 466, 467 (1981); *Machalek v. Village of Midlothian*, 116 Ill.App.3d 1021, 452 N.E.2d 655, 656 (1983); and *Shields v. Ross*, 158 Ill. 214, 224-25, 41 N.E. 985, 988 (Ill. 1895). Thus, when the Village sought to establish its rights so that it could proceed with the water main installation, it naturally sought the sixty-six feet necessary for a dedication of the road. Since Respondent lived on one side of that road, thirty-three feet of her property, beginning from the middle of the already existing road, was not an unusual request. Such a request was consistent with the original deed for Respondent's property which subjected the thirty-three feet along Tennessee

Avenue to the right of public travel. *See* Appendix to Petitioners' Brief *at* p. 1.

CONCLUSION

Wherefore, Petitioners pray that this Court will enter its Order reversing the decision issued by the Seventh Circuit Court of Appeals.

Respectfully submitted,

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