**Hiring Wreckers:**

**The Integrity Collision Case**

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**“Class of One” Equal Protection Lawsuits and**

**Governmental Discretion**

**I. Introduction.**

 The Fourteenth Amendment provides, in part:

No State shall … deny to any person within its jurisdiction the equal protection of the laws.[[1]](#endnote-1)

 At first glance, the Equal Protection Clause of the Fourteenth Amendment[[2]](#endnote-2) seems straightforward. It is generally understood as “essentially a direction that all persons similarly situated should be treated alike” by the state.[[3]](#endnote-3) Simple, right? But state and local governments treat people differently all the time. How far, then, does the Equal Protection Clause go in ensuring all persons are treated equally under the law?

 This paper will attempt to provide some guidance on the scope of Equal Protection, although it is not intended as a comprehensive legal explanation of a complex subject. To begin, the paper will address some basic concepts of Equal Protection and its reach. (Section II). Next, it will address a particular type of Equal Protection claim—known as a “class of one” claim. (Section III). Finally, it will briefly discuss a recent Equal Protection claim brought against a local city in federal court and attempt to provide some practical advice. (Section IV)

**II. Equal Protection basics.**

 As stated above, government regularly treats people differently from one another. The scope of Equal Protection depends, in part, upon whom is treated differently. When the government is treating persons differently on the basis of “race, alienage, or national origin,”[[4]](#endnote-4) the courts will review under a standard called “strict scrutiny.”[[5]](#endnote-5) Under this test, the state’s classification is constitutional only if it is “narrowly tailored to further compelling governmental interests.”[[6]](#endnote-6) Gender has been subjected to “intermediate scrutiny,” which requires that the classification be substantially related to achieving important governmental objectives.[[7]](#endnote-7) The lowest level of Equal Protection review by the courts is when none of the classes above are involved. In such a case, the courts are deferential to state action; there need only be a “rational basis” for the classification.[[8]](#endnote-8)

 In addition, a lawsuit may be subject to different standards. In suits by an employees against an employer, the employee may invoke Title VII of the Civil Right Act rather than the Equal Protection Clause itself. Title VII of the Civil Rights Act prohibits employers from taking adverse employment actions based upon the “race, color, religion, sex, or national origin” of the employee,[[9]](#endnote-9) without a different level of scrutiny for gender-based claims. In the absence of direct evidence of discrimination, employees must generally show that they:

(1) are a member of a protected class;

(2) were the subject of an adverse employment action;

(3) were treated less favorably because of membership in that protected class than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances.[[10]](#endnote-10)

**III. “Class of one” claims.**

 The Supreme Court has stated, “[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons,* not *groups*.”[[11]](#endnote-11) But the above discussion shows that Equal Protection claims often relate to groups or classifications of persons. When a person asserts that he or she, individually, was treated differently than other similarly situated persons, there may be the opportunity to assert what has become known as a “class of one” Equal Protection claim.

 In *Village of Willowbrook v. Olech*, Olech asked the Village to connect her property to the municipal water supply.[[12]](#endnote-12) The Village conditioned the connection on Olech granting a 33-foot easement, when other property owners who had sought connections to the water supply were only required to grant 15-foot easements.[[13]](#endnote-13) Olech sued for a violation of the Equal Protection Clause.[[14]](#endnote-14)

 After the district court dismissed her complaint on the grounds that Olech had not pleaded a valid Equal Protection claim, the Court of Appeals for the Seventh Circuit reversed.[[15]](#endnote-15) The Seventh Circuit held that the case could not be dismissed on the pleadings (even if Olech did not eventually prevail), because Olech had sufficiently alleged that she was treated differently based on “totally illegitimate animus” towards her from the Village.[[16]](#endnote-16) Specifically, Olech alleged that she had formerly sued the Village, and won damages, for flood damage caused by the Villages negligent installation of flooding culverts.[[17]](#endnote-17) The “substantial ill will” caused by the lawsuit provided the motivation for the Village to demand more than double the width of the standard easement from Olech.[[18]](#endnote-18) The Seventh Circuit reasoned that Olech would have to prove that the Village’s differential treatment of her was caused by an illegitimate reason (e.g., vindictive animus).[[19]](#endnote-19) The Seventh Circuit also concluded that the requirement of a totally illegitimate animus would prevent “turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case.”[[20]](#endnote-20)

 The Supreme Court accepted the case “to determine whether the Equal Protection Clause gives rise to a cause of action on behalf of a ‘class of one’ where the plaintiff did not allege membership in a class or group.”[[21]](#endnote-21) The Supreme Court did not address “the Village’s subjective motivation” or “subjective ill will” relied on by the Seventh Circuit.[[22]](#endnote-22) Rather, in a very brief opinion, the Supreme Court held that a plaintiff alleges a valid “class of one” claim “where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”[[23]](#endnote-23) One justice concurred, and wrote a separate opinion stating that the “added factor” of “an illegitimate desire to ‘get’ [the plaintiff]” was “sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right.”[[24]](#endnote-24)

 In the wake of *Olech*, courts struggled with defining the exact scope of a “class of one” claim, including whether ill will or some other improper motivation was a necessary part of such claim. Then, eight years after *Olech*, the Supreme Court addressed class of one claims again.[[25]](#endnote-25)

 In *Engquist v. Oregon Department of Agriculture*, the Court addressed public employment, providing guidance on the when a class of one claim may be appropriate. Engquist was hired to a position within a particular division of the Oregon Department of Agriculture.[[26]](#endnote-26) She experienced repeated problems with a fellow employee, Hyatt, and reported these to her supervisor.[[27]](#endnote-27) The supervisor required Hyatt to attend diversity and anger management training.[[28]](#endnote-28) After approximately nine years, an assistant director of the Department was assigned to take responsibility over the division that employed Engquist.[[29]](#endnote-29) Engquist and Hyatt both applied for a managerial position that had opened up; despite Engquist having more relevant experience, the director chose Hyatt for the position.[[30]](#endnote-30) Later, Engquist was informed that her positon would be eliminated, effectively laying her off.[[31]](#endnote-31)

 Engquist sued alleging multiple theories, including a class of one Equal Protection claim.[[32]](#endnote-32) Engquist argued, based on *Olech*, that “the Equal Protection Clause forbids public employers from irrationally treating one employee differently from others similarly situated, regardless of whether the different treatment is based on the employee’s membership in a particular class.”[[33]](#endnote-33) The Supreme Court disagreed, stating two reasons.

 First, relying on other cases involving constitutional rights, the Supreme Court explained, “[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising ‘the power to regulate or license, as lawmaker,’ and the government acting ‘as proprietor, to manage [its] internal operation.’”[[34]](#endnote-34) The rationale is largely pragmatic:

Given the “common-sense realization that government offices could not function if every employment decision became a constitutional matter,” … “constitutional review of government employment decisions must rest on different principles than review of ... restraints imposed by the government as sovereign[.]”[[35]](#endnote-35)

 Second, the Supreme Court explained that its Equal Protection cases “ha[ve] typically been concerned with governmental classifications that ‘affect some groups of citizens differently than others.’”[[36]](#endnote-36) That is, generally, plaintiffs in Equal Protection generally contend that they had been arbitrarily classified as members of an “identifiable group.”[[37]](#endnote-37) However, the Court again recognized that the Equal Protection Clause protects people, not groups, explaining, “When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being “treated alike, under like circumstances and conditions.”[[38]](#endnote-38)

 Elaborating on *Olech* and the cases on which the Court relied in the *Olech* opinion, the court stated,

What seems to have been significant … was the existence of **a clear standard against which departures, even for a single plaintiff, could be readily assessed**. There was no indication in *Olech* that the zoning board was exercising **discretionary authority based on subjective, individualized determinations** ….[[39]](#endnote-39)

After further explanation of *Olech* and the opinions cited in *Olech*, the Court came back to the contrast identified by the bolded language in the above quotes:

There are some forms of state action, however, which by their nature involve discretionary decision making based on a vast array of subjective, individualized assessments. In such cases the rule that people should be “treated alike, under like circumstances and conditions” is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.[[40]](#endnote-40)

Recognizing that “employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify,” the Court concluded that “the class-of-one theory of equal protection … is simply a poor fit in the public employment context.”[[41]](#endnote-41)

**IV. Integrity Collision discussion and practical advice.**

 Although seemingly broad at first glance, a “class of one” theory of Equal Protection is subject to limits. Essentially, when the decision at issue is one based on a number of subjective factors and within the discretion of the government actor, then a class of one theory is not available.[[42]](#endnote-42) One area of potential class of one claims is likely very familiar to municipal governments and law enforcement, in particular: claims of selective enforcement or selective prosecution (“selective prosecution,” for shorthand).

 The classic formulation for a selective prosecution claim is stated by the Supreme Court:

[T]o successfully bring a selective prosecution or enforcement claim, a plaintiff must prove that the government official’s acts were **motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right**.[[43]](#endnote-43)

Thus, selective prosecution is generally understood as many people probably envision the Equal Protection clause. That is, the government may not single a person out for differential treatment based upon a persons membership in a protected group (e.g., a certain religion or the a group of people exercising the right to free speech).

 But how might *Olech* and a class of one theory apply? In *Engquist*, the Supreme Court, in explaining its holding relating to employment, used the following example:

Suppose, for example, that a traffic officer is stationed on a busy highway where people often drive above the speed limit, and there is no basis upon which to distinguish them. If the officer gives only one of those people a ticket, it may be good English to say that the officer has created a class of people that did not get speeding tickets, and a “class of one” that did. But assuming that it is in the nature of the particular government activity that not all speeders can be stopped and ticketed, complaining that one has been singled out for no reason does not invoke the fear of improper government classification. Such a complaint, rather, challenges the legitimacy of the underlying action itself—the decision to ticket speeders under such circumstances. Of course, an allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns. But allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. **It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized**.[[44]](#endnote-44)

Thus, before *Olech* and the class of one theory, the Supreme Court stated, “It is appropriate to judge selective prosecution claims according to **ordinary equal protection standards**.”[[45]](#endnote-45)

 Another area subject to Equal Protection claims has been the selection of wreckers or tow trucks by law enforcement.[[46]](#endnote-46) Recently, the Fifth Circuit addressed a class of one claim by towing companies that asserted they were treated differently than other towing companies because they were not placed on a towing rotation list. In *Integrity Collision Center v. City of Fulshear*, the City withdrew from the County wrecker rotation program for selecting towing companies to perform non-consent tows and began its own rotation program.[[47]](#endnote-47) Two towing companies were selected and two, Integrity Collision and Buentello Wrecker (collectively, “Integrity”), were excluded.[[48]](#endnote-48) The decision was made by the chief of police, and “[t]here was no formal process for reaching that decision.”[[49]](#endnote-49)

 When Integrity requested information on the requirements to be included on the rotation, it received a list of requirements. Believing it met each of the requirements, Integrity sued the City for an Equal Protection violation.[[50]](#endnote-50) After conducting discovery in the litigation, Integrity contended that the requirements were not fully followed by the chief. For example, one wrecker company that was placed on the list was supposedly beyond the distance requirement on the list sent to Integrity.[[51]](#endnote-51) Therefore, Integrity contended that the decision to keep it off the towing rotation was as “arbitrary” as the decision by the village in *Olech* to demand a larger easement without a rational reason. However, the chief also stated that other factors, such as reputation and the ability to work together, were important in his decision.[[52]](#endnote-52)

 The Fifth Circuit concluded that the City’s decision to purchase tow services from private companies involved the “same type of ‘subjective, individualized assessments’” as the employment decisions in *Engquist*.[[53]](#endnote-53) The factors going into this decision include “factors that are not reasonably measurable, such as reputation, personal experience, and the particularities of how the city wishes to operate its non-consent tow program.”[[54]](#endnote-54)

 The Fifth Circuit also discussed two additional issues illustrating potential limits to class of one litigations. First, the decision to purchase towing services, like “selecting other outside services, such as a janitorial or pest-control service,” is one that it would be “impractical for the court to involve itself in reviewing” because local governments make “countless discretionary decisions” in carrying out their daily business.[[55]](#endnote-55) Quoting *Engquist*, the Fifth Circuit stated, “The Equal Protection Clause does not require ‘[t]his displacement of managerial discretion by judicial supervision.’”[[56]](#endnote-56)

 Second, the Fifth Circuit also discussed the necessary elements of proof for a class of one claim. To show an Equal Protection violation, Integrity had to show that the City “treat[ed] similarly situated individuals differently *for a discriminatory purpose*.”[[57]](#endnote-57) Discriminatory intent means that the decision was “made at least in part because of its discriminatory effect on Integrity”; it is insufficient to show “mere knowledge that adverse consequences will result.”[[58]](#endnote-58) In other words, differential treatment in favor of someone else is not sufficient to show discrimination against the plaintiff in a class of one claim.[[59]](#endnote-59)

 Comparing *Olech* with *Engquist* and *Integrity* allows one to derive some general rules. First, a class of one is much more likely to be successful when there is clear, objective standard that is generally applied but is not applied or applied differently in one case. In contrast, when the standard (or decision-making) is based upon a number of subjective and highly individualized assessments, it is, by its nature, not susceptible to applying to a large group of people equally. Thus, for example, suppose that a city ordinance or resolution mandated the creation of towing list and set out objective factors for the police department to use when creating the rotation. This hypothetical could result in a successful class of one claim: it is a clear, objective standard “against which departures, even for a single plaintiff, could be readily assessed.”[[60]](#endnote-60)

 In contrast, if a city’s or police department’s criteria involved subjective criteria, such as reputation, or was subject to the sole discretion of city council or the chief of police, then under the rationale of *Engquist*, an inherently subjective and individualized determination is not subject to a class of one claim. Whatever the criteria or procedures are adopted, they should be periodically reviewed and updated.

 As a final caveat: not every decision by a local government enjoys unfettered discretion. For example, statutes govern the bidding process for awarding a contract for the construction of public works[[61]](#endnote-61) and competitive bidding for certain purchase by local governments.[[62]](#endnote-62)

1. U.S. Const. amend XIV, § 1. [↑](#endnote-ref-1)
2. “Although the Fifth Amendment, unlike the Fourteenth, does not contain an equal protection clause, it does contain an equal protection component. ‘[Our] approach to Fifth Amendment equal protection claims has ... been precisely the same as to equal protection claims under the Fourteenth Amendment.’” *Wayte v. United States*, 470 U.S. 598, 608 (1985) (citations omitted). The Fourteenth Amendment applies to the states, but the equal protection component of the Fifth Amendment applies directly to the federal government. [↑](#endnote-ref-2)
3. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). [↑](#endnote-ref-3)
4. In addition to these classifications, a State law that impinges on a fundamental right is subject to “strict scrutiny” review. Fundamental rights include, among others: the right to vote, the right of interstate travel, and rights guaranteed by the First Amendment. *See, e.g.*, *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 102 (1972) (Chicago ordinance that treated picketers differently based on the subject of the picket required to meat strict scrutiny). [↑](#endnote-ref-4)
5. *City of Cleburne*, 473 U.S. at 440. [↑](#endnote-ref-5)
6. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). [↑](#endnote-ref-6)
7. *United States v. Virginia*, 518 U.S. 515, 533 (1996). [↑](#endnote-ref-7)
8. *Heller v. Doe*, 509 U.S. 312, 320 (1993). [↑](#endnote-ref-8)
9. 42 U.S.C. § 2000e-2(a). [↑](#endnote-ref-9)
10. *See, generally, McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). (PLEASE NOTE: this is a generalized statement. The particular facts and form of alleged discrimination can affect the employee’s burden in a given case.) [↑](#endnote-ref-10)
11. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). [↑](#endnote-ref-11)
12. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 563 (2000). [↑](#endnote-ref-12)
13. *Id.* [↑](#endnote-ref-13)
14. *Id.* [↑](#endnote-ref-14)
15. *Id.* at 563–64. [↑](#endnote-ref-15)
16. *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998), *aff’d,* 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). [↑](#endnote-ref-16)
17. *Id.* at 387. [↑](#endnote-ref-17)
18. *Id.* [↑](#endnote-ref-18)
19. *Id.* at 388. [↑](#endnote-ref-19)
20. *Id.* [↑](#endnote-ref-20)
21. *Olech*, 528 U.S. at 564. [↑](#endnote-ref-21)
22. *Id.* at 565. [↑](#endnote-ref-22)
23. *Id.* at 564. [↑](#endnote-ref-23)
24. *Id.* at 566 (Breyer, J., concurring). [↑](#endnote-ref-24)
25. *Engquist v. Oregon Dep’t of Agr.*, 553 U.S. 591, 594 (2008). [↑](#endnote-ref-25)
26. *Id.* [↑](#endnote-ref-26)
27. *Id.* [↑](#endnote-ref-27)
28. *Id.* [↑](#endnote-ref-28)
29. *Id.* [↑](#endnote-ref-29)
30. *Id.* at 594–95. [↑](#endnote-ref-30)
31. *Id.* at 595. [↑](#endnote-ref-31)
32. *Id.* [↑](#endnote-ref-32)
33. *Id.* at 597. [↑](#endnote-ref-33)
34. *Id.* at 598 (quoting *Cafeteria &Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961)). [↑](#endnote-ref-34)
35. *Id.* at 599 (citations omitted). [↑](#endnote-ref-35)
36. *Id.* at 601. [↑](#endnote-ref-36)
37. *Id.* [↑](#endnote-ref-37)
38. *Id.* at 602. [↑](#endnote-ref-38)
39. *Id.* (emphasis added). [↑](#endnote-ref-39)
40. *Id.* at 603. [↑](#endnote-ref-40)
41. *Id.* at 604, 605. [↑](#endnote-ref-41)
42. *See id.* [↑](#endnote-ref-42)
43. *Beeler v. Rounsavall*, 328 F.3d 813, 817–18 (5th Cir. 2003). [↑](#endnote-ref-43)
44. *Engquist*, 553 U.S. at 603–04 (emphasis added). [↑](#endnote-ref-44)
45. *Wayte*, 470 U.S. at 608 (emphasis added). [↑](#endnote-ref-45)
46. *See* *Integrity Collision Ctr. v. City of Fulshear*, 837 F.3d 581, 586 (5th Cir. 2016); *Integrity Collision Ctr. v. City of Sugar Land, Tex.*, CIV.A. H-14-2313, 2015 WL 5737633, at \*6 (S.D. Tex. Sept. 30, 2015); *Chavers v. Morrow*, CIV. A. H-08-3286, 2010 WL 3447687, at \*5 (S.D. Tex. Aug. 30, 2010), *aff’d,* 449 Fed. Appx. 411 (5th Cir. 2011); *Heusser v. Hale*, 777 F. Supp. 2d 366, 384 (D. Conn. 2011) *see also* *Fort Bend County Wrecker Ass’n v. Wright*, 39 S.W.3d 421, 425 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (asserting due process right to presence on tow rotation list); *Wimer v. Holzapfel*, 868 F. Supp. 844, 848 (E.D. Tex. 1994) (same). [↑](#endnote-ref-46)
47. *Integrity Collision Ctr. v. City of Fulshear*, 837 F.3d 581, 584 (5th Cir. 2016). [↑](#endnote-ref-47)
48. *Id.* [↑](#endnote-ref-48)
49. *Id.* [↑](#endnote-ref-49)
50. *Id.* at 584, 585. [↑](#endnote-ref-50)
51. *Id.* at 584. [↑](#endnote-ref-51)
52. *Id.* at 584, 587. [↑](#endnote-ref-52)
53. *Id.* at 587. [↑](#endnote-ref-53)
54. *Id.* [↑](#endnote-ref-54)
55. *Id.* at 588. [↑](#endnote-ref-55)
56. *Id.* [↑](#endnote-ref-56)
57. *Id.* [↑](#endnote-ref-57)
58. *Id.* at 589. [↑](#endnote-ref-58)
59. *Gil Ramirez Group, L.L.C. v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 419 (5th Cir. 2015) (citing *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, Mich.,* 470 F.3d 286, 299 (6th Cir.2006) (rejecting equal protection claim when one vendor “was treated beneficially, but no party was discriminated against”)). [↑](#endnote-ref-59)
60. *Engquist*, 553 U.S. at 602 (emphasis added). [↑](#endnote-ref-60)
61. *See* Tex. Gov’t Code, Chapter 2269. [↑](#endnote-ref-61)
62. *See* Tex. Loc. Gov’t Code, Ch. 262 (competitive bidding procedures for counties). [↑](#endnote-ref-62)