

**“CLASS OF ONE” EQUAL PROTECTION  
CLAIMS: CONFUSION AND  
UNCERTAINTY POST  
*OLECH AND ENGQUIST***

**Presented by:**

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# INTRODUCTION

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- U.S. Supreme Court - *Olech v. Village of Willowbrook* and *Engquist v. Oregon Dep't Agriculture*
- Applying *Engquist* beyond public employment context
- *Del Marcelle v. Brown County, WI* – rational basis v. personal animus?
- Litigating “class of one” claims post *Olech* and *Engquist*

# DEFINING A “CLASS OF ONE” CLAIM

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- Equal Protection Clause of the 14<sup>th</sup> Amendment
  - “nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”
- All persons similarly situated should be treated alike.

## DEFINING A “CLASS OF ONE” CLAIM

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- “Similarly situated” means a comparator who is similar in all relevant and material respects, *McDonald v. Village of Winnetka*, 371 F.3d 992 (7<sup>th</sup> Cir. 2004), or an extremely high degree of similarity between plaintiff and comparator, *Clubsides, Inc. v. Valentin*, 468 F.3d 144 (2<sup>nd</sup> Dist. 2006).
- Plaintiff must specifically identify the comparator who was treated more favorably.
  - But, see, *Geinosky v. City of Chicago*, 675 F.3d 743 (7<sup>th</sup> Cir. 2012).

## DEFINING A “CLASS OF ONE” CLAIM

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- Typical equal protection claim involves class-based discrimination (i.e., race, gender, etc.) or fundamental rights.
- A non-suspect class may also bring equal protection claims, so long as it is a discrete, identifiable group. *Corey Airport Services, Inc. v. Clear Channel Outdoor, Inc.*, 2012 WL 1970236 (11<sup>th</sup> Cir. 2012).

# “CLASS OF ONE” SUPREME COURT PRECEDENT

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*Olech v. Village of Willowbrook*, 528 U.S. 562 (2000).

- Grace Olech asked the Village of Willowbrook to connect to municipal water supply. Village conditioned the connection on granting of a 33-foot easement. Olech refused, claiming that the Village only required a 15-foot easement from others. Olech sued claiming that the Village's demand violated her equal protection rights.
- 7<sup>th</sup> Circuit (Judge Posner) allowed Olech's claim, however, held that she had to prove that the Village was motivated by “ill will” wholly unrelated to legitimate governmental objectives.

# “CLASS OF ONE”

## SUPREME COURT PRECEDENT

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- U.S. Supreme Court granted *certiorari*:
  - Whether Equal Protection Clause gives rise to cause of action on behalf of “class of one” where plaintiff did not allege membership in a class or group.
- Held (Per Curiam): A “class of one” may bring a claim where she has been intentionally treated different from others similarly situated and there is no rational basis for the disparate treatment.
- Refused to adopt 7<sup>th</sup> Circuit’s “ill will” standard and left open the question of what role motive should play in these claims.
- Justice Breyer’s concurring opinion: concerned about transforming run-of-the-mill zoning claims into cases of constitutional right absent higher standard of culpability.

# “CLASS OF ONE” SUPREME COURT PRECEDENT

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*Engquist v. Oregon Dep't. of Agriculture*, 553 U.S. 591 (2008)

- Public employee complained that her position was eliminated and she was laid off for arbitrary, vindictive and malicious reasons.
- Supreme Court held: “Class of one” theory has no place in public employment context.
  - With regard to constitutional analysis, government as employer is different than government as legislator or regulator.
  - Discretionary decision making based on subjective, individualized assessments is a poor fit for “class of one” claims.

# “CLASS OF ONE” SUPREME COURT PRECEDENT

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- Distinguished *Olech* – Village departed from a clear standard by demanding 33 foot easement where only 15 feet was historically exacted – no evidence of exercising discretion.
- In contrast, personnel decisions are often subjective and individualized, based on a wide array of factors which are difficult to articulate and quantify – different treatment is par for the course and consistent with at-will employment principles.
- Practical approach: government will be forced to defend claims and courts will be forced to sort them out - impermissibly constitutionalizes employee grievances.

# POST *OLECH* AND *ENGQUIST* QUESTIONS

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- Questions remain after *Olech* and *Engquist*:
  - Are “class of one” claims a bad fit in contexts other than public employment where decision making is discretionary?
  - What is the requisite standard of culpability in “class of one” claims?
    - Rational basis?
    - Personal animus or ill will?

Circuit courts have struggled with these issues.

# IS *ENGQUIST* LIMITED TO PUBLIC EMPLOYMENT OR APPLICABLE TO OTHER CONTEXTS?

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- “The Court’s *Engquist* opinion went too far but not far enough.”
  - Court exempted discretionary government actions and decision making from “class of one” claims even if motivated by animus
  - But, Court failed to impose animus requirement thereby endorsing equal protection claim every time a state or local rule or law is not uniformly applied.

Robert Farrell, *The Equal Protection Class-of-One Claim: Olech, Engquist, and the Supreme Court Misadventure*, 61 S.C.L. Rev. 107 (2009)

## EXTENDING *ENGQUIST* TO OTHER CONTEXTS

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- *Engquist* holding extended to other contexts:
  - Prosecutorial discretion – *United States v. Moore*, 543 F.3d 891 (7<sup>th</sup> Cir. 2008)
  - Parole decisions – *Adams v. Meloy*, 287 Fed. Appx. 531 (7<sup>th</sup> Cir. 2008).
  - Police officer discretion – *Flowers v. City of Minneapolis*, 558 F.3d 794 (8<sup>th</sup> Cir. 2009)
  - Public contract bidding – *Douglas Asphalt v. Quore, Inc.*, 541 F.3d 1269 (11<sup>th</sup> Cir. 2008)

# DECLINING TO EXTEND *ENGQUIST* TO OTHER CONTEXTS

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- *Engquist* not extended:
  - *Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135 (2<sup>nd</sup> Cir. 2010) (refusing to extend *Engquist* to revocation and suspension of license).
  - *Franks v. Rubitschun*, 312 Fed.Appx. 764 (6<sup>th</sup> Cir. 2009) (*Engquist* does not apply to a discretionary parole board decision)
  - *Hanes v. Zurick*, 578 F.3d 491 (7<sup>th</sup> Cir. 2009), (holding that *Engquist* does not extend to law enforcement decisions).

# SHOULD COURTS IMPOSE PERSONAL ANIMUS REQUIREMENT IN “CLASS OF ONE” CLAIMS?

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*Del Marcelle v. Brown County*, 680 F.3d 887 (7<sup>th</sup> Cir. 2012)

- Plaintiff complained about harassment in neighborhood by biker gang, forcing him to move away. Plaintiff sued under “class of one” theory alleging that police failed to provide protection afforded other residents. District court dismissed the suit.
- Appeal heard *en banc* in attempt to develop a standard of liability in “class of one” claims.
- *Per curiam* decision – Writing 3 separate opinions, 7<sup>th</sup> Circuit failed to agree on appropriate standard.

## *DEL MARCELLE* (cont'd)

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- Judge Posner, writing for 4 judges, stated that plaintiff must plead and prove both the absence of a rational basis and personal animus.
- Judge Easterbrook concurring in dismissal, wrote that motive played no role at all.
- Judge Woods, writing for 5 judges, dissented and wrote that the rational basis test is the correct standard (but mindful of the need to plead a plausible claim especially in discretionary decision-making cases).

# OTHER CIRCUIT COURTS

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## First Circuit

- *SBT Holdings, LLC v. Town of Westminster*, 547 F.3d 28 (1<sup>st</sup> Cir. 2008) (malicious or bad faith intent to injure)

## Second Circuit

- *Golodner v. City of New London*, 443 Fed.Appx. 622 (2<sup>nd</sup> Cir. 2011) (rational basis)

## Third Circuit

- *Eichenlaub v. Township of Indiana*, 385 F.3d 274 (3<sup>rd</sup> Cir. 2004) (rational basis)

## Fifth Circuit

- *Shipp v. McMahon*, 234 F.3d 907 (5<sup>th</sup> Cir. 2000) (*personal animus*)

## Sixth Circuit

- *Loesel v. City of Frankenmuth*, 2012 WL 3553272 (6<sup>th</sup> Cir. 2012) (rational basis or *personal animus*).

## Tenth Circuit

- *Mimics, Inc. v. Village of Angel Fire*, 394 F.3d 836 (10<sup>th</sup> Cir. 2005) (*personal animus*)

# LITIGATING “CLASS OF ONE” CLAIMS POST *OLECH* AND *ENGQUIST*

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- Trend is towards limiting “class of one” claims:
  - Failure to identify comparators. *Ruston v. Town Bd.*, 610 F.3d 55 (2<sup>nd</sup> Dist. 2010).
  - Legislative or administrative decisions versus discretionary actions.
    - *CBS Outdoor, Inc. v. Village of Itasca*, 2009 WL 3187250 (N.D. Ill. 2009) (denying motion to dismiss where village demanded removal of billboard per agreement and ordinance with landowner, but allowed billboards in other areas to remain)
    - *Sung Park v. Ind. State Univ.*, 2012 WL 3758239 (7<sup>th</sup> Cir. 2012) (expelled student failed to allege plausible claim that discretionary decision to dismiss her from school was not rational)

# LITIGATING “CLASS OF ONE” CLAIMS POST *OLECH* AND *ENGQUIST*

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- Plaintiffs bear very difficult burden in defeating summary judgment
  - Similarly situated requirement
  - Rational basis has very low threshold
  - Personal animus – easy to plead; difficult to prove

# LITIGATING “CLASS OF ONE” CLAIMS POST *OLECH* AND *ENGQUIST*

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- Viability of qualified immunity defense:
  - “Qualified immunity will also frequently relieve state actors of the burden of litigation in this area: if discretion is broad and the rules are vague, it will be difficult to show both a violation of a constitutional right and the clearly established nature of that right.” *Del Marcelle*, 680 F.3d at 915 (Wood, J., dissenting).

# Biography

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- Michael D. Bersani is a partner with Hervas, Condon & Bersani, P.C., located in Itasca, Illinois. Mike received an undergraduate degree from the University of Illinois, Urbana-Champaign in 1985 and a law degree from John Marshall Law School, Chicago, Illinois in 1988. Following law school, Mike served two years as a judicial clerk to the Honorable Judge Edward T. Barfield, First District Appellate Court, State of Florida. Upon entering private practice in 1990, Mike has concentrated his practice in defending local governments and local governmental officials and employees in both federal civil rights and state court tort litigation. Mike is admitted to practice law in Illinois and Florida, as well as the U.S. Supreme Court, Seventh Circuit Court of Appeals, and the U.S. District Courts for the Northern and Central Districts of Illinois. On a personal note, Mike and his family reside in Bartlett, Illinois, where he has served as an elected village trustee and appointed fire commissioner, and has been active in little league and high school hockey and booster organizations.