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EQUAL PROTECTION “IN FLUX”: THE SEVENTH CIRCUIT’S INABILITY TO CLARIFY A STANDARD FOR CLASS-OF-ONE EQUAL PROTECTION CLAIMS IN *DEL MARCELLE v. BROWN COUNTY CORP.*

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Abstract: On May 17, 2012, in *Del Marcelle v. Brown County Corp.*, the U.S. Court of Appeals for the Seventh Circuit sitting en banc split three ways on what standard to apply in class-of-one equal protection cases. The judges were concerned about how to account for a state actor’s motive while also ensuring that low-level government officials’ discretionary authority is adequately protected. The Seventh Circuit could have balanced these concerns appropriately had they adopted Judge Wood’s proposed framework, which evaluates a state actor’s behavior using a rational basis standard and allows the defendant’s motive to be considered, but relieves the plaintiff of the burden of specifically alleging the state actor’s motivation. This standard would have been easy for the courts to apply, would provide much needed clarity on this issue, and would have most effectively balanced the rights of victims of discrimination with the need to afford low-level state officials’ latitude to make discretionary decisions.

INTRODUCTION

On September 13, 2010, Lewis Del Marcelle brought a federal civil rights lawsuit against Brown County, the Village of Ashwaubenon, and their respective executives for denying him and his wife equal protection under the Fourteenth Amendment.¹ Del Marcelle claimed that his constitutional right to equal protection was violated when local law enforcement in Brown County, Wisconsin, ignored his complaints about a motorcycle gang’s persistent and severe harassment of him and his wife.² As a result of the harassment, Del Marcelle claimed that he and

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¹ See *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 888 (7th Cir. 2012) (per curiam) (lead opinion), *cert. denied*, 133 S. Ct. 654; Complaint at 1–3, *Del Marcelle v. Brown Cnty. Corp.*, No. 1:10-cv-00785-WCG (E.D. Wis. Sept. 13, 2010) (Bloomberg Law) [hereinafter Complaint].

² See *Del Marcelle*, 680 F.3d at 888; Complaint, *supra* note 1, at 3–4.

his wife sold their home and moved to the Village of Ashwaubenon, Wisconsin.³ Nevertheless, the gang followed them to their new location.⁴

Shortly after Del Marcelle filed his pro se complaint, the U.S. District Court for the Eastern District of Wisconsin granted the defendants' motion to dismiss.⁵ The court reasoned that Del Marcelle's complaint could not survive because it merely stated that the police were not properly doing their job.⁶ In addition, the district court noted that the equal protection claim failed because it did not allege that the plaintiffs belonged to a protected class.⁷

On appeal, a three-judge panel of the Seventh Circuit noted that Del Marcelle's complaint could have been interpreted as a class-of-one equal protection claim in which the defendants had arbitrarily provided less police protection for the plaintiffs specifically.⁸ Because the panel proposed a new standard for class-of-one equal protection claims, the full court decided to rehear the case en banc.⁹ The en banc court, however, failed to come to a majority decision on a standard to apply in class-of-one equal protection cases.¹⁰ The judges differed in articulating a limiting principle that would protect government officials' discretionary decisions while still giving citizens a forum to address discrimination in class-of-one cases.¹¹ Additionally, the court split evenly on whether to remand the case and allow the plaintiff to replead.¹² Because it takes a majority of the court to reverse a judgment, the lower court's dismissal of Del Marcelle's claim was affirmed.¹³

Nine out of the ten judges on the Seventh Circuit properly recognized that the defendants' motive should be a factor in creating a standard for class-of-one equal protection claims, but the judges were un-

³ See *Del Marcelle*, 680 F.3d at 888; *id.* at 906 (Wood, J., dissenting); Complaint, *supra* note 1, at 3.

⁴ See *Del Marcelle*, 680 F.3d at 888; Complaint, *supra* note 1, at 4.

⁵ See *Del Marcelle*, 680 F.3d at 888; Order of Dismissal at 1–2, *Del Marcelle v. Brown Cnty. Corp.*, No. 1:10-cv-00785-WCG (E.D. Wis. Oct. 13, 2010) (Bloomberg Law) [hereinafter Order of Dismissal]; Complaint, *supra* note 1, at 1.

⁶ See *Del Marcelle*, 680 F.3d at 888; Order of Dismissal, *supra* note 5, at 1–2.

⁷ See *Del Marcelle*, 680 F.3d at 888; Order of Dismissal, *supra* note 5, at 1–2.

⁸ *Del Marcelle*, 680 F.3d at 888.

⁹ *Id.* at 889.

¹⁰ *Id.*

¹¹ See *id.*; *id.* at 900 (Easterbrook, C.J., concurring); *id.* at 913 (Wood, J., dissenting).

¹² See *id.* at 889 (lead opinion).

¹³ *Id.* at 888–89.

able to agree on the appropriate standard to apply.¹⁴ The Seventh Circuit, however, should have adopted the standard set forth by Judge Wood in her dissenting opinion.¹⁵ This standard would require a plaintiff to show that the state actor lacked a rational basis for its discriminatory treatment, but does not require the plaintiff to make a specific showing of the defendant's motive.¹⁶ Judge Wood's proposed standard would have adequately protected low-level government officials in their capacity as discretionary decisionmakers while also giving all citizens a meaningful forum to confront those officials when they are singled out for unjust discriminatory treatment.¹⁷

I. THE DISMISSAL OF DEL MARCELLE'S PRO SE COMPLAINT

Del Marcelle v. Brown County Corp. originated from a dispute between Lewis and Ellen Del Marcelle and members of a motorcycle gang, whose associates included law enforcement personnel.¹⁸ The motorcycle gang harassed Del Marcelle and his wife over the course of several years, including allegedly threatening the Del Marcelles over the phone, placing explosive devices next to their home, attempting to run over Del Marcelle, and subjecting the Del Marcelles to very loud muffler sounds.¹⁹ The harassment was so severe that Ellen Del Marcelle attempted suicide.²⁰

The situation forced Del Marcelle and his wife to move from their long-time home in Denmark, Wisconsin.²¹ Nevertheless, the motorcycle gang followed them and continued the harassment.²² Both Del Marcelle and members of the gang filed numerous harassment complaints against each other with the Sheriff's Department.²³ According to Del

¹⁴ See *Del Marcelle*, 680 F.3d at 889; *id.* at 900 (Easterbrook, C.J., concurring); *id.* at 913 (Wood, J., dissenting).

¹⁵ *Id.* at 913 (Wood, J., dissenting).

¹⁶ See *id.*

¹⁷ See *id.* at 913–15.

¹⁸ See *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 906 (7th Cir. 2012) (per curiam) (Wood, J., dissenting) (explaining that facts are to be accepted as set forth by the plaintiff), *cert. denied*, 133 S. Ct. 654; Complaint, *supra* note 1, at 3.

¹⁹ *Del Marcelle*, 680 F.3d at 906 (Wood, J., dissenting); Complaint, *supra* note 1, at 3–4.

²⁰ *Del Marcelle*, 680 F.3d at 906 (Wood, J., dissenting).

²¹ See *id.* at 888 (lead opinion); Complaint, *supra* note 1, at 3. Judge Wood's dissenting opinion refers to the Town of Denmark as Glenmore. *Del Marcelle*, 680 F.3d at 906 (Wood, J., dissenting).

²² *Del Marcelle*, 680 F.3d at 906 (Wood, J., dissenting).

²³ *Id.* at 906–07; Brief and Required Short Appendix of Plaintiff-Appellant Lewis D. Del Marcelle at 8, *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887 (7th Cir. 2012) (No. 10–3426) (Bloomberg Law).

Marcelle, the police ignored most of his complaints and even issued Del Marcelle a citation for a gang member's complaints against him.²⁴ Del Marcelle claimed that the law enforcement agencies protected the motorcycle gang because an alleged member of the gang was a former law enforcement officer and the gang's leader was related to an officer in the Brown County Sheriff's Department.²⁵

On September 13, 2010, Del Marcelle filed a pro se civil rights complaint against Brown County, its County Executive, the Village of Ashwaubenon, and the Village's President.²⁶ The complaint alleged that Del Marcelle was denied equal protection of the law when the police failed to respond to his complaints about the gang.²⁷ Shortly thereafter, Brown County and its County Executive filed a motion to dismiss.²⁸ The U.S. District Court for the Eastern District of Wisconsin granted the motion and dismissed the suit against all four defendants, explaining that Del Marcelle's complaint merely alleged that the police did not adequately perform their job in protecting him from private violence and thus, that Del Marcelle had failed to state an actionable claim.²⁹ The district court also reasoned that Del Marcelle did not have an Equal Protection Clause claim under the Fourteenth Amendment because he never alleged membership in a protected class.³⁰ In dismissing Del Marcelle's complaint, the district court did not consider a class-of-one theory.³¹ A class-of-one theory allows a plaintiff to make out an equal protection violation claim without pleading that the discriminatory treatment was based on the plaintiff's membership in a specific group, such as a racial or religious minority.³²

Del Marcelle filed a timely notice of appeal in October 2010.³³ A three-judge panel of the Court of Appeals for the Seventh Circuit recognized that Del Marcelle's complaint could be interpreted as a "class-of-one" discrimination claim because the police had arbitrarily pro-

²⁴ See *Del Marcelle*, 680 F.3d at 906 (Wood, J., dissenting); Complaint, *supra* note 1, at 4.

²⁵ See *Del Marcelle*, 680 F.3d at 906 (Wood, J., dissenting); Complaint, *supra* note 1, at 4.

²⁶ *Del Marcelle*, 680 F.3d at 907 (Wood, J., dissenting).

²⁷ *Id.* at 888 (lead opinion).

²⁸ See *id.* at 907 (Wood, J., dissenting).

²⁹ See *id.* at 888 (lead opinion) (stating that the district court correctly ruled that the Fourteenth Amendment does not require States to provide adequate police protection against private violence).

³⁰ See *id.* at 888–89; Order of Dismissal at 1–2, *Del Marcelle v. Brown Cnty. Corp.*, 1:10-cv-00785-WCG (E.D. Wis. Oct. 13, 2010) (Bloomberg Law) [hereinafter Order of Dismissal].

³¹ See *Del Marcelle*, 680 F.3d at 888–89.

³² See *id.*

³³ See *id.* at 888.

vided less protection to him specifically.³⁴ The panel, however, determined that without allegations of personal animosity toward the plaintiff specifically, the claim still failed.³⁵ After the panel circulated its opinion proposing a new standard for class-of-one equal protection claims to the entire court, the Seventh Circuit decided to rehear the case en banc.³⁶

Despite appointing counsel to Del Marcelle for the en banc hearing, the Seventh Circuit could not reach a majority decision.³⁷ The judges split three ways, each proposing a different standard of review for class-of-one equal protection claims.³⁸ Additionally, the court tied five-to-five on the issue of whether to allow Del Marcelle to replead, thus affirming the district court's dismissal.³⁹ Although the Seventh Circuit does not customarily publish opinions when a tie vote affirms the lower court's decision, a majority of the judges decided that an opinion was needed to provide guidance in future class-of-one equal protection suits.⁴⁰

II. THE SEVENTH CIRCUIT'S INABILITY TO COME TO A MAJORITY DECISION WHILE BALANCING PRECEDENT AND POLICY

Although all ten Seventh Circuit judges agreed that Del Marcelle's pro se complaint failed to state a claim, the court remained divided on two issues.⁴¹ First, the court could not agree on the standard of liability that should be applied in class-of-one equal protection cases.⁴² Second, the court could not agree whether to affirm the district court's dismissal or to remand the case to allow Del Marcelle to replead.⁴³

A. *Three Standards for Asserting Class-of-One Equal Protection Claims*

The Seventh Circuit struggled to articulate a standard for class-of-one equal protection claims that would comport with the framework

³⁴ *Id.* at 888–89.

³⁵ *Id.* at 889.

³⁶ *Id.*

³⁷ *Del Marcelle*, 680 F.3d at 889.

³⁸ *See id.*

³⁹ *See id.* at 888–89.

⁴⁰ *See id.* at 888 (per curiam).

⁴¹ *See Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 889 (7th Cir. 2012) (per curiam), *cert. denied*, 133 S. Ct. 654; *id.* at 917 (Wood, J., dissenting).

⁴² *See id.* at 889 (lead opinion); *id.* at 900 (Easterbrook, C.J., concurring); *id.* at 906 (Wood, J., dissenting).

⁴³ *See id.* at 899–900 (lead opinion); *id.* at 905 (Easterbrook, C.J. concurring); *id.* at 906 (Wood, J., dissenting).

established by the Supreme Court in the 2000 case, *Village of Willowbrook v. Olech* and the 2008 case, *Engquist v. Oregon Department of Agriculture*.⁴⁴ In *Olech*, the Village agreed to grant the plaintiffs' request to connect their home to a municipal water system only if the Olechs granted the Village an easement on their property that was larger than customarily required.⁴⁵ After months of dispute, the Village admitted that the larger easement condition had no practical justification; the Olechs contended that the Village merely meant to punish them for having successfully sued the Village in the past.⁴⁶

The Seventh Circuit in *Olech* held that one's right to Equal Protection under the law could be violated when the differential treatment was caused by totally illegitimate animus.⁴⁷ The Supreme Court affirmed the lower court's decision, reasoning that the differential treatment's irrational and wholly arbitrary nature justified a class-of-one equal protection claim.⁴⁸ The Court, however, specifically avoided adopting a limiting principle dealing with the motive of the discriminatory treatment.⁴⁹

The Supreme Court grappled with a similar issue in *Engquist v. Oregon Department of Agriculture*, which involved a public employee who brought a class-of-one equal protection claim after effectively being laid off.⁵⁰ The plaintiff claimed that her employer fired her for "arbitrary, vindictive, and malicious reasons" in response to her repeated disagreements with a co-worker.⁵¹ The Court held that public employees cannot bring class-of-one equal protection claims against their employers regarding discretionary decisions to hire and fire employees.⁵² Though this decision applies only to the hiring and firing of employees in the public sector, the Court reasoned that public officials are often

⁴⁴ See *id.* at 899 (lead opinion); *id.* at 900 (Easterbrook, C.J., concurring); *id.* at 913 (Wood, J., dissenting); see also *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 594 (2008); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000) (per curiam).

⁴⁵ *Olech*, 528 U.S. at 563; *Del Marcelle*, 680 F.3d at 890.

⁴⁶ See *Olech*, 528 U.S. at 563; *Del Marcelle*, 680 F.3d at 890.

⁴⁷ See *Del Marcelle*, 680 F.3d at 890; *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998).

⁴⁸ See *Olech*, 528 U.S. at 565.

⁴⁹ See *Del Marcelle*, 680 F.3d at 890; see also *Olech*, 528 U.S. at 565 (reasoning that allegations of differential treatment that were irrational and wholly arbitrary is "quite apart from . . . subjective motivation" and is "sufficient to state a claim for relief under traditional equal protection analysis," thus not ruling on the alternative "subjective ill will" theory relied on by the Seventh Circuit).

⁵⁰ See *Engquist*, 553 U.S. at 594–95.

⁵¹ *Id.* (internal quotations omitted).

⁵² See *id.* at 609.

granted wide discretionary authority and that use of that authority should not lead to a lawsuit every time it is exercised.⁵³

In light of the Supreme Court's decisions in *Olech* and *Engquist*, the Seventh Circuit judges in *Del Marcelle v. Brown County Corp.* tried to craft standards that protected public officials' discretionary authority without creating a limiting principle that demanded the presence of "ill-will" or "illegitimate animus."⁵⁴ Judge Posner's lead opinion, in which three other judges joined, proposed that for class-of-one equal protection claims, the plaintiff must plead and prove that he was subject to intentional discriminatory treatment by state actors, that the treatment was not justified by any public duty, and that there was an improper personal motive for the treatment.⁵⁵ Judge Posner reasoned that including an element addressing the actor's improper personal motives would further protect a government official's discretionary authority because there is often no "rational basis" for discretionary decisions.⁵⁶ The improper personal motive requirement means that the plaintiff has to allege more than merely some bad motive.⁵⁷ Rather, the complaint must allege a personal reason for the defendant's discriminatory actions, such as animus or personal gain through corruption or larceny.⁵⁸

Unlike the standard proposed by Judge Posner, Judge Wood's standard, set forth in her dissenting opinion, did not require a specific showing of the defendant's motive.⁵⁹ Instead, Judge Wood, joined by four other judges, proposed that the plaintiff's complaint must make plausible allegations that the plaintiff was the victim of intentional discriminatory treatment by a state actor, that the state actor had no rational basis for singling out the plaintiff, and that the treatment resulted in the plaintiff's injury.⁶⁰ Judge Wood reasoned that having only a rational basis requirement would protect state officials' discretionary authority sufficiently without creating a need to show the defendant's motive.⁶¹ Judge Wood's standard centered on the premise that a state

⁵³ See *Del Marcelle*, 680 F.3d at 895–97; see also *Engquist*, 553 U.S. at 603–04 (comparing the authority granted to public employers and police officers to make "discretionary decisionmaking based on a vast array of subjective, individualized assessments").

⁵⁴ See *Del Marcelle*, 680 F.3d at 899; *id.* at 900 (Easterbrook, C.J., concurring); *id.* at 911–13 (Wood, J., dissenting).

⁵⁵ *Id.* at 899 (lead opinion).

⁵⁶ See *id.* at 895–99.

⁵⁷ See *id.* at 899.

⁵⁸ See *id.* at 892, 899.

⁵⁹ See *id.* at 913 (Wood, J., dissenting).

⁶⁰ *Del Marcelle*, 680 F.3d at 913 (Wood, J., dissenting).

⁶¹ See *id.* at 917.

actor's decision, based on discretionary authority, is presumed to be rational and therefore constitutional.⁶² Thus, under this standard, the plaintiff bears the burden to plead facts that indicate how the discretionary decision was in fact not rational.⁶³ This showing might be achieved by pleading facts that demonstrate personal animus.⁶⁴ In addition, the more discretion afforded to the official, the more difficult it is for the plaintiff to demonstrate that the decision was not a legitimate exercise of the official's discretionary authority.⁶⁵

Chief Judge Easterbrook, in his concurring opinion, took a different approach that did not take into account the defendant's intent or motive at all.⁶⁶ Instead, Chief Judge Easterbrook read the *Olech* decision to mean that the rational basis test applies to class-of-one equal protection claims and that the test asks only whether a rational basis for the state official's actions can be conceived.⁶⁷ Under this standard, the defendant's discriminatory treatment of others does not warrant a lawsuit unless there is no conceivable rational basis for the treatment, even if there was a discretionary decision made for personally malicious reasons.⁶⁸

B. *The Seventh Circuit Splits Evenly on Whether to Remand or Affirm Dismissal of Del Marcelle's Complaint*

Ultimately, the judges split five-to-five on whether to remand the case and allow Del Marcelle to replead.⁶⁹ This tie led the Seventh Circuit to affirm the district court's dismissal of Del Marcelle's pro se complaint.⁷⁰ Judge Posner concluded that Del Marcelle's claim solely involved police discretion, and not personal motives.⁷¹ Remanding the case to allow him to replead would therefore be pointless because the facts did not indicate any personal motivations by the police.⁷² Chief Judge Easterbrook concurred in the decision not to allow Del Marcelle to replead because the Chief Judge's proposed standard requiring a

⁶² See *id.* at 913.

⁶³ See *id.* at 911.

⁶⁴ See *id.* at 913.

⁶⁵ See *id.* at 915.

⁶⁶ See *Del Marcelle*, 680 F.3d at 900 (Easterbrook, C.J., concurring). No other judges joined Chief Judge Easterbrook's concurring opinion. *Id.*

⁶⁷ *Id.*

⁶⁸ See *id.*

⁶⁹ See *id.* at 888 (per curiam).

⁷⁰ *Id.*

⁷¹ See *id.* at 899–900 (lead opinion).

⁷² See *Del Marcelle*, 680 F.3d at 899–900.

conceivable rational basis for the discriminatory treatment was clearly met.⁷³ Chief Judge Easterbrook pointed to two conceivable rational bases for the plaintiff's treatment by law enforcement: limited resources to investigate all of Del Marcelle's complaints, or the police department's conclusion that Del Marcelle exaggerated or imagined the problems that he reported.⁷⁴

Judge Wood's dissenting opinion, while proposing a standard similar to Judge Posner's, concluded that Del Marcelle should be afforded an opportunity to replead and meet the correct standard.⁷⁵ Despite some of the known facts weighing against Del Marcelle's case, the dissent recognized that the full factual record had yet to be developed.⁷⁶ In addition, Judge Wood argued that Del Marcelle should get another chance because the state of the law is unsettled, the plaintiff had been proceeding *pro se*, and because the "the general rule favor[s] an opportunity to replead."⁷⁷

The Seventh Circuit's tie vote on whether to allow Del Marcelle to replead had two main effects.⁷⁸ First, because the district court's dismissal was affirmed, Del Marcelle was foreclosed from seeking further judicial redress for the injuries he allegedly sustained at the hands of the police.⁷⁹ Second, the plurality's proposed standard of review for class-of-one equal protection claims is not binding on lower courts or public officials.⁸⁰

III. JUDGE WOOD'S RATIONAL BASIS STANDARD

The Seventh Circuit's failure in *Del Marcelle v. Brown County Corp.* to come to a controlling decision on a standard to apply in class-of-one

⁷³ See *id.* at 900, 905 (Easterbrook, C.J., concurring).

⁷⁴ *Id.* at 900.

⁷⁵ See *id.* at 900; *id.* at 906 (Wood, J., dissenting).

⁷⁶ See *id.* at 917–18 (Wood, J., dissenting). There were inconsistencies with Del Marcelle's claims regarding whether the police failed to respond to his complaints. See *id.* For example, the police had in fact investigated the incident where an alleged gang member tried to run Del Marcelle over by interviewing the car's driver and several witnesses. See *id.* The police concluded that Del Marcelle actually provoked the incident by throwing a rock through the car's windshield resulting in shards of glass landing on the driver's baby. See *id.*; Brief of Defendants-Appellees, *Brown County Corp. and Tom Hinz* at 27, *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887 (7th Cir. 2012) (No. 10–3426) (Bloomberg Law).

⁷⁷ See *Del Marcelle*, 680 F.3d at 918 (Wood, J., dissenting).

⁷⁸ See *id.* at 888–89 (lead opinion); *id.* at 907 (Wood, J., dissenting).

⁷⁹ See *id.* at 907 (Wood, J., dissenting).

⁸⁰ See *id.* at 906.

equal protection cases further postpones needed clarity on this issue.⁸¹ The court should have adopted the standard set out in Judge Wood's dissenting opinion, as it would most effectively balance the rights of victims of discrimination with the need to afford low-level state officials latitude to make discretionary decisions.⁸²

A standard that requires the plaintiff to demonstrate that the state actor lacked a rational basis for singling them out, but without showing the defendant's specific motivation, allows courts to make individualized decisions about when discretion becomes unconstitutional discrimination.⁸³ This rational basis standard enables the court to consider the wrongful motivations of a state actor without precluding justice for the victim of the discrimination solely because he or she cannot point to a personal motivation.⁸⁴ At the same time, the standard assumes that the state actor's discretionary decision is rational; the more discretion the official has, the higher the burden is to show that they were not acting within their discretionary authority.⁸⁵ The heavy burden this standard places on plaintiffs in overcoming this assumption negates the criticism that Judge Wood's rational basis standard will inundate the court with similar claims.⁸⁶

Implementing a standard that occasionally asks police officers, who have broad discretionary authority, to defend their decisions is not unprecedented.⁸⁷ Therefore, a standard that does not completely shield police officers' discretionary decisions from scrutiny will not hinder any legitimate purpose in law enforcement.⁸⁸

In contrast, Chief Judge Easterbrook's proposed standard provides too much protection to police officers' discretionary decisions.⁸⁹ The Chief Judge's standard for class-of-one equal protection claims simply asks whether a rational basis can be conceived in defense of the state

⁸¹ See *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 906 (7th Cir. 2012) (per curiam) (Wood, J., dissenting), *cert. denied*, 133 S. Ct. 654.

⁸² See *id.* at 913–15.

⁸³ See *id.*

⁸⁴ See *id.* at 918.

⁸⁵ See *id.* at 914–15.

⁸⁶ See *id.* at 893 (lead opinion); *id.* at 914–15 (Wood, J., dissenting).

⁸⁷ See *Del Marcelle*, 680 F.3d at 916 (Wood, J., dissenting) (citing *Hanes v. Zurick*, 578 F.3d 491, 495 (7th Cir. 2009) (reasoning that police officers' actions are frequently subject to Constitutional constraint, giving examples of police needing "articulable facts" to stop a suspect (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)) and when evaluating police seizures under the Fourth Amendment (citing *Whren v. United States*, 517 U.S. 806, 813 (1996))).

⁸⁸ See *id.* at 916–17.

⁸⁹ See *id.* at 905 (Easterbrook, C.J., concurring).

actor.⁹⁰ If a rational basis can be conceived, the state actor is not liable under a class-of-one equal protection analysis.⁹¹ This standard does not allow courts to consider discriminatory intent or motives by state actors.⁹² Chief Judge Easterbrook's standard would make it more difficult for a plaintiff's claim to survive a motion to dismiss because it does not consider motive.⁹³ Hence, any conceivable rational basis could effectively defeat the plaintiff's claim, regardless of whether there is malicious motivation.⁹⁴

Similarly, the personal motive requirement in Judge Posner's proposed standard would be too constraining on potential class-of-one equal protection claims.⁹⁵ Judge Posner's standard requires that the plaintiff show that the state actor's discriminatory treatment was based on personal motivations unrelated to their public duties rather than a rational basis for their actions.⁹⁶ Such a stringent test, however, forces the plaintiff to cite the precise motivation behind his victimization.⁹⁷ This test may preclude meritorious cases from being heard when plaintiffs cannot meet such a specific pleading requirement.⁹⁸

The Seventh Circuit should have adopted Judge Wood's standard for class-of-one claims because it is easy to administer and soundly shelters police discretion while protecting the ability of those who have been unjustly discriminated against to bring claims.⁹⁹ Judge Wood's standard would negate the need for a judge to speculate as to why a defendant chose to discriminate, and instead allows the facts surrounding the defendant's actions to demonstrate the motive for those actions.¹⁰⁰ In addition, Judge Wood's standard appropriately presumes that discretionary decisions by state actors are rational.¹⁰¹ Therefore, the defendant does not bear the burden of explaining how a given decision was not unconstitutionally discriminatory.¹⁰² Had the Seventh Circuit adopted Judge Wood's standard for class-of-one equal protection claims, it would have properly guarded low-level state officials' dis-

⁹⁰ See *id.* at 900.

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *Del Marcelle*, 680 F.3d at 900 (Easterbrook, C.J., concurring).

⁹⁴ See *id.*

⁹⁵ See *id.* at 899 (lead opinion).

⁹⁶ See *id.*

⁹⁷ See *id.* at 918 (Wood, J., dissenting).

⁹⁸ See *id.* at 899 (lead opinion).

⁹⁹ See *Del Marcelle*, 680 F.3d at 913 (Wood, J., dissenting).

¹⁰⁰ See *id.* at 918.

¹⁰¹ See *id.* at 913–15.

¹⁰² See *id.* at 915.

cretionary authority, as well as given adequate protection to citizens and certainty to courts faced with this category of cases.¹⁰³

CONCLUSION

The Seventh Circuit's split on the issue of whether to allow the plaintiff in *Del Marcelle v. Brown County Corp.* to replead resulted in a failure to come to a controlling decision on what standard to apply in class-of-one equal protection claims. The Seventh Circuit should have adopted Judge Wood's standard for class-of-one equal protection claims requiring that the plaintiff plead plausible allegations, which can include the defendant's motive, to demonstrate that the state actor lacked a rational basis. Judge Wood's standard not only would have been easier for lower courts to administer, but also would have balanced low-level government officials' discretionary authority with the need to grant a forum for those unjustly discriminated against by state actors.

¹⁰³ See *id.* at 906, 913–15.