



1-1-2018

"Class of One" Dismissed: A Proposal to Relax the Similarly Situated Test in Cases of Obvious Government Animus

Kyle C. Sproul

Follow this and additional works at: <https://scholarlycommons.pacific.edu/uoplawreview>



Part of the [Law Commons](#)

Recommended Citation

Kyle C. Sproul, *"Class of One" Dismissed: A Proposal to Relax the Similarly Situated Test in Cases of Obvious Government Animus*, 50 U. PAC. L. REV. 151 (2018).

Available at: <https://scholarlycommons.pacific.edu/uoplawreview/vol50/iss1/9>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in The University of the Pacific Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

“Class of One” Dismissed: A Proposal to Relax the Similarly Situated Test in Cases of Obvious Government Animus

Kyle C. Sproul*

TABLE OF CONTENTS

| | | |
|------|---|-----|
| I. | INTRODUCTION..... | 152 |
| II. | BACKGROUND OF THE CLASS OF ONE EQUAL PROTECTION CLAIM..... | 153 |
| | A. <i>The Beginning of Class of One Equal Protection Claims</i> | 154 |
| | B. <i>Applying the Similarly Situated Test Rigorously in Land Use</i> | 156 |
| | C. <i>Current Role of Animus in Equal Protection Claims</i> | 158 |
| III. | PROBLEMS WITH THE CURRENT TESTS | 160 |
| | A. <i>Strict Application of the Similarly Situated Test Eliminates Class of One Claims</i> | 160 |
| | B. <i>Varying Applications of the Similarly Situated Test do not Provide Proper Guidance to Plaintiffs or to State Courts in Evaluating Class of One Claims</i> | 162 |
| IV. | NEW PROPOSAL..... | 164 |
| | A. <i>Sliding Scale Test</i> | 164 |
| | 1. <i>Degree of Similarity</i> | 164 |
| | 2. <i>Actual Evidence of Government Animus</i> | 165 |
| | B. <i>Why the Sliding Scale Test is Necessary</i> | 165 |
| | C. <i>Test Suite</i> | 167 |
| | 1. <i>Government Uses Proper Discretion</i> | 167 |
| | 2. <i>Government Uses Improper Discretion</i> | 168 |
| | 3. <i>Questionable Use of Government Decision-Making Authority</i> . | 170 |
| | 4. <i>When Should “Similarly Situated” Mean Similar or Identical?</i> | 172 |

* J.D., McGeorge School of Law, May 2018; B.S., Biochemistry and Molecular Biology, University of Nevada, Reno, 2014. To my father, Curtis C. Sproul, for his continual support and for being my passion for the law. I would also like to extend special thanks to my family and friends: Mom, Gordon, Megan, Conrad, Alyssa, Kelli, Rachel, Sam, Daniel, Ryan, Michael, Mark, Jared, Nathan, and James. Finally, I owe a much deserved thank you to my advisor Professor John Sprankling and the Volume 48 staff for their tireless effort and assistance.

2018 / *Similarly Situated Test in Cases of Obvious Government Animus*

5. *Actual Evidence of Animus by an Unaffiliated Government Actor*..... 173
6. *Government’s Rational Basis a Pretext for an Impermissible Motive*..... 174
V. CONCLUSION 176

I. INTRODUCTION

A landowner may file a “class of one” equal protection claim when he or she believes that local government decision-making has denied him or her equal protection of the law.¹ In most states, courts require a landowner to prove that the government, without a rational basis, treated him or her differently from other landowners *in a near identical situation*.² This “similarly situated test” furthers a strong policy to protect governments that exercise proper discretion.³ However, it is illogical to require a landowner, who is singled out by obvious government animus, to indicate disparate treatment of another landowner in near identity.⁴ Such a requirement shields a government’s improper use of discretion by placing too steep a burden on plaintiffs who would otherwise have a permissible claim under the Equal Protection Clause.⁵ Therefore, courts should adopt an operable test that will relax the similarly situated test for plaintiffs when the motivation for the government actor’s decision includes showings of animosity.⁶

Dibbs v. Hillsborough County exemplifies the shortfalls of the current test.⁷ In *Dibbs*, Hillsborough County adopted a Community Plan to guide residential development in the northwestern part of the Keystone-Odesa area with the goal of maintaining the region’s rural character.⁸ *Dibbs* contended that the County’s repeated frustration of his plans to develop his several properties was not based

1. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny any person within its jurisdiction the equal protection of the laws.”); *see also* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (contrasting a standard equal protection claim that involves a suspect class from a class of one equal protection claim, where an individual alleges “that [they alone] have been intentionally treated differently from others similarly situated [with] no rational basis for the difference in treatment”).

2. *See infra* Part II.B (discussing the evidentiary burden of a prima facie identical standard in class of one claims).

3. *Pappas v. Town of Enfield*, 18 F. Supp. 3d 164, 185 (D. Conn. 2014) (providing examples of a government exercising proper discretion, such as basing a decision on professional judgement, community need, or public commentary).

4. *See Swanson v. City of Chetek*, 719 F.3d 780, 784 (7th Cir. 2013) (suggesting the requirement is redundant in an equal protection case).

5. *Fenje v. Feld*, 398 F.3d 620, 628 (7th Cir. 2005).

6. *Cf. Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995) (arguing that plaintiffs who are the subject of deliberate animosity “ought to have a remedy in federal court”).

7. *See generally* *Dibbs v. Hillsborough Cty.*, 625 F. App’x 515 (11th Cir. 2015), cert. denied, 136 S. Ct. 2451 (2016).

8. *Id.* at 516.

on any rational application of the Keystone Plan, but instead was based on personal animus toward Mr. Dibbs.⁹ Specifically, Dibbs alleged the County singled him out because of “vindictiveness, maliciousness, animosity, spite or other reasons unrelated to a legitimate governmental interest.”¹⁰

To show personal animus, Dibbs submitted testimony of the County Commissioner, who overheard a County reviewer state, “I think we can stop [Dibbs’s] project by calling sand a mineral.”¹¹ Dibbs also listed other developers the County permitted to opt out of similar community plans¹²—including one who received approval to “connect to water and sewer and increase density, the same as Dibbs.”¹³ Despite Dibbs’s evidence of the County’s animus against him, the court dismissed his claim because he could not prove he was intentionally treated different from a landowner who was permitted to opt out of the Keystone Plan, specifically.¹⁴

On appeal, the United States Supreme Court denied a writ of certiorari without comment, thereby failing to address how to apply the similarly situated test in cases of clear government animus.¹⁵ In Part II, this Comment considers the similarly situated test and its origins, with particular emphasis on the way the circuit courts have interpreted the test.¹⁶ Part III looks at problems courts face when the test is given alternative meanings, and the issues that arise when the test is applied too strictly against the plaintiff.¹⁷ This Comment concludes with Part IV, which defines the proposed test and applies it to hypothetical scenarios and examples that will help prove its validity and practicality.¹⁸

II. BACKGROUND OF THE CLASS OF ONE EQUAL PROTECTION CLAIM

In 1995, courts grappled for the first time with questions regarding how they should consider equal protection rights when a government treats individuals differently from others who are similarly situated.¹⁹ Courts have used the

9. *Dibbs v. Hillsborough Cty.*, 67 F. Supp. 3d 1340, 1346 (M.D. Fla. 2014).

10. *Dibbs*, 625 F. App’x at 518; *see also Dibbs*, 67 F. Supp. at 1345–46, 1355 (pointing to the County’s unnecessary delays of his applications over a ten-year period, including a seven month delay of his excavation permit and a 21 month delay of his approval for a borrow pit. He also claimed the County “disliked” him personally for having won a prolonged legal battle against the County back in 1997, which served as a motivation to deny multiple applications to remove his properties from the Keystone Plan).

11. Brief for Petitioner at 30, *Dibbs v. Hillsborough Cty.*, 625 F. App’x 515 (2015) (No. 15-10152), 2016 WL 1056616.

12. *Dibbs*, 67 F. Supp. 3d at 1355.

13. Brief for Petitioner, *supra* note 11, at 9; *see also id.* at 7 (putting on additional evidence of eleven other borrow pits, some identical in size to Dibbs’ borrow pit, that were approved in a much shorter time period than it took to process his approval).

14. *Dibbs*, 67 F. Supp. 3d at 1355.

15. *Dibbs*, 625 F. App’x 515.

16. *See infra* Part II (looking at the test’s development under case precedent).

17. *See infra* Part III (concerning the test’s ambiguity and its effect on plaintiffs).

18. *See infra* Part IV (putting the proposed test through six hypothetical scenarios or examples).

19. *Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995); *see generally* *Vill. of Willowbrook v. Olech*,

2018 / Similarly Situated Test in Cases of Obvious Government Animus

similarly situated inquiry in wrongful termination cases to assess the commonalities between an employee plaintiff and a co-worker “to suggest that the plaintiff was singled out for worse treatment.”²⁰ This part is divided into three sections: the first looks at the evolution of the class of one claim in different contexts; the second analyzes why courts gravitate towards a strict application of the similarly situated test in land use cases; and the third considers government animus and its current role in class of one claims.²¹

A. The Beginning of Class of One Equal Protection Claims

The first major case to discuss this class of one issue was *Esmail v. Macrane*, where a Naperville mayor sought to deny Esmail’s liquor store licenses arbitrarily and consistently, while granting licenses to similar or less accredited store owners in the area.²² Reversing the lower court’s dismissal of Esmail’s equal protection claim, the Seventh Circuit Court of Appeals found evidence of more than mere unequal treatment, and held that Esmail’s case should have survived the pleading stage because the mayor initiated an “orchestrated campaign of official harassment directed against him out of sheer malice.”²³ Unlike the treatment involved in a nonactionable selective prosecution claim,²⁴ this treatment resulted from the mayor’s solely vindictive motive.²⁵ This class of one theory fits narrowly within the Fourteenth Amendment Equal Protection Clause, and at first *required* an identification of the government’s motivating factor in their decision—a condition not seen in typical, group-based equal protection claims.²⁶

The landmark decision of *Village of Willowbrook v. Olech* was the first Supreme Court case to recognize the class of one equal protection claim in the land use and zoning context.²⁷ There, the United States Supreme Court upheld Olech’s equal protection claim when the Village had told Ms. Olech it would connect her property to the municipal water supply only if she granted the Village a 33-foot easement on her property.²⁸ The Village only required other

528 U.S. 562 (2000) (leaving the word similarly situated undefined).

20. MICHAEL J. CONNOLLY & WALTER B. CONNOLLY, JR., *A PRACTICAL GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY* § 3.04, 21 (Law Journal Press 2d ed. 2006).

21. *See infra* Part II.A, II.B, and II.C, respectively.

22. *Esmail*, 53 F.3d at 178.

23. *Id.* at 179.

24. *See id.* (offering a satirical explanation of claims that would not survive the pleading stage: “If a bad person is treated better than a good person, this is just as much an example of unequal treatment as when a bad person is treated better than an equally bad person or a good person worse than an equally good person.”).

25. *Id.*

26. Benjamin L. Schuster, *Fighting Disparate Treatment: Using the “Class of One” Equal Protection Doctrine in Eminent Domain Settlement Negotiations*, 45 REAL PROP. TR. & EST. L.J. 369, 385 (2010).

27. *See generally* Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (holding that a “homeowner could assert equal protection claim as class of one” in the land use and zoning context).

28. *Id.* at 563.

neighboring landowners to grant the Village a 15-foot easement.²⁹ The Court held this evidence was enough to state a claim under a class of one theory, but declined to comment on whether “subjective ill will” should be required to convert an otherwise “run-of-the-mill zoning case” into one that should be treated as a matter of constitutional protection.³⁰ The lower court in *Olech* had departed from the decision in *Esmail* and definitively held “nothing . . . suggests a general requirement of ‘orchestration’” in class of one equal protection cases.³¹ Since *Olech*, some courts have traditionally read such a requirement into the test,³² while other courts have chosen not to.³³

In his *Olech* concurrence, Justice Breyer famously noted, “zoning decisions . . . will often, perhaps almost always, treat one landowner differently from another.”³⁴ Courts have suggested that different treatment of similarly situated individuals alone will not justify an equal protection claim.³⁵ Furthermore, courts share in this overarching fear that too lax a test may strip local governments of their power and subject their agents to a plethora of personal liability suits.³⁶ Despite these universally recognized fears, circuits apply the similarly situated test differently across the United States.³⁷

Today, a plaintiff must show the following to prevail on a class of one equal protection claim: (1) that he or she was treated differently than others similarly situated, and (2) that the government had no rational basis for the disparate treatment.³⁸ This Comment focuses specifically on the justifications for changing the similarly situated test, since prong (2) is naturally established in cases of readily obvious government animus.³⁹

29. *Id.*

30. *Id.* at 565–66 (Breyer, J., concurring) (“This case, however, does not directly raise the question whether the simple and common instance of a faulty zoning decision would violate the Equal Protection Clause. That is because . . . respondent had alleged an extra factor as well . . . illegitimate animus.”).

31. *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998).

32. *Patterson v. American Fork City*, 67 P.3d 466, 476 (Sup. Ct. Utah 2003) (dismissing the developer’s complaint for failing to state a malicious motive by the city); *Terrazas v. Blaine Cty. ex rel. Bd. of Comm’rs*, 207 P.3d 169, 181 (Sup. Ct. Idaho 2009) (affirming judgment for the county and finding the developer was not intentionally singled out).

33. See generally *Franklin v. City of Merriam*, 2008 U.S. Dist. LEXIS 34543, at *12 (D. Kan. Apr. 25, 2008); *Highland Dev., Inc. v. Duchesne Cty.*, 505 F. Supp. 2d 1129, 1153 (D. Utah 2007) (refusing to affirmatively adopt animus as a requirement).

34. *Vill. of Willowbrook*, 528 U.S. at 565 (Breyer, J., concurring).

35. *E & T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987); see also *Rossi v. W. Haven Bd. of Educ.*, 359 F. Supp. 2d 178, 183 (2005) (“Decisions that are imprudent, ill-advised, or even incorrect may still be rational.”).

36. Shaun M. Gehan, *With Malice Toward One: Malice and the Substantive Law in “Class of One” Equal Protection Claims in the Wake of Village of Willowbrook v. Olech*, 54 ME. L. REV. 329, 332–33 (2002).

37. See Schuster, *supra* note 26 (noting many different applications of the test across the U.S.).

38. *Vill. of Willowbrook*, 528 U.S. at 564.

39. See *Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995) (“If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court.”).

B. *Applying the Similarly Situated Test Rigorously in Land Use*

The Supreme Court in *Olech* left the similarly situated test undefined by failing to address what it means for two landowners to be “similar.”⁴⁰ Scholars, such as Robert Farrell, say the Supreme Court did so to allow lower courts more discretion in deciding how to best apply the similarly situated test.⁴¹ There is, however, a deeply-rooted sentiment in constitutional law that, in land use, the Fourteenth Amendment Equal Protection Clause protects persons from intentional discrimination, “whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”⁴² Because the similarly situated test is central to the resolution of a class of one dispute, it follows that many courts would afford the test the same scrutiny as other claims of discrimination.⁴³

Accordingly, circuit courts have increasingly applied one definition—*prima facie* identical.⁴⁴ These courts have trended towards a strict interpretation of the test based in part on a desire to alleviate this fear of constitutionalizing every dispute involved in land use decisions.⁴⁵ This fear is demonstrated by the *Olech* case having been cited by over 4,500 published opinions since the case was decided 15 years ago.⁴⁶ Additionally, one study concluded that plaintiffs had prevailed in 35% of class of one claims since *Olech*, compared to just 9% of plaintiffs surveyed in ordinary rational basis cases over a 25 year period.⁴⁷ This is why, when plaintiffs challenge government action involving planning, master-plans, or real estate development, courts are quick to draw sharp distinctions and their own conclusions regarding the plaintiff and “those alleged to be similarly situated yet treated differently”—commonly known as a comparator.⁴⁸

While Courts apply the same legal standard, variations on the explicit

40. See generally *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (neglecting to define at what point two landowners are “similar”).

41. Robert C. Farrell, *Classes, Persons, Equal Protection, and Village of Willowbrook v. Olech*, 78 WASH. L. REV. 367, 412 (2003).

42. *Sioux City Bridge Co. v. Dakota Cty.*, 260 U.S. 441, 445 (1923) (citing a host of analogous decisions).

43. *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1009 (7th Cir. 2004) (“The reason that there is a ‘similarly situated’ requirement in the first place is that at their heart, equal protection claims, even ‘class of one’ claims, are basically claims of discrimination.”).

44. *United States v. Moore*, 543 F.3d at 891, 896 (7th Cir. 2008) (quoting *Racine Charter One, Inc. v. Racine Unified Sch. Dist.*, 424 F.3d 677, 680 (7th Cir. 2005)); see also *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1204 (11th Cir. 2007); *Prestopnik v. Whelan*, 249 F. App’x 210, 213 (2d Cir. 2007); and *Jicarilla Apache Nation v. Rio Arriba Cty.*, 440 F.3d 1202, 1213 (10th Cir. 2006).

45. See *Griffin Indus.*, 496 F.3d at 1207 (“[T]o avoid constitutionalizing every state regulatory dispute . . . we are obliged to apply the ‘similarly situated’ requirement with rigor.”).

46. Westlaw search of *Olech v. Willowbrook* indicates 4,579 citing decisions as of 4/1/2017. WESTLAW.

47. Farrell, *supra* note 41, at 416–17.

48. Kevin D. Caton, *Class-of-One Equal Protection Claims Based Upon Real Estate Development, Zoning, and Planning*, 68 A.L.R. 6th 229 Art. 1 § 2 (2011).

language suggest a disagreement on the level of scrutiny courts should afford the similarly situated test.⁴⁹ In the Eleventh Circuit case *Campbell v. Rainbow City*, the United States Court of Appeals applied the highest threshold of the similarly situated test imaginable, holding, “for any development to be similarly situated to [p]laintiffs’ proposed project, it must be *prima facie identical* in all relevant respects.”⁵⁰ This is a fact-specific inquiry, requiring plaintiffs to show that similarities between themselves and their comparators are “extremely high.”⁵¹

The Seventh Circuit applied a slight variation on the test in *Ajayi v. Aramark Business Services*, holding that a plaintiff employee’s claim failed because she could not show she was “treated less favorably than” an employee who was “directly comparable to her in all material respects.”⁵² On the other hand, *Dartmouth Review v. Dartmouth College* is significantly cited for its application of the test.⁵³ There, the First Circuit Court of Appeals held “[e]xact correlation is neither likely nor necessary,” and suggested that a prudent person should at least find a rough equivalence between the comparators.⁵⁴ In what is likely the weakest application of the test, the Sixth Circuit Court of Appeals held in *Bench Billboard Co. v. City of Cincinnati* “a court should not demand exact correlation, but should instead seek ‘relevant similarity.’”⁵⁵

These differing interpretations of the similarly situated test demonstrate that some courts are willing to depart from such a strict application of the rule.⁵⁶ Aggrieved plaintiffs are increasingly met with judges that seem to go out of their way to find distinctions between identified comparators.⁵⁷ This is true even though some circuit courts have found a similarly situated analysis is best

49. See *infra* Part II.B (providing four case examples of differing levels of scrutiny).

50. *Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006) (citing *Racine Charter One, Inc. v. Racine Unified Sch. Dist.*, 424 F.3d 677 (2005)); *Purze v. Vill. of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2004) (holding that to be considered “similarly situated,” comparators must be “*prima facie identical* in all relevant respects”); *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004) (“It is clear that similarly situated individuals must be very similar indeed.”).

51. *Prestopnik v. Whelan*, 249 F. App’x 210, 213 (2d Cir. 2007) (“[Prima facie identical] requires a showing that the level of similarity between the plaintiff and the person(s) with whom she compares herself is “extremely high” - so high (1) that no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy, and (2) that the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake.”).

52. *Ajayi v. Aramark Bus. Servs.*, 336 F.3d 520, 531–532 (7th Cir. 2003).

53. *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 19 (1st Cir. 1989) (LEXIS search indicates over 400 citing decisions as of January 8th, 2017).

54. *Id.*

55. *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 987 (6th Cir. 2012).

56. See generally *id.* (illustrating one of the least strict applications of the test yet); see also *Rollins v. Mabus*, 627 F. App’x 618, 620 (9th Cir. 2015); *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1114 (9th Cir. 2011); *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003) (construing the similarly situated requirement to mean similar rather than identical).

57. Michael S. Giaimo, *Challenging Improper Land Use Decision-Making Under the Equal Protection Clause*, 15 FORDHAM ENVTL. L. REV. 335, 348 (2003).

2018 / *Similarly Situated Test in Cases of Obvious Government Animus*

performed by a jury.⁵⁸ A project applicant already faces an uphill-battle in succeeding on such a strict test because proposed development projects are so unique in their “location, access to roadways, zoning district[s], topography, size[,] and previous use.”⁵⁹ Sharing this sentiment, at least one court has rationalized that the differing applications of the similarly situated requirement may depend upon the complexity of the plaintiff’s request:

Governmental decision-making challenged under a “class of one” equal protection theory must be evaluated in light of the full variety of factors that an objectively reasonable governmental decision maker would have found relevant in making the challenged decision. Accordingly, when dissimilar governmental treatment is not the product of a one-dimensional decision—such as a standard easement or a tax assessed at a pre-set percentage of market value—the “similarly situated” requirement will be more difficult to establish.⁶⁰

Courts are looking to strike a perfect balance with the similarly situated test that will afford state actors adequate discretion without disrupting the federal and state court balance over decisions involving constitutional review.⁶¹

C. *Current Role of Animus in Equal Protection Claims*

A majority of courts have concluded that government animus or subjective ill-will is not an express requirement of a class of one equal protection claim, but is at least some evidence that a claim exists.⁶² However, the trend of courts post-*Olech* is to follow the Breyer concurrence and include ill-will as a necessary requirement of a claim, instead of following the Supreme Court’s majority opinion.⁶³ For example, cases out of the Second and Seventh Circuits have dismissed class of one equal protection claims “if the plaintiff cannot [prove] the government had an illegitimate motive, such as discrimination, retaliation,

58. See *Harlen Assocs. v. Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001) (suggesting judges can exercise their power in summary judgment).

59. *Giaimo*, *supra* note 57, at 349; see also *McDonald’s Corp. v. City of Norton Shores* 102 F. Supp. 2d 431, 438 (W.D. Mich. 2000) (denying applicant for naming comparator restaurants on streets different from his own project); *Ind. Land Co. v. City of Greenwood*, 2003 U.S. Dist. LEXIS 16777, at *24 (S.D. Ind. Sept. 4, 2003) (denying applicant for naming comparators who were approved under a different city council); *Swanson v. City of Chetek*, 719 F.3d 780, 782 (7th Cir. 2013) (denying applicant for naming comparators without a front fence, instead of those with both a front fence and a boundary fence).

60. *Griffin Indus. v. Irvin*, 496 F.3d 1189, 1203–04 (11th Cir. 2007).

61. See *id.* at 1203 (“Too broad a definition of similarly situated could subject nearly all state regulatory decisions to constitutional review in federal court and deny state regulators the critical discretion they need to effectively perform their duties.”).

62. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (indicating eight justices (absent Breyer) in their per curiam opinion for the *Olech* court decided not to include the idea of subjective ill will as a requirement); see also *Giaimo*, *supra* note 57, at 343.

63. David Pettit & Michael Schafner, *In a Class of Their Own: Speaking Out at a Land Use Forum May Be All That a Plaintiff Needs to Do to Establish a “Class Of One” Civil Rights Cause of Action*, 26 L.A. LAW. 39, 40 (2004).

‘malicious intent’ or some other ‘bad faith’ motivation.’⁶⁴ These circuits may require evidence of intentional mistreatment because the second prong of a class of one equal protection claim, that the government have no rational basis for the disparate treatment, already affords the government decision-maker great deference.⁶⁵

Few courts have applied a weaker similarly situated standard in cases of readily obvious animus, and have not required plaintiffs to identify exact disparate treatment in their comparators.⁶⁶ To illustrate, *Geinosky v. City of Chicago* addressed a situation where it was nearly impossible for the plaintiff to point out a similarly situated comparator because the government actor’s animus was so extreme.⁶⁷ In *Geinosky*, officers of the Chicago Police Department issued 24 parking citations concerning Geinosky’s Toyota within one year.⁶⁸ The factual record “reveal[ed] a disturbing pattern,” where one officer issued Geinosky 13 tickets alleging parking violations on specific dates at exactly 10:00 p.m.⁶⁹ Some tickets contradicted one another, implying “that the Toyota was in two places almost at once.”⁷⁰ Officers issued other tickets to Geinosky’s Toyota even after he had sold it.⁷¹ The district court dismissed Geinosky’s class of one claim for failing to point out a comparator who had also received 24 parking tickets within one year.⁷² In its reversal, the Seventh Circuit Court of Appeals granted Geinosky’s claim, with no proof of direct motive on the department’s part, because the sheer volume of tickets and the nature of their dispersal was enough to conclude animus was present.⁷³

In the land use context, *Swanson v. City of Chetek* held that a homeowner who proves direct evidence of government animus against him needs to show only that “harassment, yelling, arbitrary denials and frivolous litigation do not normally follow requests for fence permits” to survive a class of one equal protection claim.⁷⁴ Unlike traditional class of one land use claims, these courts do not seem as concerned that such a ruling would open the floodgates to frivolous litigation against government actors.⁷⁵ The *Geinosky* court reasoned that claims

64. Giaimo, *supra* note 57, at 342 (citing *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000), *cert. denied*, 531 U.S. 1080 (2001); *Purze v. Vill. of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2001); *Cruz v. Town of Cicero*, 275 F.3d 579, 587 (7th Cir. 2001).

65. See *infra* Part II.A (listing requirements of satisfying a class of one equal protection claim); see also Giaimo, *supra* note 57, at 342–43 (explaining the highly deferential nature of the rational basis inquiry).

66. E.g., *Swanson v. City of Chetek*, 719 F.3d 780, 784 (7th Cir. 2013); see also *Geinosky v. City of Chicago*, 675 F.3d 743, 749 (7th Cir. 2012) (noting plaintiff’s general assertion enough in this instance).

67. *Geinosky*, 675 F.3d at 749.

68. *Id.* at 745.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Geinosky*, 675 F.3d at 746–47.

73. *Id.* at 748, 751.

74. *Swanson v. City of Chetek*, 719 F.3d 780, 785 (7th Cir. 2013).

75. *Geinosky*, 675 F.3d at 748 (“We do not credit the city’s assertion that allowing this suit will open the

2018 / *Similarly Situated Test in Cases of Obvious Government Animus*

of this extreme nature are rare, and therefore the discretion law enforcement officials have when engaging in random law enforcement remains unaffected.⁷⁶ Therefore, case examples have shown an increasing role of recognizing animus in class of one land use claims.⁷⁷

III. PROBLEMS WITH THE CURRENT TESTS

Plaintiffs aggrieved by deliberate animus have difficulty meeting the prima facie identical standard and other strict variations of the test, especially when development projects—much like people—are almost never identical.⁷⁸ “We are looking for comparators, not ‘clone[s],’” begs the Seventh Circuit.⁷⁹ Further, plaintiffs cannot foresee what comparisons or distinctions are necessary to satisfy the test because “the picture [among] circuits is very mixed.”⁸⁰

This section addresses why imposing strict standards on plaintiffs who have suffered readily obvious animus is dangerous.⁸¹ Finally, the unclear “role of motive or intent” as animus in class of one claims fails to provide better guidance to plaintiffs or help resolve circuit conflict.⁸²

A. *Strict Application of the Similarly Situated Test Eliminates Class of One Claims*

As explained in *Campbell*, the Eleventh Circuit specifically requires plaintiffs to identify prima facie identical comparators—a standard so strict that it is nearly impossible for plaintiffs to meet and calls into question the utility of class of one claims.⁸³

Whitmore v. Department of Labor considered the Eleventh Circuit’s strict interpretation in a whistleblower context to determine “what it means for [two] employees to be ‘similarly situated.’”⁸⁴ After 37 years as an OSHA employee, Robert Whitmore began making public disclosures about OSHA’s failure to

floodgates to a wave of ordinary malicious prosecution (or other tort) cases brought as constitutional class-of-one claims.”).

76. *Id.* at 748–49.

77. *E.g.*, *Swanson*, 719 F.3d 780; *Geinosky*, 675 F.3d 743.

78. *See infra* Part II.A (discussing Breyer’s view that distinctions between two projects can almost always be made).

79. *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012); *see also Tapalian v. Tusino*, 377 F.3d 1, 6 (1st Cir. 2004) (“Exact correlation is neither likely nor necessary.”).

80. *Marcelle v. Brown County Corp.*, 680 F.3d 887, 892 (7th Cir. 2011) (Posner, J., concurring).

81. *See infra* Part III.A (noting the issues imposed by a strict interpretation of the similarly situated test).

82. *Marcelle*, 680 F.3d at 900 (Easterbrook, J., concurring); *see also infra* Part III.B (noting how courts and plaintiffs sometimes struggle with the requirements).

83. *See e.g.*, *Campbell v. Rainbow City*, 434 F.3d 1306, 1315 (11th Cir. 2006) (arguing plaintiff’s comparators, both of whom sought approval for their developments, were not prima facie identical because only one sought *tentative* approval).

84. *Whitmore v. Dep’t of Labor*, 680 F.3d 1353, 1373 (Fed. Cir. 2012).

properly enforce its records.⁸⁵ The whistleblowing effort caused tension between Whitmore and his direct supervisor Joe Dubois, which led to multiple spats and argumentative altercations.⁸⁶ With a seemingly equal display of misconduct from both sides, the last straw involved an incident resulting in Whitmore's termination and Dubois's protection from discipline.⁸⁷

The court evaluated the circumstances of the differential treatment and Whitmore's whistleblower defense by applying a similarly situated test, inquiring as to "any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated."⁸⁸ Both Dubois and Whitmore worked in the same OSHA department, held nearly identical positions, and were engaged in similar inappropriate workplace behavior.⁸⁹ The administrative judge contrarily concluded that no meaningful comparison could be made regarding the different treatment solely because Whitmore was the instigator.⁹⁰

The Federal Circuit Court of Appeals disagreed with the lower court and refused to read the similarly situated test "so narrowly as to require virtual identity" on the issue of similarly situated non-whistleblowers.⁹¹ The court believed such a strict interpretation "effectively reads the [similarly situated test] out of our precedent."⁹² Echoing Justice Breyer's concurrence in *Olech*, the *Whitmore* court admonished the test's strict interpretation by noting "[o]ne can always identify characteristics that differ between two persons to show that their positions are not 'nearly identical,' or to distinguish their conduct in some fashion."⁹³

Conversely, the Eastern District Court of New York in *Payne v. Huntington Free School District* reached the opposite holding for the governing school board on an equally narrow interpretation of the similarly situated test.⁹⁴ In *Payne*, a part-time school teacher, who happened to be married to the school superintendent, initiated a class of one suit when she was terminated from her position.⁹⁵ With no guidance, the court employed a very strict view of the similarly situated test and used the husband's status as a superintendent to distinguish all other comparators offered by the school teacher.⁹⁶ No one else in

85. *Id.* at 1357.

86. *See id.* at 1358–60 (noting instances such as denying paid leave, cyber-bullying, and other in-office antics).

87. *Id.* at 1360.

88. *Id.* at 1372.

89. *Whitmore*, 680 F.3d at 1373.

90. *Id.* at 1372.

91. *Id.* at 1373.

92. *Id.*

93. *See infra* Part II.B (discussing Justice Breyer's concurring opinion); *Whitmore*, 680 F.3d at 1373.

94. *Payne v. Huntington Free Sch. Dist.*, 219 F. Supp. 2d 273, 281 (E.D.N.Y. 2002).

95. *Id.* at 278–79 (arguing she was treated differently from other school teachers similarly situated).

96. *Id.* at 280.

the district was a “superintendent’s wife” specifically, and the court considered no other supervisory-subordinate relationships as similarly situated to the claimant.⁹⁷

Decisions like these illustrate the uphill battle plaintiffs face and allow future courts to reach pre-determined results.⁹⁸ Essentially, this “virtual identity” test risks discouraging plaintiffs from bringing class of one claims and leaves them without a chance in court.⁹⁹ Courts seem to prefer stopping frivolous litigation over preserving meritorious claims in the class of one context.¹⁰⁰ This preference has prompted other hard and fast rules that attempt to take class of one claims out of existence.¹⁰¹ As former Supreme Court Justice Stevens put it, “[e]ven if some surgery were truly necessary to prevent governments from being forced to defend a multitude of equal protection ‘class of one claims,’ the Court should use a scalpel rather than a meat-axe.”¹⁰² These decisions and scholarly commentary illustrate how a narrow interpretation risks preventing plaintiffs from ever succeeding on a class of one claim, because finding a similar comparator is nearly impossible in unusual cases of obvious animus.¹⁰³

B. Varying Applications of the Similarly Situated Test do not Provide Proper Guidance to Plaintiffs or to State Courts in Evaluating Class of One Claims

Despite the current trend in using a prima facie identical standard, many circuits have employed their own version of the similarly situated test in a class of one claim.¹⁰⁴ First, the *Olech* Court clouded land use class of one claims by leaving the similarly situated test undefined and failing to explain key words pleaded by the landowner, such as “irrational” and “wholly arbitrary.”¹⁰⁵ A split

97. *Id.* at 278, 280.

98. *See* Farrell, *supra* note 41, at 413.

99. *See id.* (“By insisting that any prospective members of the comparison class not differ in any way from the plaintiff, the court virtually foreordained the result that the plaintiff could not find any similarly situated persons and thus her equal protection claim would fail.”).

100. *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2160 (2008) (Stevens, J., dissenting); *see also* *Griffin Indus. v. Irvin*, 496 F.3d 1189, 1208 (11th Cir. 2007); *Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1059 (6th Cir. 1996) (“[T]he presence of personal animosity should not turn an otherwise valid enforcement action into a violation of the Constitution.”).

101. Matthew C. Juneau, *Surgery or Butchery? Engquist v. Oregon, Class-of-One Equal Protection, and the Shift to Categorical Treatment of Public Employees’ Constitutional Claims*, 70 LA. L. REV. 313, 344 (2009) (proving that *Engquist’s* per se rule banning class of one claims in the public employment context “required the automatic dismissal of thirty-one of the thirty-six class of one claims examined”).

102. *Engquist*, 128 S. Ct. at 2158.

103. Since the *Olech* decision in 2000, the Eleventh Circuit has ruled against Plaintiffs on five out of six occasions and has overturned the one judgment in favor of the plaintiff by applying its ‘nearly identical’ standard in all cases. LEXIS.

104. *See infra* Part II.B (providing case examples).

105. *See* *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (failing to define the test); *Marcelle v. Brown Cty. Corp.*, 680 F.3d 887, 890 (7th Cir. 2011).

Seventh Circuit Court in *Marcelle v. Brown County Corporation*¹⁰⁶ issued an advisory opinion to try and resolve *Olech*'s ambiguity, but admitted that unless the "role of motive and intent in class of one suits" is defined,¹⁰⁷ lower court judges may never agree on "what those principles [concerning a class of one claim] should be."¹⁰⁸

Second, ambiguity causes courts to identify unnecessary distinctions between comparators.¹⁰⁹ For example, Judge Roger's dissent in an Eighth Circuit female prisoner equal protection case criticized the application of the similarly situated test for fixating on irrelevancies such as the dimensions of the two prison facilities.¹¹⁰ In the land use context, one scholar notes how difficult it is to "compare the resulting apples and oranges" when applying the current similarly situated tests against landowners.¹¹¹ "Every parcel is unique. Every owner's circumstances are different"—resulting in courts applying the test in highly unpredictable ways.¹¹² While courts recognize that class of one claims often require "a comprehensive and largely subjective canvassing of all possible relevant factors"¹¹³ when pinpointing differential treatment, a uniformly applied test in obvious animus cases is necessary to avoid confusion and disagreements among Circuit Courts.¹¹⁴

The fact-intensiveness of each case makes it seemingly impossible for courts to apply a test suitable for each situation, but this is not ordinarily the case when the facts reveal the clearest examples of government favoritism.¹¹⁵ Therefore, it is possible that a specific and detailed account of the test, its preferred factors, and how courts apply them would better provide guidance for class of one judges and plaintiffs when conducting a similarly situated analysis.¹¹⁶

106. *Marcelle*, 680 F.3d at 917.

107. *Id.* at 900.

108. *Id.* at 891 (Posner, J.).

109. See generally Ernest Lidge III, *Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 856 (2002) (outlining the effort put into identifying irrelevant distinctions in employment cases).

110. *Women Prisoners of the D.C. Dep't of Corrs. v. District of Columbia*, 93 F.3d 910, 954 (D.C. Cir. 1996) (Rogers, J., dissenting).

111. Symposium, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 ECOLOGY L.Q. 493, 507 (2007).

112. *Little v. City of Oakland*, 2000 U.S. Dist. LEXIS 13633, at *16 (N.D. Cal. Sept. 13, 2000).

113. *Jennings v. City of Stillwater*, 383 F.3d 1199, 1213–14 (10th Cir. 2004).

114. Joseph Cole, *The Almighty Discretionary Power of State Officials Trumps the Equal Protection Clause?*, 41 U. TOL. L. REV. 669, 678 (2010).

115. Symposium, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 ECOLOGY L.Q. 493, 507 (2007).

116. See Nolan v. Thompson, 521 F.3d 983, 990 (8th Cir. 2008) (emphasizing the necessity of a specific and detailed account of similarly situated comparators in class of one cases).

IV. NEW PROPOSAL

This Comment proposes a sliding scale test to relax the similarly situated test for plaintiffs when the government actor's decision was motivated by illegitimate animus or subjective ill-will.¹¹⁷ The first section introduces the proposal and its component parts.¹¹⁸ The second section explains why courts should adopt this proposal in cases of clear government animus.¹¹⁹ Finally, the third section examines the proposal's potential effectiveness in practice.¹²⁰

A. *Sliding Scale Test*

First, the plaintiff must identify one or more comparators and provide *actual evidence* of the government actor's arbitrary treatment.¹²¹ Once the plaintiff satisfies these prerequisites, courts should then apply the sliding scale test by using certain factors to weigh (1) the degree of similarity offered by the class of one plaintiff against (2) the government actor's motivation for their decision.¹²² If a government actor elicits clear animus against the plaintiff, the plaintiff's burden to show comparators similarly situated lowers significantly.¹²³ This section addresses the two parts in more detail.¹²⁴

1. *Degree of Similarity*

To utilize the test, the class of one equal protection claimant who is subjected to a municipal citation or government action¹²⁵ must identify others in an arguably similar situation who the government treated differently.¹²⁶ The plaintiff's prerequisite to name comparators remains the same,¹²⁷ but in evaluating similarity between the plaintiff and alleged comparators, courts may consider these non-exhaustive factors: (1) the project's location; (2) planned use;

117. See *supra* Part I (introducing the proposed test).

118. See *infra* Part IV.A.1–2 (introducing the factors courts should consider when weighing the degree of similarity against the government's clear evidence of animus).

119. See *infra* Part IV.B (discussing why the proposal is necessary).

120. See *infra* Part IV.C (using a series of case examples and hypotheticals).

121. See *supra* Part I (introducing the proposed test).

122. See *supra* Part I (introducing the proposed test).

123. See *supra* Part I (introducing the proposed test).

124. See *infra* Part IV.A.1–2 (introducing the factors courts should consider when weighing the degree of similarity against the government's clear evidence of animus).

125. *Swanson v. City of Chetek*, 719 F.3d 780, 783 (7th Cir. 2013) (emphasizing that a party must have been on the receiving end of a municipal citation or government action to have standing to classify as a proper class of one plaintiff).

126. *Olech v. Vill. of Willowbrook*, No. 97 C 4935, 2002 U.S. Dist. LEXIS 9266, at *45–46 (N.D. Ill. May 23, 2002).

127. See *Lindquist v. City of Pasadena*, 656 F. Supp. 2d 662, 692 (S.D. Tex. 2009) (implying that it is the plaintiff's and not the court's job to identify comparators).

(3) impact on the community; (4) zoning designation; (5) previous uses; (6) government's treatment of permit applications; and (7) whether the project exists in a comparable community plan.¹²⁸

2. *Actual Evidence of Government Animus*

The class of one plaintiff must always provide explicit or implicit evidence that a Government actor¹²⁹ displayed illegitimate animosity or subjective ill-will towards the plaintiff in treating him differently from comparators similarly situated.¹³⁰ Evidence of third-party intermeddling in plaintiff's affairs or animus directed towards him is irrelevant.¹³¹ In class of one claims, the following factors can serve as evidence whether a government actor's illegitimate animosity or subjective ill-will towards a plaintiff is actually present: (1) evidence of discrimination; (2) harassment; (3) readily-apparent hostility, malice, vindictiveness, or malignant animosity; (4) whether a pattern or continuousness of unjustified conduct exists; and (5) the government's purpose behind or motivation for their decision.¹³²

B. *Why the Sliding Scale Test is Necessary*

This proposal is justified for multiple reasons: First, too strict a test in class of one claims takes the focus of the Equal Protection Clause away from protecting individual rights.¹³³ Even one court from the stringent Eleventh Circuit notices that defining similarly situated too narrowly may leave plaintiffs with no ground to stand on.¹³⁴ The proposed test introduces a broader and more relaxed standard that reduces overzealous local officials keeping aggrieved persons from

128. See *supra* Part I (introducing the proposed test); see also *Pappas v. Town of Enfield*, 18 F. Supp. 3d 164, 182 (D. Conn. 2014) (listing "lot size, density of buildings, types of housing, temporal density," and even the composition of the decision-making board themselves as other potential factors; and *Allegheny Pittsburgh Coal Co. v. Cty. Com.*, 488 U.S. 336, 340 n.3 (1989) (using "topography, location, development, mineral content," and distance from contiguous parcels as potential identifiers).

129. The City, County, or a person directly involved in the City or County's decision-making, approval, or denial process.

130. *Contra* *E & T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987) (holding illegitimate animosity or subjective ill-will does not include different treatment standing alone); see also *Rossi v. W. Haven Bd. of Educ.*, 359 F. Supp. 2d 178, 183 (D. Conn. 2005) ("decisions that are imprudent, ill-advised, or even incorrect may still be rational").

131. See *Kennie v. Nat. Res. Dep't*, 451 Mass. 754, 762 (2008) (refusing to consider evidence of a third-party who "interfered with, or attempted to interfere with, the plaintiffs' right to use and improve their property subject to governmental regulations that [were] fairly administered").

132. See *supra* Part I (introducing the proposed test); cf. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (identifying certain indicators of actual government misconduct).

133. See *Farrell*, *supra* note 41, at 379 (indicating that "the Fourteenth Amendment itself provides that no state shall deny to any person the equal protection of the laws").

134. See *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1203 (11th Cir. 2007) ("[T]oo narrow a definition of similarly situated could exclude from the zone of equal protection those who are plainly treated disparately and without a rational basis.").

seeking a proper remedy in federal court.¹³⁵

Second, there is a need to “provide lower federal and state courts guidance concerning when class of one comparators, landowners, or development projects are ‘similarly situated’” yet are subject of illegitimate animus or subjective ill-will.¹³⁶ A sliding scale test would resolve the ambiguity of *Olech* because it formulates a standard that is “both consistent with *Olech* and operable.”¹³⁷ A sliding scale test better allows courts to decide whether the government’s differential treatment resulted from legitimate or illegitimate considerations because it offers a “comprehensive canvassing of all possible relevant factors.”¹³⁸ The similarly situated prong is a “malleable concept”, and a sliding scale test that considers spelled-out factors makes class of one disputes easier for courts to grapple with.¹³⁹ Besides uncertainty, current ambiguity in the law leaves an undefined similarly situated test that threatens the local government authority.¹⁴⁰ A sliding scale test limits the risk of overstepping local law decision-making and policy because it only affects government decisions motivated by animus or ill-will directed at the plaintiff.¹⁴¹ If the government would have decided against the plaintiff’s application or request regardless of any animus, then animus alone would not frame the action.¹⁴² “Ill will must be the sole cause of the complained action.”¹⁴³

As gatekeepers of the law, judges will be the arbiters of applying this test at the summary judgment stage, while the fact-finder will decide on the merits thereafter.¹⁴⁴ A current trend interprets *Olech* to relax the burden on a plaintiff’s complaint at the pleading stage, yet summary judgment determinations remain at a high burden.¹⁴⁵ Therefore, courts would apply the sliding scale test at the

135. *Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995) (“If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court.”).

136. Brief for Petitioner at 34, *Dibbs v. Hillsborough Cty.*, 625 F. App’x 515 (2015) (No. 15-10152), 2016 WL 1056616.

137. *Cf. Marcelle v. Brown Cty. Corp.*, 680 F.3d 887, 891 (7th Cir. 2012) (reinforcing Judge Posner’s opinion that, despite some support, current tests are inconsistent with the *Olech* decision and are inoperable).

138. *Jennings v. City of Stillwater*, 383 F.3d 1199, 1213–14 (10th Cir. 2004) (“Looking only at one individual, however, there is no way to know whether the difference in treatment was occasioned by legitimate or illegitimate considerations without a comprehensive . . . canvassing of all possible relevant factors.”).

139. *Contra* Alex M. Hagen, *Mixed Motives Speak in Different Tongues: Doctrine, Discourse, and Judicial Function in Class-Of-One Equal Protection Theory*, 58 S.D. L. REV. 197, 211 (2013) (arguing in support of a malleable similarly situated test that leaves each court to define their own standard). This Comment, however, suggests a malleable test with a pre-defined standard.

140. Gehan, *supra* note 36.

141. *See infra* Part I (introducing the proposed test).

142. Giaimo, *supra* note 57, at 343.

143. *Id.*

144. *Cf. Lindquist v. City of Pasadena*, 656 F. Supp. 2d 662, 687 (S.D. Tex. 2009) (implying that it is the plaintiff’s and not the court’s job to identify comparators).

145. *See Connick v. Myers*, 461 U.S. 138, 170 (1983) (Brennan, J., dissenting) (recognizing the Court applied too strict a standard); *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 245 (3d Cir. 2002) (recognizing the *Willowbrook* decision did not require that the “plaintiff identify in the complaint specific instances where others

summary judgment stage to reduce the strict burden imposed by the current similarly situated test.¹⁴⁶ The test's narrow application at the summary judgment stage should weed out the litigious claims while lifting the burden on state and local officials.¹⁴⁷ Putting this sliding scale test through a test suite of case examples and hypotheticals is the best method to evaluate the test's effectiveness.¹⁴⁸

C. *Test Suite*

A device originally used in computer programming, a test suite in the law assesses a prescriptive legal proposal, rule, or guideline for its soundness.¹⁴⁹ Committing this sliding scale test to a test suite is useful because it not only identifies potential real-life issues the test will address, but it also confirms the value of the proposal to the legal community.¹⁵⁰ The following sections pose diverse hypotheticals or embody case precedent meant to demonstrate both how the test operates and what potential results the test yields.¹⁵¹ These situations identify the proposal's application in pleading and practice to determine when its use is appropriate.¹⁵² The examples provided do not resolve every conceivable scenario, but comprehensively address situations and issues plausible in land use context of class of one equal protection claims.¹⁵³

1. *Government Uses Proper Discretion*¹⁵⁴

Some recognize that class of one claims must be highly scrutinized to avoid constitutionalizing "what are essentially issues of local law and policy."¹⁵⁵ The proposed test protects this principle because it does not apply to traditional class

have been treated differently for the purposes of equal protection" and that such evidentiary hurdles "should not defeat [a] claim at the pleading stage") (citing *DeMuria v. Hawkes*, 328 F.3d 704, 707 (2d Cir. 2003)); *Williams v. Riley*, 275 F. App'x 385, 390 (5th Cir. 2003) (applying the minimal showing for claimant convict who complained of correctional officer misconduct, the court held plaintiff need only "show he has been intentionally treated differently from others similarly situated").

146. See *supra* Part I (introducing the proposed test).

147. Farrell, *supra* note 41, at 377 ("Determining 'all relevant aspects' of similar situations usually depends on too many facts (and too much discovery) to allow dismissal on a Rule 12(b)(6) motion. If we require defendants to wait until summary judgment, we burden local and state officials with the regular prospect of 'fishing expeditions' and meritless suits.").

148. See generally Eugene Volokh, *Intermediate Questions of Religious Exemptions - A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595 (1999) (discussing how to use a test suite).

149. *Id.* at 599.

150. *Id.* at 600.

151. *Id.*

152. See *id.* at 595 (identifying what issues need to be tested and whether the doctrine makes sense).

153. *Id.* at 600.

154. The following hypothetical is based on the facts of *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306 (11th Cir. 2006).

155. *Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1058-59 (6th Cir. 1996).

of one claims involving a government's proper use of discretion.¹⁵⁶ Imagine for instance that Elaine is looking to get tentative approval from her City's planning commission to build a 100-unit apartment complex on a ten acre plot of land.¹⁵⁷ The planning commission tables Elaine's application twice, and eventually denies her proposal on the third attempt because the proposed apartment complex violates City density requirements.¹⁵⁸ Elaine offers two other development projects as comparators, both of which had their applications approved: a commercial development and a 20-unit apartment that satisfies city density requirements.¹⁵⁹

Elaine's proffered comparators are not similarly situated under any level of scrutiny because the commercial development is not a residential project, and the 20-unit apartment project has no issues meeting City density requirements.¹⁶⁰ The planning commission's decision was rational because the commission used appropriate zoning factors to deny Elaine's proposal; a class of one complaint that identifies a project treated differently, alone, is not enough.¹⁶¹ Thus, the proposed test is not applicable here because no *actual* evidence supports a finding of illegitimate animus or subjective ill will.¹⁶² This result leaves precedent that applies the test rigorously against the plaintiff intact because it is nonsensical to lower the plaintiff's burden when local governments use their discretion properly.¹⁶³

2. *Government Uses Improper Discretion*¹⁶⁴

In *Swanson v. City of Chetek*, Karl Swanson purchased a home next door to the mayor of Chetek and, with a permit, built a three-foot fence along the

156. See *supra* Part I (introducing the proposed test).

157. See generally *Campbell*, 434 F.3d at 1310 (juxtaposing the situation, wherein plaintiffs sought to build 180 units on a ten-acre plot of land).

158. See generally *id.* at 1310–11 (claiming City density requirements permitted only 100 units on a ten-acre plot of land).

159. See generally *id.* at 1311–12 (proffering eight comparators).

160. See generally *id.* at 1314–17 (citing here the project's use, attempts at receiving tentative approval, and the land's density as important factors in dismissing *Campbell*'s comparators).

161. See generally *id.* (stating the alleged comparators were not similarly situated because of different zoning factors); *E & T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987) (“Different treatment of dissimilarly situated persons does not violate the equal protection clause.”).

162. Cf. *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000) (“plaintiff must present evidence the defendant deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position” . . . going beyond personal hostility to the plaintiff).

163. Cf. *Bell v. Duperrault*, 367 F.3d 703, 711 (7th Cir. 2004) (supporting traditional equal protection analysis where a defendant's arbitrary actions, “quite apart from the [defendant's] subjective motivation, are sufficient to state a claim”).

164. The following hypothetical is based on the facts of *Swanson v. City of Chetek*, 719 F.3d 780 (7th Cir. 2013).

property line and the front street.¹⁶⁵ The mayor resented the Swansons building this fence and initiated an orchestrated campaign of harassment against Swanson.¹⁶⁶ This “campaign” included admonishing the building inspector for issuing the Swansons a remodeling permit, trespassing onto the Swansons’ property, and telling the fence constructors that “the Swanson[s] . . . were drug dealers and unlikely to pay for the work provided.”¹⁶⁷ Further, it was apparent the Mayor used his power and influence to coerce the building inspector into delaying the grant of Swanson’s fence permit.¹⁶⁸ The mayor was also responsible for prosecuting Swanson in the City’s municipal court for violating the five-foot property line setback requirement.¹⁶⁹ Swanson filed a class of one equal protection claim against the mayor and identified his other neighbor, Michele Eberle, as a comparator.¹⁷⁰ Eberle constructed a fence along the Swanson-Eberle property line without a permit and was not sued for its removal.¹⁷¹ The magistrate judge found Eberle’s situation dissimilar and denied Swanson’s claim because: (1) Swanson failed to include fence dimensions in his complaint, and (2) Eberle’s situation included only a boundary fence and no front fence.¹⁷²

Under this scenario, the proposed test would be triggered because Swanson has met his burden to indicate comparators and there is actual evidence of illegitimate animus against the landowner—not just a general allegation he was treated differently from Eberle.¹⁷³ The proposed test is appropriate here for two reasons: first, a clear demonstration of overt hostility makes it “oddly formalistic to demand a near identical, one-to-one comparison to prove the [government actor’s] readily-apparent hostility.”¹⁷⁴ Plaintiffs who fail to plead sufficient facts that show actual government animus already risk dismissal or a strict application of the similarly situated test; and this standard will continue to preserve government authority.¹⁷⁵ In this instance, however, the sliding scale test would provide resolve for Swanson by allowing a judge to canvass Swanson’s comparators leniently when weighed against the Mayor’s clearly unjustified conduct.¹⁷⁶

This improved standard is consistent with *Olech*, operable, and fair to

165. *Id.* at 781.

166. *Id.* at 781–82.

167. *Id.* at 782.

168. *Id.*

169. *Swanson*, 719 F.3d at 782.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 785 (determining a specific harasser is identified, a motive is present, and the mayor’s actions “appear illegitimate on their face”).

174. *Swanson*, 719 F.3d at 785.

175. *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 548 (7th Cir. 2008) (exemplifying a zoning decision denying developers claim at the pleading stage).

176. *Cf. Jennings v. City of Stillwater*, 383 F.3d 1199, 1214 (10th Cir. 2004) (suggesting the degree of proffered similarity should depend on the context of each case).

plaintiffs because it leaves local government decision-making authority intact without precluding a plaintiff's opportunity for remedy.¹⁷⁷ Second, courts cannot extend the reaches of this test or be overbroad with its application because it is narrowly applied to cases of obvious animus.¹⁷⁸ Courts faced with Swanson's situation can avoid disagreement and *Olech*'s ambiguity by applying a fact intensive, defined standard that examines factors on a case-by-case basis.¹⁷⁹

3. *Questionable Use of Government Decision-Making Authority*¹⁸⁰

Under current tests, some courts have difficulty deciding whether a plaintiff's pleadings demonstrate slight irrationality in the government's actions or obvious animus.¹⁸¹ *Village of Arlington Heights v. Metro Housing Development Corporation* tried to shed light on whether an invidious discriminatory purpose was a motivating factor in the government's decision.¹⁸² The court considered factors such as: "[t]he historical background of the decision," the government's administrative history represented in its meetings and reports, and departures from the normal procedural and substantive sequence used by the decision-making body.¹⁸³ Although *Village of Arlington* concerned a suspect class, the factors seemingly would translate to a class of one suit without opening the floodgates to litigation because the inquiry is largely the same.¹⁸⁴ The proposed test effectuates this purpose by refining the factors to limit judicial intervention and constitutionalizing run of the mill land use decisions.¹⁸⁵

Consider Frank and Chase, two neighboring property owners.¹⁸⁶ The

177. Cf. Farrell, *supra* note 41, at 413 (arguing a relaxed standard will not preclude a plaintiff's opportunity for an equal protection remedy).

178. See *supra* Part IV.A.2 (applying the sliding scale test only in cases of actual, improper discretion).

179. See *Jennings*, 383 F.3d at 1214 ("Inevitably, the degree to which others are viewed as similarly situated depends substantially on the facts and context of the case . . . This is the key to understanding *Olech*.").

180. The following hypothetical tracks the issues contemplated in *Wilkie v. Robbins*, 551 U.S. 537 (2007).

181. See, e.g., *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000) (expressing uncertainty with how to consider the government's motive); *Purze v. Vill. of Winthrop Harbor*, 286 F.3d 452, 454 (7th Cir. 2002) (finding the plaintiff's allegations of ill will insufficient); *Cruz v. Town of Cicero, Ill.*, 275 F.3d 579, 587 (7th Cir. 2001) (noting plaintiffs must establish an obvious illegitimate animus); see also *Lunini v. Grayeb*, 395 F.3d 761, 767-768 (7th Cir. 2005) (noting questions of material fact surrounding the officer's motivations for arresting the plaintiff); *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004) (noting the lack of a precise formula to use).

182. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977).

183. *Id.*

184. Horstensia S. Carreira, *Protecting the "Class of One"*, 36 REAL PROP. PROB. & TR. J. 331, 359 (2001).

185. *Id.* at 359-60 ("If these factors are "tightened-up" when applied to non-suspect classifications, fewer reasons exist to fear an overwhelming wave of judicial intervention on behalf of individuals . . . These requirements especially protect typical one-shot local government decisions and highly specific zoning decisions from egregious judicial intervention.").

186. See generally *Wilkie v. Robbins*, 551 U.S. 537, 537 (2007) (involving a federal *Bivens* and RICO actions that fielded similar issues of government conduct, instead of a class of one claim).

previous owner of Frank's property and the previous owner of Chase's property each granted easements to the City to access nearby City-owned property.¹⁸⁷ Frank's easement was recorded when he purchased the property, but Chase's was not.¹⁸⁸ Both Frank and Chase had previously petitioned their City Council for Special Recreation Use Permits that would allow them to host cattle drives on the City's land.¹⁸⁹ The City Council granted both requires, but Chase's requests were met with difficulty, hard bargaining, coercion, and pressure from the Government to persuade Chase to re-grant his easement.¹⁹⁰ When Chase refused, the City Council later cancelled his permit.¹⁹¹

If Chase, in his class of one suit, claims illegitimate animus because "defendants simply demanded too much and went too far," then the court's discretion will decide whether the prerequisites are satisfied to apply the proposed test.¹⁹² Assume for a moment that a court finds illegitimate animus and applies the proposed test based on this evidence: the government now has a defined standard to apply that would more leniently compare the plaintiff's comparators against the weight of the government's animus.¹⁹³

This proposal replaces the ambiguity of a "too much" standard for a more reliable "what for" standard.¹⁹⁴ If, however, Chase does not suggest the Government's actions were illegitimate,¹⁹⁵ or the court makes an initial determination that the Government executed its discretion properly, then the

187. *See generally id.* ("The previous owner [of Robbins's property] granted the United States an easement to use and maintain a road running through the ranch to federal land in return for a right-of-way to maintain a section of road running across federal land to otherwise isolated parts of the ranch.")

188. *See generally id.* (implying the Bureau had hoped Robbins would regrant the easement to them).

189. *See generally id.* (noting Robbins held cattle drives on his land).

190. *See generally id.* at 538, 568 (dealing with Robbins's unfavorable agency actions against him, including "a 1995 cancellation of the right-of-way given to Robbins's predecessor in return for the Government's unrecorded easement, a 1995 decision to reduce the [permit] from five years to one, the [special use permit]'s termination and a grazing permit's revocation," and a "seven-year campaign of harassment [that] had a devastating impact on Robbins' business").

191. *See generally Wilkie*, 551 U.S. at 568–69 (noting the Government cancelled Robbins' permit after he refused to provide an easement to the Government).

192. *See generally id.* at 539, 557 (contrasting the present hypothetical because Robbins did not claim illegitimate animus).

193. *Id.* at 539 (illustrating that even if a court finds illegitimate animus, it may very well use the factors to conclude that the "[government was] within their rights to make it plain that [owners]'s willingness to give an easement would determine how complaisant they would be about his trespasses on public land"). This less-than compelling evidence of animus would raise the amount of proof required for similarly situated comparators, much like traditional class of one cases. The fact that the City treated Frank differently in the application process might defeat Chase's claim. *See also id.* at 573 (concluding contrarily that if illegitimate animus is overwhelmingly demonstrated by "trespasses to [owner]'s property, vindictive cancellations of his rights to access federal land, and unjustified or selective enforcement actions," then Chase's differential application experience would likely not defeat his claim).

194. *Cf. id.* at 556–57 (noting if the Bureau's conduct clearly serves a legitimate purpose, then "[t]he 'what for' question already has an answer in terms of lawful conduct." Conversely, if the Bureau's conduct is clearly illegitimate, the proposed test gives courts a roadmap to an answer rather than applying guesswork as to what constitutes going "too far").

195. *See generally id.* at 539 (following the situation posed in *Wilkie*).

proposed test does not apply.¹⁹⁶ Here, this outcome makes sense because not every case will mirror the specific facts and allegations of this hypothetical.¹⁹⁷

4. *When Should “Similarly Situated” Mean Similar or Identical?*¹⁹⁸

In view of varying precedent, plaintiffs that are the subject of actual government animus should be apprised of what evidentiary threshold will be applied when undergoing a similarly situated analysis.¹⁹⁹ The Seventh Circuit allows a more lenient demonstration of facts, yet the Eleventh Circuit imposes a rigorous threshold on some plaintiffs who plead an overabundance of facts.²⁰⁰

To illustrate the issue, consider these facts: Gristle Industries operates a chicken rendering plant and holds a permit to dump “cleansed” waste onto the company’s own land.²⁰¹ Assume Gristle can prove that the City’s mayor, who owns neighboring land adjacent the plant, used clear and unjustified personal animus to conspire with the Environmental Protection District (EPD) to suspend Gristle’s dumping permit.²⁰² Gristle files a class of one claim and points to Ameri-Chick Poultry, a competing chicken rendering plant, as a comparator allowed to keep its permit and that the City did not treat disparately.²⁰³ Aware of the relaxed threshold the proposed test offers in this situation, counsel for Gristle details in the complaint Ameri-Chick’s use of the land to dump waste, the similar impact Gristle’s permit has on the community, the zoning designation, and the government’s history in handing out permits to the two facilities.²⁰⁴ The judge applies the proposed test and denies Ameri-Chick’s motion for summary judgment, leaving the jury to resolve the issue.²⁰⁵

The above hypothetical is a good example of how the proposed test may have changed the result in *Griffin Industries*.²⁰⁶ The plaintiff in *Griffin Industries* filed

196. See *supra* Part IV.B.1 (following the realm of the facts posed in *Campbell*).

197. See *supra* Part IV.B.2 (the proposed test operates on a very fact intensive, case by case basis).

198. The following hypothetical is based on *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189 (11th Cir. 2007) with modified facts to demonstrate a point.

199. See *supra* Part III.B (arguing factors provide plaintiffs better guidance).

200. Compare *Swanson v. City of Chetek*, 719 F.3d 780, 784 (7th Cir. 2013) (holding a near one-to-one comparison is unnecessary when clear illegitimate animus exists), with *Griffin Indus., Inc.*, 496 F.3d at 1205 (imposing the prima facie identical standard on plaintiff who had pleaded an abundance of facts).

201. See generally *Griffin Indus., Inc.*, 496 F.3d at 1194–95 (issuing Griffin a LAS permit to allow the company to spray waste onto his land).

202. See *id.* at 1196 (arguing oppositely that although the mayor did own land next to the plant, the court did not think the mayor’s influence, pressure, and alleged conspiracy with the EPD was enough to indicate illegitimate animus).

203. See generally *id.* at 1197 (the plaintiff alleged a business competitor did not suffer the same conduct the plaintiff’s plant did).

204. See *id.* at 1206 (posing a different scenario, where Griffin pointed to the similar water pollution issues, citizen complaints, and size of the facilities).

205. See generally *Griffin Indus., Inc.*, 496 F.3d 1189 (dismissing Griffin’s suit at the pleading stage).

206. See Farrell, *supra* note 41, at 413 (a plaintiff would likely receive more favorable treatment under a relaxed similarly situated analysis).

a 41-page complaint and 21 exhibits detailing how it was similarly situated to the defendant's chicken rendering plant.²⁰⁷ The Eleventh Circuit Court of Appeals applied the prima facie identical threshold, and felt the plaintiff's entire 41-page complaint was conclusory.²⁰⁸ In finding not one scintilla of evidence indicating similarly situated comparators, it is possible the plaintiff was entirely without a clue on what factual evidence to plead;²⁰⁹ or how much evidence was proper to meet a prima facie identical threshold.²¹⁰ Certainly, a look through conflicting precedent would not have been helpful.²¹¹ Courts continually struggle "with what a plaintiff must plead, and ultimately show, to prevail" on the test.²¹² Further, a prima facie identical threshold in this scenario may cause plaintiffs to plead more than is necessary.²¹³ The proposed test at least puts plaintiffs on notice of the threshold when clear government animus is present, and allows them to collect proper evidence before involving the courts.²¹⁴

5. *Actual Evidence of Animus by an Unaffiliated Government Actor*²¹⁵

Some cases involve third-party government animus where there is no direct influence over the local governing body.²¹⁶ Consider a group of four lakeside property owners, each seeking a permit from their town's conservation commission to "construct a pier and dock off the waterfront edge of their property."²¹⁷ As required by the town's commission, any person seeking such permit must provide the town's shellfish constable, who is not a member of the commission, "with data detailing the size and frequency distributions for shellfish on the proposed site."²¹⁸ The constable tells one property owner, Ryan, that he will "do whatever it takes to prevent a dock" from being built in that area.²¹⁹ As a surveyor conducts shellfish surveys, the constable purchases and

207. *Griffin Indus., Inc.*, 496 F.3d at 1205.

208. *Id.* at 1205–06.

209. *Cf. id.* at 1205 (suggesting plaintiff's complaint is one that omits key factual details proper for a similarly situated analysis).

210. *See id.* at 1205–06 (admonishing Griffin, even after imposing the highest threshold possible on the company, for including too much detail in the complaint).

211. *Marcelle v. Brown Cty. Corp.*, 680 F.3d 887, 918 (7th Cir. 2012) (Wood, J., dissenting, noting the "unsettled state of the law").

212. *Id.* at 906 (Wood, J., dissenting).

213. *See Griffin Indus., Inc.*, 496 F.3d at 1205–06 (failing the similarly situated burden because the overabundance of factual detail caused the court to find numerous contradictions in his complaint).

214. *See supra* Part I (introducing the proposed test); Part IV.A (outlining potential factors used in a similarly situated analysis).

215. The following hypothetical is based on the facts of *Kennie v. Natural Res. Dep't*, 451 Mass. 754 (2008).

216. *See generally id.* at 757 (involving a town constable who sent fraudulent survey results to the City's planning commission).

217. *See id.* at 755 (noting plaintiff similarly sought a permit to construct a dock).

218. *Id.* at 756.

219. *See id.* at 757 (citing constable's statement to plaintiff that he was "mandated to do whatever it takes

plants a significant amount of shellfish at the waterfront edge of Ryan's property.²²⁰ The conservation commission grants building permits to all property owners except Ryan because his results exceed permissible shellfish quantity levels.²²¹

The proposed test does not apply here because Ryan can easily indicate similarly situated comparators treated differently; but there is no actual evidence to support a finding that the conservation commission acted with illegitimate animus or subjective ill-will.²²² Despite the constable's third-party intermeddling, the commission executes its discretion properly because it is following protocol to grant permits.²²³

This result relieves any fear of constitutionalizing claims that are matters of local discretion because it provides no outlet for plaintiffs that are the subject of unlucky circumstances; the standard will remain rigorously applied against the plaintiff.²²⁴ This hypothetical differs from *Swanson* because the mayor there had direct influential authority over the inspector's decision to deny issuance of a fence permit.²²⁵ Additionally, Ryan has remedies aside from a class of one equal protection claim.²²⁶

6. *Government's Rational Basis a Pretext for an Impermissible Motive*²²⁷

Certain cases have challenged government land use decision, which on their face appear like a proper exercise of discretion, but in actuality are objectively false or are based upon improper motive.²²⁸ The proposed test may provide

to prevent docks from being built in the area").

220. See generally *Kennie*, 451 Mass. at 757 (claiming the constable planted the shellfish in water).

221. See generally *id.* at 758 (noting the plaintiffs withdrew their application ahead of time because they knew the shellfish would exceed permissible levels).

222. See *id.* at 762 (arguing plaintiffs "do not contest the constitutionality of the regulatory wetlands protection scheme administered by the commission or indeed any actions by the commission - which is not a defendant").

223. *Id.*

224. Gehan, *supra* note 36.

225. See *supra* Part IV.B.2 (recall that the mayor used his power and status to influence the issuance of a fence permit, whereas the constable in this hypothetical has no power of authority over the commission).

226. See *Kennie*, 451 Mass. at 762 (the plaintiffs' could enforce "(1) [their] protected right to seek a permit from the commission, whether or not they had an entitlement to the order they sought; [or] (2) if, as the plaintiffs assert, Marcy's words and subsequent actions were an attempt to cause the commission to act on tainted evidence, he himself would have interfered with, or attempted to interfere with, [their] right to use and improve their property subject to governmental regulations that are fairly administered.").

227. The following example considers the facts of *MetroPCS Inc. v. City & Cty. of San Francisco*, No. C 02-3442 PJH, 2006 U.S. Dist. LEXIS 43985 (N.D. Cal. June 16, 2006).

228. *E.g., id.* at *53 (stating that even if the defendant showed a rational basis for its conduct, the plaintiff could prevail if it "show[ed] that the [defendant's] rational basis [was] a pretext for an 'impermissible motive.'"); *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 946 (9th Cir. 2004) ("[A]n equal protection plaintiff may show pretext by creating a triable issue of fact that either: (1) the proffered rational basis was objectively false; or (2) the defendant actually acted based on an improper motive."); see also *Patel v. Penman*, 103 F.3d 868, 876 (9th Cir. 1996) (recognizing that pretext might be shown if the city was "using its code

judges guidance in this otherwise unclear area of law because courts have not “set forth the exclusive means through which to prove pretext.”²²⁹

In *MetroPCS Inc. v. City & County of San Francisco*, MetroPCS sought a conditional use permit to build a wireless antenna facility.²³⁰ The San Francisco Planning Commission originally granted MetroPCS the conditional use permit but overturned their own decision on appeal.²³¹ The court ruled for the City on its earlier summary judgment motion to deny MetroPCS’s class of one claim; however, MetroPCS then provided evidence to show that the Commission’s ‘rational decision’ to uphold the appeal was a pretext for an impermissible motive.²³²

The proposed test applies here if a judge, based on plaintiff’s newly suggested evidence for impermissible motive, makes an initial determination that the San Francisco Planning Commission has exhibited illegitimate animus or subjective ill-will.²³³ Since the judge in *MetroPCS* already upheld the City’s motion for summary judgment, the test for pretext gives plaintiffs new life in their class of one pursuit.²³⁴ If the basis for the judge’s earlier decision was couched in insufficient evidence of identical comparators, then the proposed test gives plaintiffs a second opportunity at leniency in identifying those comparators.²³⁵

The proposed test does not supplant the test for pretext, but allows judges to use the evidence offered by plaintiffs proving pretext in deciding to relax the similarly situated test where evidence of illegitimate animus or subjective ill-will

enforcement process not to enforce compliance with the codes but rather to drive . . . downtown motels out of business”); *Armandariz v. Penman*, 75 F.3d 1311, 1327 (9th Cir. 1996) (finding “a triable issue of fact as to whether the [city’s] asserted rationale of directing efforts to enforce the housing code at high-crime areas was merely a pretext” to reduce property values for the city to purchase them at a reduced rate); *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990) (“Although a water moratorium may be rationally related to a legitimate state interest in controlling a water shortage” the plaintiffs raised a triable issue of fact regarding the “very existence of a water shortage.”).

229. *MetroPCS Inc.*, 2006 U.S. Dist. LEXIS 43985, at *54.

230. *Id.* at *2, *4, *6 (noting MetroPCS chose this location for the proposed facility because it fit their needs to provide service to moderate to low-income customers; their original planned site above the Mars Commercial Building was denied because of community opposition).

231. *Id.* at *11.

232. *Id.* at *56 (arguing in support of the contention that these findings were a pretext, MetroPCS introduced the following evidence: “photographs of the proposed antennas that purportedly belie the Board’s findings[;] . . . the location preference system and Ms. Estes’ testimony as proof of the Board’s purportedly “contradictory” findings as to other carriers’ cell sites[;] . . . [testimony from] the City’s own witness, Mr. Badiner, . . . that he had previously come to the opposite conclusion from the Board as to some of the findings upon which the Board’s decision was based, as did Supervisor Daly”; Metro PCS’s indication of “no evidence” as to the Board’s remaining findings; and the “comments of numerous supervisors at the hearing on the appeal of the Planning Commission’s grant of MetroPCS’ CUP application, as proof that these comments demonstrate ‘animosity’ toward MetroPCS”).

233. *See supra* Part IV.A (instructing how to apply the proposed sliding scale test).

234. *See MetroPCS Inc.*, 2006 U.S. Dist. LEXIS 43985, at *53–54 (ruling for the City on their motion for summary judgment).

235. *Id.* at *60–61 (note that judge’s actual basis for his ruling included a determination that the San Francisco Planning Commission exercised proper discretion of authority).

2018 / Similarly Situated Test in Cases of Obvious Government Animus

is clear.²³⁶ *MetroPCS* clarifies that a judge would likely not find illegitimate animus here, however, the proposed test operates on a case-by-case basis making it useful in more complicated decisions.²³⁷

V. CONCLUSION

Olech's decision clouds the law governing class of one equal protection claims, and multiple circuit courts are responding by applying their own varying interpretations on the similarly situated test, what constitutes government animus, and more.²³⁸ Addressing these issues in cases of obvious government animus is necessary and practical to preserve the plaintiff's chances of success in class of one claims.²³⁹ Landowners, courts, and other potential plaintiffs need better guidance on the constituencies of class of one claims and how courts might apply them, so there is a fair canvassing of the Plaintiff's evidence while maintaining local government discretion and proper power of authority.²⁴⁰ This is especially true when animus is readily obvious, because "it seems redundant to require that the plaintiff show disparate treatment in a near exact, one-to-one comparison to another individual."²⁴¹

This proposed test resolves this issue by providing judges with an operable standard that protects plaintiffs when local government interests exercise illegitimate animus or subjective ill-will.²⁴² Until a workable standard is created, potential class of one plaintiffs should be wary of the uncertain and rigorous system that lies before them.²⁴³

236. See *supra* Part I (outlining the purpose of the proposed sliding scale test).

237. See, e.g., *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 946–947 (9th Cir. 2004) (involving a question of pretext for malignant animosity where Executive of the Lahontan Governing Board and Squaw Valley's president were hostile towards one another. Squaw Valley proffered evidence including: the "[Board's] campaign of vengeance"; deliberate "embarrassment"; and the Board's "perturbed" and "aggressive" actions "during meetings and on the phone").

238. See *supra* Part II.B (providing multiple interpretations of the similarly situated test); *Marcelle v. Brown Cty. Corp.*, 680 F.3d 887, 912 (7th Cir. 2012) (discussing plaintiff's confusion proving illegitimate animus).

239. *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1373 (Fed. Cir. 2012) (arguing a strict interpretation may read these claims out of precedent).

240. Cf. *Nolan v. Thompson*, 521 F.3d 983, 990 (8th Cir. 2008) (noting class of one plaintiffs need to provide a "specific and detailed account" of comparators and must be able to do so in light of a state actor's broad "exercise [of] discretion to balance a number of legitimate considerations").

241. *Swanson v. City of Chetek*, 719 F.3d 780, 784 (7th Cir. 2013).

242. See *supra* Part IV (outlining the proposed sliding scale test).

243. *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1275 (11th Cir. 2008) (supporting the contention that the similarly situated requirement is rigorously applied against class of one plaintiffs).