

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: VILLAGE OF WILLOWBROOK, ET AL. v. GRACE

OLECH

CASE NO: 98-1288 c.1

PLACE: Washington, D.C.

DATE: Monday, January 10, 2000

PAGES: 1-52

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OF THE
UNITED STATES

CAUTION: VILLAGE OF WILLOWBROOK ET AL V. GRACE

OLICH

CASE NO. 98-1388-54

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 VILLAGE OF WILLOWBROOK, ET AL., :
4 Petitioners :
5 v. : No. 98-1288
6 GRACE OLECH :
7 - - - - - X

8 Washington, D.C.
9 Monday, January 10, 2000

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:03 a.m.

13 APPEARANCES:

14 JAMES L. DeANO, ESQ., Wheaton, Illinois; on behalf of the
15 Petitioners.

16 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the United States, as amicus curiae.

19 JOHN R. WIMMER, ESQ., Downers Grove, Illinois; on behalf
20 of the Respondent.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 98-1288, The Village of Willowbrook v.
5 Grace Olech.

6 Mr. DeAno.

7 ORAL ARGUMENT OF JAMES L. DeANO

8 ON BEHALF OF THE PETITIONERS

9 MR. DeANO: Mr. Chief Justice, and may it please
10 the Court:

11 The question on which this Court granted the
12 petition for writ of certiorari in this case is whether
13 the Equal Protection Clause gives rise to a cause of
14 action on behalf of a class of one where that claimant
15 does not allege membership in any class or group, but
16 asserts that vindictiveness motivated the government to
17 treat her differently than others similarly situated.

18 QUESTION: Mr. DeAno, let me ask you a question
19 or two about this so-called class of one. Was it really a
20 class of one, or were there five people or so involved in
21 the suit?

22 MR. DeANO: I think the facts of the complaint
23 could give rise to a class of five. However, the cause of
24 action was brought under this vindictive action,
25 class-of-one type of equal protection claim, so I know

1 that there's an argument in this case that there is --

2 QUESTION: Yes, well, it wasn't in fact a class
3 of one, and when has this Court ever said that the Equal
4 Protection Clause only addresses classes as opposed to
5 individuals? Have we ever said that?

6 MR. DeANO: The case that we cite -- no, not
7 directly, this Court has not said that.

8 QUESTION: And why should we? I mean, if the
9 city wants to single out one citizen for some irrational
10 action, why isn't that citizen protected?

11 MR. DeANO: The citizen is protected if that
12 class is drawn for a constitutionally impermissible
13 reason, and we submit that vindictiveness is not a
14 constitutionally impermissible reason, and really what
15 it's looking into is the distinction between --

16 QUESTION: I don't even understand the
17 vindictiveness point. I mean, if the city says to Ms.
18 Olech, we won't hook you up to city water unless you give
19 us 50 feet of land for a street, and every other person in
20 the city, they say, fine, we'll hook you up, give us 5
21 feet, but to her they say 50 feet, now, what does
22 vindictiveness have to do with it at all? I mean, is
23 there no equal protection claim for Ms. Olech?

24 MR. DeANO: We submit that if there is an equal
25 protection claim, it is not under this Esmail-type theory,

1 and then --

2 QUESTION: But isn't there a claim? You treated
3 me differently. You required 50 feet from me and 10 feet
4 from every other person in the city.

5 MR. DeANO: If the reason that they sought the
6 additional 50 feet in your example was constitutionally
7 impermissible, to punish --

8 QUESTION: It doesn't matter what the reason
9 was. Don't you have to treat citizens equally when
10 hooking them up to city water?

11 MR. DeANO: Well, I would look at this Court's
12 case of Snowden v. Hughes, where the Court said that
13 simply differential treatment, even if it violates State
14 law, and in this case village policy, it is not a
15 violation of the Equal Protection Clause unless it is done
16 for a constitutionally impermissible reason. Now --

17 QUESTION: Mr. DeAno, supposing that in this
18 case they asked 50 feet of Mrs. Olech's property and asked
19 only 10 feet from people whose property was
20 indistinguishable from Mrs. Olech, do you say that that
21 would not be any sort of an equal protection claim?

22 MR. DeANO: If it was done for an impermissible,
23 constitutionally impermissible --

24 QUESTION: When is it --

25 QUESTION: Well --

1 QUESTION: -- you keep referring to
2 impermissible. All the Constitution says is, you shall
3 not deny people equal protection of the laws. That's
4 constitutionally impermissible, period.

5 MR. DeANO: Justice Scalia, I would point to the
6 Snowden case where the Court said, simply differential
7 treatment is not a violation of --

8 QUESTION: Well, of course not, if there's a
9 rational basis for the difference.

10 MR. DeANO: And --

11 QUESTION: It becomes constitutionally
12 impermissible when there is no rational basis.

13 MR. DeANO: And that's what we're arguing in
14 this case, that --

15 QUESTION: Oh, it's a perfectly rational basis.
16 We want an additional 40 feet. We're greedy.

17 MR. DeANO: Well --

18 (Laughter.)

19 MR. DeANO: If --

20 QUESTION: It's perfectly rational, you see.

21 MR. DeANO: Well, if the rational basis is to
22 serve a legitimate government objective, for example, in
23 this instance to upgrade and improve an existing road,
24 then we submit that the question should be, if it's an
25 equal protection claim it should fall under traditional

1 equal protection analysis, with the --

2 QUESTION: Mr. DeAno, one problem I have with
3 that answer is, how do we get even to know what the
4 purpose of the government was when this case is tossed out
5 on a 12(b)(6) motion and all we're supposed to look at is
6 the face of the complaint, and the complaint doesn't say
7 anything about, they wanted to widen the road.

8 MR. DeANO: Well, I think as the district court
9 found, the complaint alleges that the reason that the
10 village sought the additional, and I think it's in this
11 case 18 feet, was so that it could improve and dedicate
12 this road.

13 QUESTION: Did the -- the complaint said that?

14 MR. DeANO: The complaint alleged that the
15 reason they sought the additional space was so that they
16 could, I believe, pave and complete the road with
17 sidewalks and public utilities, and that's what the
18 district court found to be a legitimate purpose.

19 We submit that if these facts give rise to an
20 equal protection claim --

21 QUESTION: We don't have the -- do we have the
22 complaint?

23 MR. DeANO: Yes. It's at page 8 and 9 of the
24 Joint Appendix. It actually starts at page 3 of the Joint
25 Appendix.

1 QUESTION: And where is the part where the
2 plaintiff sets out that the State's -- that the village's
3 reason --

4 MR. DeANO: At page 9 of the Joint Appendix, and
5 it's allegation number 25, where it's alleged that they
6 sought the property so that they could dedicate the public
7 roadway and construct pavement, public utilities --

8 QUESTION: Yes, thank you.

9 MR. DeANO: Okay.

10 Our position is not that no single individual
11 can ever state an equal protection claim when they've been
12 singled out for improper treatment. Our point is that the
13 Esmail doctrine coming from the Seventh Circuit
14 essentially says that what we look to first is the
15 government's motive, and our position is that motive need
16 not be delved into if the ultimate objective or purpose is
17 legitimate.

18 QUESTION: But you would agree, then, that there
19 may be a claim stated by an individual who is not
20 otherwise a member of a class if the individual states
21 that the differential treatment is not rationally related
22 to any legitimate governmental purpose. Do you agree with
23 that formulation?

24 MR. DeANO: Yes. Under Snowden I agree that if
25 it's a -- the phrase used in Snowden, if it is purposeful

1 and intentional discrimination, I think that looks into
2 whether they've been singled out for reasons that the
3 Constitution has found to be admissible.

4 QUESTION: Well, supposing -- again, let's have
5 the 50-foot and 10-foot examples, that from Mrs. Olech
6 they want 50 feet, from people identically situated they
7 want 10 feet, and it simply is a result of a goof in the
8 City Clerk's office. No one had it in for Mrs. Olech, but
9 nonetheless that's the way it comes out. Does the fact
10 that it was a mistake rather than a conscious thing make
11 the equal protection claim disappear?

12 MR. DeANO: I believe so. I don't believe that
13 you can commit an equal protection violation through
14 error, omission, mistake. I think there has to be, under
15 Snowden, an intentional and purposeful discrimination.

16 QUESTION: There is certainly an intentional
17 difference in treatment. They're intentionally trying to
18 get 50 feet from one person and only 10 feet from another.
19 Isn't that enough of a -- you say that's not enough of an
20 intent?

21 MR. DeANO: Intent versus motive, if the intent
22 is to take 50 feet, then certainly they treated her
23 differently than others --

24 QUESTION: Right.

25 MR. DeANO: -- when they took less than 50 feet

1 from them.

2 QUESTION: Right.

3 MR. DeANO: However --

4 QUESTION: That's not enough, according to you?

5 MR. DeANO: Well, that may state a traditional
6 equal protection claim, but then the question for the
7 Court would be, is there a rational basis for this, and we
8 submit that this complaint alleges a rational basis for
9 why they asked for an additional 18 feet in this case.

10 QUESTION: No, but you say it alleges a rational
11 basis because establishing roads is a governmental
12 objective. Is that your answer?

13 MR. DeANO: Establishing roads and also for the
14 purpose --

15 QUESTION: Well, what about the rational basis
16 for the differential treatment?

17 MR. DeANO: The differential treatment is the
18 beginning of the analysis. Once you find the differential
19 treatment, I think then you look to whether there's a
20 rational basis for that.

21 QUESTION: In other words, your theory is that
22 the government can treat people in any otherwise
23 unjustifiably differential way so long as in isolation it
24 has a legitimate objective for treating each individual in
25 the way the individual is treated?

1 In other words, if the government says, well, I
2 think we'll take 10 feet from this property owner, 25 feet
3 from the property owner next door, and 50 feet from the
4 property owner next door to him, in each instance we're
5 going to take this land because we want to establish
6 streets, and I take it your argument is that so long as in
7 each instance they want to establish streets, the fact
8 that they are intentionally differentiating in the amount
9 of land taken is irrelevant.

10 MR. DeANO: That --

11 QUESTION: Is that your argument?

12 MR. DeANO: No. That situation may give rise to
13 an equal protection claim. However, then the question
14 would be whether the Court can find a conceivable rational
15 basis for why the government asked for 10 feet in one
16 instance, 25 feet in another.

17 QUESTION: Okay. In other words, a rational
18 basis for the difference in treatment?

19 MR. DeANO: Yes.

20 QUESTION: Okay.

21 QUESTION: Why isn't the complaint alleging --
22 it may not be right, but it alleges a difference. It
23 says, from us they wanted 66 feet to build a road. From
24 everybody else in the town they wanted 15 feet, which
25 isn't enough to build the road, and there's no basis for

1 this distinction. That's what I took it as saying.

2 MR. DeANO: The complaint alleges those facts.

3 QUESTION: All right. So how, then, can you say
4 that on its face the complaint doesn't state a claim?

5 MR. DeANO: Under the Esmail theory, where is --
6 where the Court says to look at motive before you look at
7 anything else, that's what we're saying, that that may be
8 a traditional equal protection claim.

9 QUESTION: You may be right or wrong about that,
10 I don't know. The -- but we took the case, I take it, to
11 decide whether there was a -- one person could state an
12 equal protection claim, and the first thing I read is that
13 this isn't one person, it's five.

14 MR. DeANO: Well --

15 QUESTION: So now should we get into this much
16 more difficult question about motive and so forth?

17 MR. DeANO: Not whether simply one person can
18 ever state an equal protection claim, but whether that one
19 person can state that they were singled out because of the
20 government's motive, vindictiveness.

21 QUESTION: Well, suppose that they're singled
22 out because of the government's motive, and it also
23 happens that there's no rational basis, which I take it is
24 what Judge Posner said. He said -- he said, they have
25 stated a claim where the only reason that anybody could

1 give as far as the complaint's concerned for this
2 distinction is hatred or malice or some absurd state of
3 mind.

4 MR. DeANO: Well --

5 QUESTION: I'll get his exact words, if you
6 want.

7 MR. DeANO: Well, in answer to that question, I
8 think that --

9 QUESTION: He says, if it refuses to perform
10 this obligation for one of the residents for no reason --
11 no reason. No reason -- other than a baseless hatred,
12 then it would violate the Equal Protection Clause.

13 MR. DeANO: And under traditional equal
14 protection analysis, the question then would be for the
15 Court to search the record to see if there is any
16 conceivable rational basis.

17 QUESTION: Well, here we have the record. It's
18 the complaint. I don't see any rational basis in the
19 complaint.

20 MR. DeANO: The -- we submit that the rational
21 basis is that in this instance they had a nondedicated
22 road over which they were now being asked to place a
23 public improvement.

24 QUESTION: I suppose if your hatred is not
25 baseless, it's okay. I mean, if you really -- this woman

1 deserves to be hated, or something --

2 MR. DeANO: No --

3 (Laughter.)

4 QUESTION: -- would that make it all right?

5 MR. DeANO: No, it's not that if hatred is
6 baseless, it's if the act, the legitimate -- the goal of
7 the government. In this instance, we submit that what
8 they were trying to do here was legitimate. Whether their
9 motive, then, was improper should not be relevant under --

10 QUESTION: Why, then, shouldn't you read this
11 complaint to say, they wanted 33 feet to widen the road.
12 but everybody else, they wanted only 15 feet. Fine, if
13 they want 33, they exercise their power of eminent domain
14 and they pay us for the difference between 33 and 15. If
15 that's what the complaint is saying, we're supposed to
16 read it liberally, then the 12(b)(6) dismissal is
17 improper, because the complaint would not have on its
18 face --

19 MR. DeANO: On that set of facts, if they
20 alleged a traditional equal protection claim, the next
21 question would be, is there a conceivable rational basis
22 for what was done, and that's why we point, and why the
23 district court pointed to paragraph 25, which alleged that
24 although the respondent is saying the reason they did this
25 is because they're retaliating against me, they also

1 supplied an allegation that explained another basis,
2 another reason why the village wanted that 18 feet.

3 QUESTION: But wouldn't that reason still be
4 inadequate if everybody else was either not asked for the
5 33, or paid for the difference?

6 MR. DeANO: I don't think so, because the
7 reason -- if nobody else was asked for 33 feet, that would
8 create the classification. But once the classification is
9 created, then the question becomes, what was the
10 legitimate government purpose? Was there a conceivable
11 rational basis? So that's where we think paragraph 25
12 is --

13 QUESTION: It has to be a rational basis, not
14 for taking the 33 feet, but a rational basis for treating
15 this person different from other people, right?

16 MR. DeANO: I agree with that, and the reason
17 that she was asked for the 33 feet is why she was treated
18 differently.

19 QUESTION: But other people, they did not have
20 the need for the 33 feet from other people?

21 MR. DeANO: This is a unique situ -- no, because
22 in this situation we had a nondedicated road.

23 QUESTION: But we don't know that from the
24 motion to -- from the complaint and the motion to dismiss,
25 do we?

1 MR. DeANO: Well, the complaint alleges that it
2 had never been dedicated, and that there had never been
3 any easement granted to any governmental body for the use
4 of any portion of it, so --

5 QUESTION: You say all the facts necessary to
6 support your argument that there is a rational basis can
7 be deduced from the complaint?

8 MR. DeANO: Yes, Your Honor, and that's what the
9 district court found, that --

10 QUESTION: I think that's asking rather a lot of
11 a court like this. I mean, I thought we took this case to
12 find out whether one person who was not otherwise a member
13 of a class can state an equal protection claim, and I
14 think perhaps we're at the point where everybody is
15 agreeing that the answer is yes, and the argument now is
16 whether, in response to that claim, it can be found on
17 this record that there is a legitimate governmental
18 purpose to which the demand was rationally related, and
19 I'm not sure that that's really what we're in business for
20 here.

21 MR. DeANO: The --

22 QUESTION: And it also seems that this was, as
23 has been pointed out, dismissed on the face of the
24 complaint. I mean, normally you wouldn't make that
25 motion. You'd file an answer, and then there would be

1 motions for summary judgment and you can look at it. I
2 don't know why the Village of Willowbrook took this
3 unusual route and thought they had a right to dismiss the
4 complaint rather than file an answer.

5 MR. DeANO: Because the complaint was brought
6 under a theory of the Equal Protection Clause recognizing
7 the Seventh Circuit in the Esmail case, and we submit that
8 Esmail is not a proper -- is not a viable cause of action
9 under the Equal Protection Clause. If this complaint had
10 alleged --

11 QUESTION: Well, but if the complaint boils down
12 to, they treated me differently than every other citizen
13 when it comes to hooking up water, that's enough, and it
14 doesn't matter if it's one person or five person -- five
15 people. Now, go file your answer, you know. We've
16 answered the question, go file an answer. I mean, why
17 isn't that enough?

18 MR. DeANO: Because the reason that the motion
19 to dismiss was filed was because Esmail is a new theory in
20 the Seventh Circuit, and there had been no other cases
21 interpreting it. Looking at the complaint, we didn't
22 believe that it fits the --

23 QUESTION: But you know, we don't necessarily
24 follow a case from the Seventh Circuit. Perhaps we
25 wouldn't hear. But if there's enough in the complaint to

1 support a traditional equal protection claim, we wouldn't
2 have to get into that.

3 MR. DeANO: And that's not the theory, though,
4 that the respondent brought this case under, and the
5 petition that we filed asked not only that the Court
6 consider whether a class of one could ever file an equal
7 protection claim, it's whether a class of one who is
8 alleging that the class was created by vindictiveness,
9 because vindictiveness has not been a constitutionally
10 protected interest.

11 QUESTION: But if one doesn't need to find
12 vindictiveness in order to say that a complaint like the
13 States have claimed for relief under the Equal Protection
14 Clause, it seems to me we wouldn't get into the Esmail
15 question at all.

16 MR. DeANO: That's correct, but then if it was
17 under traditional equal protection analysis we believe
18 that the district court took the right approach and looked
19 for a rational basis for what the government did, and
20 that's why the case was dismissed in the district court.

21 QUESTION: Have we ever said -- has this Court
22 ever said that in the abstract there's some free-floating
23 duty for the government always to act rationally? We
24 haven't said that.

25 MR. DeANO: No. No.

1 QUESTION: So the duty to act rationally applies
2 only when the government's actions affect a certain
3 person?

4 MR. DeANO: When the government takes a position
5 that differentiates, creates a class, then I think the
6 question is whether -- what is that class? Is it a
7 suspect class, or is it not? If it's not, then the next
8 question is, was there any conceivable rational basis to
9 explain what the government did here? So it can act
10 irrationally if there's a conceivable rational -- not, it
11 can act irrationally, it can separate. It can make
12 classes if there's a rational basis for that.

13 QUESTION: Do you think your argument is
14 consistent either with the -- Justice Stone's opinion in
15 Snowden or with Learned Hand's opinion in Burt?

16 MR. DeANO: I think it's inconsistent with
17 Learned Hand's position in Burt, but I think it's
18 consistent with the Snowden decision in that in Snowden
19 you had a single individual who claimed that he had been
20 denied the right to be placed on the ballot in Illinois,
21 and that he had qualified for that, and that the
22 canvassing board maliciously, willfully, and arbitrarily
23 refused him that right, and the Court said that despite
24 those allegations you have not alleged intentional or
25 purposeful discrimination, and it went on to say --

1 QUESTION: But that seems to me to suggest that
2 the missing allegation was precisely the allegation you've
3 got here.

4 MR. DeANO: Vindictiveness?

5 QUESTION: Yes.

6 MR. DeANO: Well, we cite, then, U.S. v. O'Brien
7 and Arlington Heights and Washington v. Davis for the
8 position that the motivation, which vindictiveness --

9 QUESTION: I understand that, but it seems to me
10 if one confined himself to Snowden and Burt, you would
11 lose. These later cases you rely on I understand, but it
12 seems to me those two cases are definitely against you.

13 MR. DeANO: Snowden I think it's how you
14 interpret intentional and purposeful discrimination, and
15 if you read intentional and purposeful discrimination
16 broadly in that it's enough to say --

17 QUESTION: If you read Snowden the way Learned
18 Hand read it, then you lose, and he's usually a pretty
19 good judge, we say.

20 (Laughter.)

21 MR. DeANO: If you read Snowden the way Learned
22 Hand did, yes. What he's saying is, you only need to add
23 the additional allegation that the reason you singled me
24 out was because you were coming after me, and we submit
25 that -- what Esmail does is turns traditional equal

1 protection analysis on its head, because it now says, the
2 first thing you do is look at an allegation of motive, and
3 if the motive is alleged to be improper, you don't have to
4 go through --

5 QUESTION: Yes, but an allegation of motive like
6 that can also be construed as saying there was no other
7 rational basis that can explain this except that motive,
8 so it's really the functional equivalent of an allegation
9 that there was no rational basis for what you did, which
10 tends to be consistent with the notion that the city
11 later, came round later and said 15 feet's enough.

12 MR. DeANO: When the -- what would give rise to
13 the rational basis inquiry is the allegation that I've
14 been treated separately or differently, and it's a bad
15 motive. Then you go to rational basis, and that's where
16 we submit that this complaint, as the district court
17 found, alleges a rational basis because the reason that
18 they requested it is explained by the fact that this was a
19 nondedicated, unimproved road. They wanted to do all of
20 this --

21 QUESTION: It was still nondedicated when they
22 said 15 feet's enough.

23 MR. DeANO: That's true, and at that point they
24 made a decision that we can't -- although it would have
25 been more efficient to do all of this at once, to widen

1 and improve the road, and put pavement there, if she's
2 going to object to it, they consulted the village attorney
3 and the village attorney said, if all you want to do is
4 put the water main in, then 15 feet would be sufficient.

5 Now --

6 QUESTION: I always -- you're talking about
7 rational basis as though it means actual rational basis.
8 I had always thought that our rational basis test means a
9 conceivable rational basis. We don't look to whether the
10 State actually had this rational basis in mind. It might
11 have. This is a basis that we invent in our own
12 imagination, and since that could have supported it,
13 there's a rational basis, correct?

14 MR. DeANO: I agree.

15 QUESTION: And you would assert that that
16 conceivable rational basis will overcome a claim of a
17 violation of equal protection even when you can bring in
18 evidence to show that, oh yeah, that might have been a
19 rational basis, but in fact they were out to get me.

20 MR. DeANO: Yes.

21 QUESTION: They did not use that rational basis.
22 They were out to get me. You would say still no equal
23 protection violation?

24 MR. DeANO: Yes, and under U.S. v. O'Brien and
25 Washington v. Davis, once there is a legitimate purpose,

1 there's no need to look into --

2 QUESTION: You're beginning to talk subjectively
3 again. Once there is a -- once there is a conceivable
4 legitimate purpose.

5 MR. DeANO: Okay, conceivable, any imaginable by
6 the court, even if it's not pled in the complaint, but we
7 believe that this complaint does plead that.

8 QUESTION: Can you -- does that carry as far as
9 saying, yeah, we conceived it, but it has been shown on
10 this record that that was indeed not the basis?

11 MR. DeANO: If it can be conceived, then there's
12 no reason to look into the record for why they might --
13 why that motive might not have been the correct motive.

14 QUESTION: So this is a tempest in a teapot, is
15 essentially what you're saying. Yeah, you can have a
16 class of one, but the court can always dream up a rational
17 basis for what government does, and so, end of case.

18 MR. DeANO: Not always. Not always dream up a
19 rational basis, but when a complaint like this alleges
20 facts that give rise to that, then certainly, and I agree
21 that it's what can be conceived, not necessarily what is
22 found, but here we have the allegation in the complaint.

23 QUESTION: And if the reason that government was
24 out to get the person was because of race, there's a cause
25 of action?

1 MR. DeANO: There is.

2 QUESTION: And is that because it's a suspect
3 class, or there's a constitutional right involved?

4 MR. DeANO: Because there's a suspect class,
5 because they've differentiated because of --

6 QUESTION: Suppose they're discriminating
7 allegedly because of the exercise of the constitutional
8 right?

9 MR. DeANO: That would be, but that's -- and
10 that is not the theory that has been pled in this case.
11 The theory that has been pled is what our argument is
12 against, that Esmail says that vindictive action can give
13 rise to an equal protection claim when you allege
14 differential treatment and vindictiveness as the cause for
15 it, or the motivation for it.

16 QUESTION: Yes, but the vindictiveness allegedly
17 was in retaliation for filing a lawsuit, which I assume
18 she had a statutory right at least to file.

19 MR. DeANO: That's correct, but then we -- I
20 think we would look at this case under traditional equal
21 protection analysis, and the question would be, is there
22 any conceivable rational basis --

23 QUESTION: Well, why is filing -- if -- why, if
24 the vindictiveness on one hand is caused by hostility to
25 race, another case it's caused by hostility to the fact

1 that the -- a lawsuit was filed. You would say they're
2 different cases.

3 MR. DeANO: They would -- I think they
4 require -- they would be traditional equal protection
5 claims, not --

6 QUESTION: Well, that's what -- why isn't this
7 the second?

8 MR. DeANO: Because they have alleged that they
9 are proceeding under Esmail, which is not -- which is a
10 vindictiveness --

11 QUESTION: Well, they allege that the
12 vindictiveness was caused by the fact that they filed this
13 earlier lawsuit.

14 MR. DeANO: That's correct. They --

15 QUESTION: Thank you, Mr. DeAno.

16 Mr. Gornstein, we'll hear from you.

17 ORAL ARGUMENT OF IRVING L. GORNSTEIN

18 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

19 MR. GORNSTEIN: Mr. Chief Justice, and may it
20 please the Court:

21 We have explained in our brief why we believe
22 this is not an appropriate case for resolving the class-
23 of-one issue, but if the Court reaches the question, it
24 should hold that a class-of-one claim is subject to the
25 same analysis as other equal protection claims.

1 That means that unless there is a fundamental
2 right, or a suspect classification involved, rational
3 basis review applies, and under rational basis review the
4 relevant inquiry is an objective one into whether there is
5 any conceivable rational basis for the alleged difference
6 in treatment.

7 QUESTION: What if they had a class of litigants
8 against the city, and they had a rule that anybody who
9 sues the city, will get disparate treatment, 33 feet
10 instead of 15 feet, and that's their policy. Would that
11 be an equal protection challenge?

12 MR. GORNSTEIN: Justice Stevens, it would. It
13 would be -- it would implicate the fundamental right which
14 this Court has recognized --

15 QUESTION: Why isn't that this case?

16 MR. GORNSTEIN: Well, it is this case, and
17 that's one of the reasons that we told -- suggested to the
18 Court --

19 QUESTION: Oh. So you agree with respondent,
20 then?

21 MR. GORNSTEIN: -- that we suggested to the
22 Court that it not examine the class-of-one issue, because
23 the class-of-one issue really arises when there is no
24 suspect classification and no fundamental right involved,
25 but this happens to implicate the fundamental right to

1 file a lawsuit, which this Court has recognized as being
2 protected by the First Amendment as a component of the
3 right to petition for a redress of grievances. If the --

4 QUESTION: Mr. DeAno said that's not the theory
5 of the plaintiff's complaint. They didn't make
6 retaliation for filing the litigation the basis for the
7 lawsuit.

8 MR. GORNSTEIN: They actually did, in their
9 factual allegations, allege that the basis for the
10 retaliation was the filing of the lawsuit, and that is in
11 Joint Appendix 10, allegation number 27.

12 QUESTION: Well, what if you decide that you're
13 going to treat this person differently because they've
14 filed a lawsuit against the village, but it turns out
15 there's a perfectly rational basis for treating them
16 differently?

17 MR. GORNSTEIN: Mr. Chief Justice, in that case,
18 when you have a First Amendment right at issue, the
19 sequence of events is dictated by this Court's decision in
20 Doyle, which says that the plaintiff has the burden to
21 show that a motivating factor in the decision was the
22 exercise of First Amendment rights and at that point, if
23 the plaintiff establishes that initial burden, then the
24 burden shifts to the defendant to show that the same
25 decision would have been reached even the -- even in the

1 absence of the consideration of the protected activity.

2 But where there is no fundamental right at
3 stake, and that is a hypothesis of the question presented,
4 the only question is whether there is a conceivable
5 rational basis for treating the plaintiff differently from
6 others and, if there is, the inquiry ends. You do not
7 inquire at all into the actual subjective motivations for
8 the decision.

9 QUESTION: So under the Doyle approach, my
10 hypothetical, would a court say, yes, this is a prima
11 facie denial of equal protection because of 50 feet versus
12 10 feet, and the respondent has come up with a perfectly
13 good explanation of why, but we also find that the motive
14 for doing it was not the rational basis, that they simply
15 wanted to get this person because they filed a lawsuit,
16 and kind of dug up the rational basis later. Then what
17 happens under Doyle? We would have done it anyway, so --

18 MR. GORNSTEIN: This Court recently issued a per
19 curiam decision this term, and I believe it's called Le
20 Sage, in which the government took the action on the base
21 of race and -- in part, and the government was able to
22 show to the satisfaction of the Court that the same thing
23 would have occurred even absent the consideration of race,
24 and in that event there is at least no award for past
25 conduct. There --

1 QUESTION: But you have to get beyond the
2 dismissal of the complaint to reach that.

3 MR. GORNSTEIN: That's correct.

4 QUESTION: Le Sage was hardly a dismissal of the
5 complaint situation.

6 MR. GORNSTEIN: That's correct. I'm just
7 talking about a hypothetical scenario where there's a
8 First Amendment claim raised, and then it would be -- it
9 would usually require a trial to determine whether, in
10 fact, the actual -- the defendant would have taken the
11 same action in any event.

12 Let me --

13 QUESTION: Should we begin our opinion in this
14 case by saying there is no constitutional right for
15 similarly situated persons to be treated equally under the
16 law? Is that our opening line?

17 MR. GORNSTEIN: There is a constitutional right
18 for people who are being treated equally -- who are
19 similarly situated, in fact, to be treated equally, but
20 how the Court approaches that question depends on whether
21 there's a suspect classification or a fundamental right
22 involved. If neither of those are involved, then the
23 relevant inquiry is, is there any conceivable rational
24 basis for treating differently plaintiff from the persons
25 that the plaintiff alleges to be similarly situated.

1 QUESTION: Is that necessary to reduce the
2 number of suits filed in Federal court, to reduce the
3 intervention of courts in routine governmental actions?

4 MR. GORNSTEIN: That is the --

5 QUESTION: Are we compromising the basic
6 principle by saying that?

7 MR. GORNSTEIN: No, because I think the basic
8 principle that the Court has established is -- under
9 rational basis review is a baseline of protection, but
10 only against those classifications, or those different --
11 intentional differences in treatment that lack any
12 conceivable rational basis --

13 QUESTION: Well, why --

14 QUESTION: If you're a county council and the
15 board of commissioners said, we're going to bury this
16 application because we just don't like this guy, you tell
17 them that that is constitutionally permissible?

18 MR. GORNSTEIN: I do not. I tell them that
19 there should be a conceivable rational basis for that
20 decision, and that that is not an impermissible way to
21 proceed.

22 QUESTION: And that you would propose to
23 conceive one.

24 (Laughter.)

25 MR. GORNSTEIN: But when the case comes to

1 court, then the question is whether there's a conceivable
2 rational basis and, if there is under this Court's
3 decisions in Fritz and in Beech, then the inquiry is at an
4 end.

5 QUESTION: What about in every case of
6 defamation, libel, intentional torts committed by a State
7 officer, breach of contract, where let's assume the
8 State's wrong in all those cases?

9 Now, those are all illegal activities, so I
10 don't know what the rational basis would be. Now, does
11 every one of those actions become an Equal Protection
12 Clause action?

13 MR. GORNSTEIN: No, because there are two
14 components to the equal protection cause of action.
15 First, as Snowden v. Hughes had said, there has to be an
16 intentional difference in treatment between the plaintiff
17 and others who are alleged --

18 QUESTION: Well, there is in every such case.

19 MR. GORNSTEIN: And then, at that point, then
20 all -- the inquiry is really a very simple one into
21 whether there is any conceivable, rational basis --

22 QUESTION: And what could there be in cases
23 where the government's committed an intentional tort, or
24 intentionally breached a contract?

25 MR. GORNSTEIN: Because there -- I could

1 hypothesize ones in particular cases that may come up.
2 For example, in this case let's put aside the First
3 Amendment for a moment. It may be that somebody could
4 establish that there was -- somebody was out to get
5 somebody, but if there was a conceivable rational basis
6 such as the one that the petitioner is suggesting here,
7 that unlike every other person in this town, this person
8 is asking for access for water from a nonpublic road, that
9 could supply a conceivable rational basis for treating
10 that plaintiff differently from everybody else in the
11 village.

12 QUESTION: And the result is otherwise if race
13 is the basis, because of history, the core principle of
14 the Equal Protection Clause, or why?

15 MR. GORNSTEIN: Yes. In certain limited
16 situations the Court has concluded that motive inquiries
17 are essential to protect against the most invidious forms
18 of discrimination and protect the most fundamental rights,
19 but when those rights are not implicated, then rational
20 basis review applies, and that is supported, really, by
21 three related --

22 QUESTION: Let me just interrupt with one
23 question. Why does the fact that a nonpublic road is
24 involved explain the disparate treatment between 15 feet
25 and 33 feet? How can that possibly explain that?

1 MR. GORNSTEIN: Justice Stevens, it may or may
2 not explain it. I suppose the possible --

3 QUESTION: It has to be a rational basis for --

4 MR. GORNSTEIN: It does, and the possible
5 explanation --

6 QUESTION: -- and on its face it isn't rational.

7 MR. GORNSTEIN: The possible explanation would
8 be that the city has a policy for some reason that it does
9 not want to furnish access to people for water over roads
10 that are not their own.

11 QUESTION: That policy is surely not disclosed
12 in the complaint.

13 MR. GORNSTEIN: I'm -- Justice Stevens, I wasn't
14 suggesting that the complaint itself doesn't state a
15 claim. It may or may not state a claim. I think at this
16 stage of the proceedings that's not the question before
17 the Court, whether this complaint does or doesn't state a
18 class-of-one claim. The question is whether a person in a
19 class of one can state a claim.

20 I think all the Court has to say if it gets to
21 this question is that yes, a person in a class of one can
22 state a claim, but unless -- if there's no fundamental
23 right or suspect classification involved, only by showing
24 there's no conceivable rational basis for treating the
25 plaintiff differently from others who are similarly

1 situated.

2 QUESTION: So the complaint has to conjure up
3 every conceivable basis and negate it? That's what the
4 pleading is supposed to look like?

5 MR. GORNSTEIN: I would not say that, Justice
6 Ginsburg. I think the complaint can state the facts that
7 show that they are apparently being treated differently
8 from other -- others who are similarly situated. Were it
9 not for the one paragraph in the complaint the petitioner
10 mentioned which suggested a possible rational basis, the
11 complaint clearly would have stated a claim in our view,
12 but it is by raising in the complaint itself a possible
13 rational basis that the issue arises as to whether you can
14 dismiss the complaint here.

15 QUESTION: Thank you, Mr. Gornstein.

16 Mr. Wimmer, we'll hear from you.

17 ORAL ARGUMENT OF JOHN R. WIMMER

18 ON BEHALF OF THE RESPONDENT

19 MR. WIMMER: Mr. Chief Justice, and may it
20 please the Court:

21 Before I get into the merits of the arguments
22 that have been made on behalf of the Village of
23 Willowbrook, I'd like to address the matter of what
24 questions are properly before this Court in this case.

25 As the Court is aware, there were two questions

1 raised in the petition for a writ of certiorari, the first
2 being whether the Equal Protection Clause gives rise to a
3 cause of action on behalf of a class of one where the
4 plaintiff has not alleged membership in a vulnerable
5 group, but rather that ill will caused the government to
6 treat her differently from others similarly situated.

7 The second question was whether the government
8 conduct alleged in Mrs. Olech's amended complaint meets
9 the standard to state a cause of action on behalf of a
10 class of one, assuming that the Equal Protection Clause
11 protects such individuals.

12 Now, this Court in this case granted certiorari
13 limited to question one, and what that means, I believe,
14 is that arguments that fall within the scope of question
15 two are not properly before this Court because this Court
16 has in effect denied certiorari on question two, and we've
17 cited the case of Missouri v. Jenkins from this Court,
18 where there was a limited grant of certiorari on one of
19 two questions, and in that case, which was a school
20 desegregation case, the State made arguments that really
21 fell within the scope of the question which had not
22 been -- on which certiorari had not been granted, and this
23 Court said that those questions would not be considered.

24 QUESTION: Well, but the discussion of question
25 1 may involve some -- you know, rather than a purely

1 hypothetical discussion might involve discussion of
2 question 2. That's not to say question 2 is before the
3 Court, but I don't know that you can totally separate
4 them.

5 MR. WIMMER: I don't know that they can be
6 totally separated. I know in Missouri v. Jenkins the
7 second question was whether the tax increase ordered by
8 the district court in the school desegregation case
9 violated Federal-State comity. The first question was
10 whether the remedy was too broad, and when the State tried
11 to argue that it violated Federal-State comity because the
12 remedy was too broad, this Court indicated that that
13 wouldn't be within the scope of the grant.

14 I think in this case when the village argues
15 that Mrs. Olech's specific amended complaint failed to
16 sufficiently allege that there was not a rational basis
17 related to a legitimate government interest, that doesn't
18 go to whether the Equal Protection Clause protects a class
19 of one. That falls within question 2, whether this
20 particular amended complaint meets the standard to state a
21 cause of action for violation of the Equal Protection
22 Clause, assuming that that clause protects such
23 individuals.

24 QUESTION: But as to question 1, it talks about
25 a class of one, and the complaint itself reveals that

1 they're a class of five, at least, so wouldn't it be a
2 totally hypothetical advisory opinion to answer question 1
3 in the context of a case that doesn't raise it?

4 MR. WIMMER: Well, I don't think it would be an
5 advisory opinion necessarily, because although there are
6 five people involved, I think the principal the class of
7 one -- the distinction is between a class of one and a
8 vulnerable group. Whether there's two, or five, or one, I
9 think the same considerations would apply if it's not a
10 vulnerable group, as stated by the village.

11 QUESTION: Mr. Wimmer, did you represent
12 Ms. Olech --

13 MR. WIMMER: Yes.

14 QUESTION: -- at all times below?

15 MR. WIMMER: Yes, Your Honor.

16 QUESTION: And you drafted the complaint?

17 MR. WIMMER: I did.

18 QUESTION: Then why didn't you include the
19 theory that Mr. Deano suggested may have been okay, that
20 is, it was retaliation for exercise of their First
21 Amendment right to sue the village?

22 MR. WIMMER: Well, Your Honor, I did state in
23 paragraph 27, and this is on page 10 of the appendix, that
24 the defendants treated plaintiff Grace Olech and Thaddeus
25 Olech, Howard Brinkman, and Rodney C. Zimmer and Phyllis

1 S. Zimmer differently from other property owners in the
2 Village of Willowbrook by demanding the 33-foot easements
3 and the 66-foot dedicated street as a condition of the
4 extension of the water main because of the ill will
5 generated by the State court lawsuit, and in an attempt to
6 control storm water drainage in the vicinity to the
7 detriment of plaintiff Grace Olech and Thaddeus Olech and
8 other plaintiffs in the State court lawsuit by the use of
9 ditches and swales along Tennessee Avenue.

10 So when the village says that the complaint
11 alleges that they wanted the 33 feet for all these good
12 purposes, that's not what it alleges. It alleges they
13 made those demands out of ill will caused by the lawsuit.

14 The paragraph cited by the village simply says
15 they sent the proposed easement which would give them the
16 right to do all those things, but the complaint does not
17 allege that that is why the village made those demands.

18 QUESTION: What if we had a somewhat different
19 situation here, where we're not talking about the demand
20 for easement dedication, but whether the village is going
21 to contract with a particular person, or take bids from
22 various persons to do the paving in this area, and the
23 village says, well, one person we're not going to contract
24 with is X, because X has a reputation for suing everybody,
25 for just being a very litigious person constantly taking

1 advantage of his right to petition. Is that impermissible
2 under the First Amendment?

3 MR. WIMMER: Well, if the lawsuit that was
4 brought was meritorious, I think it would be. I think if
5 there had been a lot of -- and I think about the cases
6 cited by the government in this case, California Motor
7 Transport, and the other cases cited by the government
8 which indicate that if the lawsuit is not -- doesn't have
9 probable cause, or if it's a harassing lawsuit, or
10 something like that, then the First Amendment implications
11 aren't there.

12 In this case, the State court lawsuit, we
13 prevailed and got a judgment against the Village of
14 Willowbrook, so --

15 QUESTION: So you say that the First Amendment
16 does protect someone who the county or the village simply
17 doesn't want to deal with because they have a propensity
18 to litigate at the drop of a hat. Sometimes they win,
19 sometimes they lose.

20 MR. WIMMER: Well, I think if -- it would come
21 down to what the propensity to litigate in cases that are
22 not valid, that would probably be a proper consideration
23 for the village to take into account. That's not what
24 happened here, though, because the one case was a valid
25 case and went to judgment.

1 QUESTION: What was your theory? If we go to
2 this other issue, I can see two situations. 1, a
3 plaintiff says, there is no rational basis conceivable,
4 and they're motivated by ill will. Situation 2 is, the
5 plaintiff says, they had a brilliant reason, a perfect
6 reason, an outstanding reason. However, they were
7 motivated by ill will in reality. Now, does this case
8 raise issue 2?

9 MR. WIMMER: I don't believe so, Your Honor. We
10 alleged in the complaint that the decision was -- and this
11 is on page 10 -- wholly -- strike that -- irrational and
12 wholly arbitrary, and we've also alleged that it was based
13 on ill will and I think that, as Judge Posner said in the
14 court of appeals opinion for the Seventh Circuit, the
15 tincture of ill will will not render government action
16 unconstitutional if it would have happened anyway.

17 What we have here is a situation where it was
18 irrational because the village attorney admitted that they
19 didn't need a 66-foot street dedication to install and
20 maintain a water main, and they didn't demand it of other
21 people in the village.

22 With respect to the argument that Mrs. Olech's
23 situation is somehow unique, there's no basis in the
24 complaint to conclude that that is the case, and that
25 there are not other nondedicated streets in the village.

1 Under Hishon v. King & Spaulding this Court is to
2 construe -- or all courts are to construe complaints
3 favorably to the plaintiff and reach all reasonable
4 inferences in favor of the plaintiff, and what the village
5 is asking you to do is the exact contrary, to assume that
6 this was the only dedicated street and make conclusions on
7 that basis.

8 QUESTION: Well now, if a complaint were to
9 allege that the city took some -- singled out the
10 plaintiff for some negative action solely because the city
11 didn't like the person for some reason, the mayor hated
12 her, and it turns out, though, that there is a perfectly
13 rational basis that the Court can think of for the mayor's
14 action, is there a lawsuit just because the mayor, in his
15 heart of hearts, hated the plaintiff and wanted that
16 outcome, even though we can derive a perfectly rational
17 basis?

18 MR. WIMMER: Probably not, Judge, although this
19 Court did say in the City of Cleburne v. Cleburne Living
20 Center that some objectives, such as a bare desire to harm
21 a politically unpopular group, are not legitimate State
22 interests. I think in this case, where there was no
23 conceivable rational explanation for the city's disparate
24 treatment of Mrs. Olech, and she's alleged that they were
25 out to punish her for filing a meritorious lawsuit against

1 the village, that there's enough.

2 But I do think that this whole concept of
3 whether the particular amended complaint in this case
4 adequately states a cause of action is not properly before
5 the Court.

6 QUESTION: I think you know what's bothering us,
7 that if we accept your theory, then in those thousands,
8 tens of thousands of zoning decisions where local
9 personalities are involved and difficult discretionary
10 judgments are made, it's going to always be followed by a
11 lawsuit of ill will. And we simply are concerned about
12 having the Federal courts become the ultimate policeman of
13 the zoning process.

14 MR. WIMMER: Your Honor, I think there's
15 sufficient protection from municipalities or government in
16 the fact that the plaintiff has to show that there was no
17 rational basis, no conceivable rational basis related to
18 legitimate government interests for the conduct.
19 That's going to eliminate a lot of frivolous lawsuits
20 against municipalities. If a municipality can have an
21 affidavit, we did it for this reason, and totally logical
22 and rational, and advances a legitimate government
23 interest, the case is over.

24 QUESTION: They don't have to say that. They
25 don't have to say we did it for this reason. They have to

1 say, we might have done it for this reason -- right?

2 MR. WIMMER: That's correct.

3 QUESTION: So in this respect you're in
4 agreement with the government's theory of the case?

5 MR. WIMMER: I agree that a rational basis
6 related to a legitimate government interest for the
7 disparate treatment would indicate that there was no equal
8 protection violation.

9 QUESTION: A conceivable basis. A conceivable
10 basis.

11 MR. WIMMER: Based on the facts that are before
12 the Court, yes. I don't think there is one here, because
13 that also runs into the rule that in *Hishon v. King &*
14 *Spaulding*, if there are any set of facts consistent with
15 the complaint by which it could be concluded that there
16 was no rational basis related, or no conceivable rational
17 basis related to a legitimate government interest, then
18 the case should go on.

19 With respect to the question on which this Court
20 granted certiorari, whether the Equal Protection Clause
21 protects a class of one --

22 QUESTION: Do we have a class of one? What's
23 your position on that?

24 MR. WIMMER: That the Equal Protection Clause --
25 oh, do we have a class of one in this case? That's the

1 way it was argued. There certainly are five people, as
2 the government has pointed out, that filed the State
3 lawsuit, and they were all treated differently by the
4 Village of Willowbrook.

5 QUESTION: This objection that a class of five
6 is not a class of one, was this made at the petition stage
7 in the opposition to certiorari?

8 MR. WIMMER: I don't believe so. I did object
9 to the presentation of some questions, but not that.

10 With respect to the question of whether the
11 class of one is protected --

12 QUESTION: May I ask you just a variation --

13 MR. WIMMER: Yes.

14 QUESTION: -- of Justice Scalia's question? In
15 the trial proceedings, was there an objection to the
16 complaint made on the basis that there was only a class of
17 one involved?

18 MR. WIMMER: No. As a matter of fact, at the
19 district court the Village of Willowbrook acknowledged
20 that a cause of action for violating the Equal Protection
21 Clause could be brought on behalf of a class of one. They
22 took that position but argued that --

23 QUESTION: Because that was a law of the Seventh
24 Circuit?

25 MR. WIMMER: Right. They did not say we want to

1 preserve another issue for appellate review.

2 With respect to the question on which the Court
3 granted certiorari, I think it's important to recall that
4 governments derive their power from the consent of the
5 governed, and that the legitimacy of government action is
6 based on that. In our country the consent of the governed
7 is set forth in the written Constitution, and I think in
8 interpreting the language of the Constitution, the
9 language of that grant, it's important to adhere to the
10 language that the people have chosen to use, especially
11 when construing a protection that the people saw fit to
12 secure for themselves, and that no court should engraft
13 limitations on the application of a protection like that
14 that the people didn't see fit to put in it, because then
15 what would happen to the consent of the governed, and the
16 legitimacy of the exercise of government power?.

17 As Justice Story said in *Martin v. Hunter's*
18 *Lessee*, which I cited in my brief, the words are to be
19 taken in their natural and obvious sense, and not in a
20 sense unreasonably restricted or enlarged.

21 With that background, if one looks at the
22 language of the Equal Protection Clause, nor shall any
23 State deny to any person within its jurisdiction the equal
24 protection of the laws, I think there's no basis to
25 conclude that that provision should be limited in its

1 application to someone who says I'm being discriminated
2 against because of membership in a group or class.

3 QUESTION: And what is your answer, Mr. Wimmer,
4 to the argument that you have pled yourself out of court
5 by making your statement of the class of one or five but
6 then including in the complaint a rational basis for
7 seeking more land, that is, they wanted to make the
8 street?

9 MR. WIMMER: Well, I don't think I did include
10 in my complaint a rational basis for the Village of
11 Willowbrook to treat Mrs. Olech differently from other
12 property owners. When one decides whether there's a
13 rational basis related to a legitimate government
14 interest, it should not be considered in the abstract, and
15 the village can always say, we wanted to build a road
16 here.

17 The question is, was there -- and in the case I
18 cited, Sioux City Bridge Company, where one taxpayer's
19 property was assessed higher than everybody else's, the
20 government can only say, we had a rational basis to assess
21 his property 100 percent. That's what it was worth.

22 You have to look, is there a rational basis
23 related to a legitimate government interest for the
24 difference in treatment? They may well have wanted a
25 road, but if they didn't demand of everyone who wished to

1 have municipal water a road, then there was no rational
2 basis to treat her differently from everybody else in the
3 city by demanding a road.

4 QUESTION: May I ask you a hypothetical about a
5 concession you made earlier? Supposing you had a
6 complaint that alleged vindictive discrimination, 33 feet
7 because they hated the person, and the city filed an
8 answer and said yes, that's the real reason we did it, but
9 our lawyer has told us we might have done it for this
10 rational reason. We didn't do it, but we might have. Who
11 would win in that case?

12 MR. WIMMER: Well, I think --

13 QUESTION: Is there a stupidity clause in the
14 Constitution --

15 (Laughter.)

16 QUESTION: -- somewhere we could get them on, or
17 something?

18 MR. WIMMER: Well, I think one could argue
19 convincingly in light of Your Honor's language in the
20 Cleburne case that if the city admitted that they were
21 doing it to punish a person, a politically unpopular
22 person or group, that the plaintiff would prevail. That's
23 not a legitimate government interest. This Court has
24 stated --

25 QUESTION: And it's not a totally hypothetical

1 question, either, to respond to my good colleague, because
2 sometimes you take depositions before the answer is filed,
3 and the depositions make it perfectly clear that was the
4 real purpose, but then they conceive of a legitimate
5 purpose later.

6 MR. WIMMER: Well, I think, as I say, that a
7 convincing argument can be made under Cleburne that if
8 they made that concession, that it was not -- it was what
9 this Court has said to be not a legitimate government
10 interest that motivated them to take that action, that
11 there would be an equal protection --

12 QUESTION: Why, if they only make the
13 concession?

14 QUESTION: Maybe there's a presumption --

15 QUESTION: Why not litigate it, then? If the
16 fact that they did it out of maliciousness should justify
17 judgment for the plaintiff, then we should litigate the
18 point, but why should we just allow it when they admit it?

19 MR. WIMMER: Well, that's a good question,
20 although in this case --

21 QUESTION: It's a very good question. I --

22 (Laughter.)

23 QUESTION: You want to throw us right back into
24 the pool that we thought we had jumped out of.

25 MR. WIMMER: Well, in this case, where the

1 complaint does not show a rational basis related to a
2 legitimate government interest for the disparate
3 treatment, I think it is proper to inquire into the
4 motive, however, Judge -- or, I'm sorry, Your Honor --
5 because I have to show that there was a denial of equal
6 protection.

7 That connotes purposeful conduct on behalf of
8 the village, so I think that an allegation that they were
9 retaliating against them for filing a lawsuit shows that
10 it was not simply uneven law enforcement, or an accidental
11 disparate treatment, but an --

12 QUESTION: I suppose the way Judge Posner's view
13 could be explained is that there is a presumption that the
14 government acted for a reasonable purpose, and if there's
15 specific evidence to the contrary, then the case can
16 proceed and it just becomes a pleading case.

17 MR. WIMMER: Well, yes. At this point I have
18 alleged that it was irrational.

19 QUESTION: I thought you had both.

20 MR. WIMMER: And --

21 QUESTION: No conceivable rational purpose, and
22 animus.

23 MR. WIMMER: I believe I do, Your Honor. I
24 allege --

25 QUESTION: And if you get rid of the former, I

1 guess we have a Federal lawsuit even if the land was set
2 aside as coastal land, you know, a wonderful reason, has
3 the most beautiful view in the State, but it turns out,
4 it's alleged, that the real reason he did it is, he didn't
5 like the landowner.

6 I mean, once you get rid of a conceivable,
7 rational basis, you open the court to lawsuits no matter
8 how good the reason was, as long as there's an allegation
9 of animus.

10 MR. WIMMER: That's right, although I think in
11 this case that's not what we have, since I've alleged
12 both, and the allegations of the complaint have to be
13 accepted as true at this point.

14 Briefly, with respect to exhaustion of remedies,
15 that's another question which I believe is not properly
16 before the Court for a number of reasons. It was not ever
17 mentioned prior to the brief on the merits by the village.
18 It was not mentioned in the district court, where I could
19 have amended the complaint if there was a technical
20 deficiency, and also, even if Your Honors intend to
21 address the exhaustion of remedies issue, I believe the
22 Court has already held at least two times that one need
23 not exhaust his State remedies in order to state a claim
24 for a denial of the Equal Protection Clause.

25 And on this rationally related argument, what

1 this really comes down to is whether it was rationally
2 related to a legitimate State interest for Willowbrook to
3 demand private property rights of Mrs. Olech and the other
4 plaintiffs in the State court case as a condition of
5 receiving running water when those rights were not
6 demanded of others as a condition of receiving running
7 water, and where the private property rights were not
8 required for installation and maintenance of the water
9 main.

10 That's what the complaint says, and I think that
11 question really answers itself. There's not a rational
12 basis based on the face of the complaint.

13 One other point the village makes is, they argue
14 that the road was already in existence, and that they
15 simply desired to establish their right to maintain it.
16 The complaint does not allege how wide the road is, and
17 since it's not in the record I'm not going to state how
18 wide it is, but I think if that's a significant fact the
19 inference should be drawn in favor of the plaintiff that
20 the road is substantially narrower than the 66-foot road
21 that they were demanding be put in.

22 So I'd like to thank the Court. In conclusion,
23 I believe that the Equal Protection Clause applies to
24 everybody, whether they're a member of a class or group or
25 not. It certainly applies to Mrs. Olech. Thank you.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wimmer.
2 The case is submitted.

3 (Whereupon, at 12:02 p.m., the case in the
4 above-entitled matter was submitted.)

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