No. 15-1149

In The
Supreme Court of the United States

STEPHEN J. DIBBS,

Petitioner,

v.

HILLSBOROUGH COUNTY, FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND HILLSBOROUGH COUNTY CHAPTER FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In class-of-one Equal Protection claims which allege the plaintiff was treated differently from others similarly situated, may the jury consider evidence that the challenged regulatory action is substantively similar to that applicable to the proffered comparators?

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INTEREST OF AMICI CURIAE

A. NFIB Legal Center

Here The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.[1] The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Evidence of consent has been filed with the Clerk of the Court. Counsel of record for the parties received notice of the intention to file this brief eight days prior to the due date of this brief because undersigned counsel did not receive consent of their clients until that date; counsel for the parties have acknowledged notice and consented to the filing of this brief. Pursuant to Rule 37.6, amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission.

year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. Because small business owners typically invest substantial assets into acquisition of property for their entrepreneurial endeavors—often including their personal savings—it is imperative to ensure that their property rights and their right to be treated equally, are guaranteed meaningful protections. This case is important to NFIB Legal Center because the correct analysis in class-of-one Equal Protection claims under *Village of Willowbrook v. Olech*[2] cuts across many areas of law of interest to NFIB's members, such as property and land use, employment law, selective enforcement claims,[3] whistleblower law,[4] free speech,[5] and RLUIPA.[6] Clarification of the standards applicable in these cases is greatly needed.

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

[3] *See Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills*, 815 F. Supp. 2d 679 (S.D.N.Y. 2011).

[4] *See Whitmore v. Dep't of Labor*, 680 F.3d 1353 (Fed. Cir. 2012) ("substantially similar" under Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)).

[5] *Bible Believers v. Wayne Cnty*, 805 F.3d 228, 257-58 (6th Cir. 2015) (county treated plaintiffs differently than others based on content of their speech).

[6] *See Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007) ("equal terms" provision in Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq*.).

B. NAACP

Hillsborough County Chapter for the National Association for the Advancement of Colored People (NAACP) is a non-profit legal organization that, for more than seven decades, has helped African Americans secures their civil and constitutional rights. Throughout its history, NAACP has challenged public and private policies and practices that deny African Americans housing opportunities and isolate African American communities. Over the years, the NAACP has challenged public and private policies that deny African Americans equal housing opportunities.[7] NAACP wishes to address the matter of equal protection of the laws as this matter directly bears on the rights of the NAACP's members. NAACP has a strong interest in the fair application of the Fourteenth Amendment to the United States Constitution, which provides critically important protections for all Americans.

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[7] *See*, *e.g.*, *McGhee v. Sipes*, 334 U.S. 1 (1948) (companion case to *Shelley v. Kraemer*, 334 U.S. 1 (1948)) (racially restrictive covenants); *Cent. Ala. Fair Hous. Ctr. v. Lowder Realty Co.*, 236 F.3d 629 (11th Cir. 2000) (racial steering); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (racial discrimination in public housing and assistance programs); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (redlining); *Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (exclusionary zoning).

SUMMARY OF ARGUMENT

By requiring Petitioner prove he was in *exactly* the same circumstances as the other Hillsborough County (County) property owners he proffered as comparators to support his class of one claim, the Eleventh Circuit effectively held that Petitioner must belong to a class of at least *two*.

The rule cannot require a comparator to be so similar to the plaintiff as to be practically indistinguishable. That would be an impossible standard, and would allow government to treat individuals differently without any rational justification. The Eleventh Circuit's approach requires a plaintiff to search for unicorns, not evidence. A viable Equal Protection claim does not require that comparators be "identical in all relevant respects"[8] as the Eleventh Circuit held, merely that the plaintiff has been treated differently than others *similarly* situated.[9]

The Eleventh Circuit's most critical error—and where its approach diverges from other courts—is that it assumed the County's regulations applicable to Petitioner under the Keystone Community Plan were so different from the regulations applicable to

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[8] *See* Pet. App. 49a (District Court's conclusion that "[t]o be considered similarly situated, comparators must be *prima facie* identical in all relevant respects.") (quoting *Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006)).

[9] *Olech*, 528 U.S. at 564 ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.").

the other property owners whom Petitioner sought to introduce as substantially similar comparators that they were irrelevant. In the court's view, the substantive similarity (more precisely, the lack of articulable differences) between the Keystone Community Plan and the other community plans, had no relevance whatsoever.

There is no basis for assuming that landowners in one district are *ipso facto* differently situated simply because of an arbitrary line on the zoning map. In all relevant respects, the separate community plans were materially similar. Thus, Petitioner should have been treated by the County the same as other County landowners. But the Eleventh Circuit proceeded without reviewing, or even comparing, the substance of these community plans—an approach that squarely conflicts with the standards set forth by other courts. Petitioner should have been allowed to submit the question of regulatory similarity to a jury, which could have weighed the evidence to determine whether the plaintiff's position was or was not substantially similar to the proffered comparators.

This brief argues that the Eleventh Circuit's approach diverges from how other courts have considered the same issue. The better rule is that the substance of the regulations are themselves a factor which the trier of fact may consider to determine whether proffered comparators are substantially similar to the plaintiff. This Court should grant certiorari to consider this issue.

ARGUMENT

The Fourteenth Amendment's guarantee of equal protection essentially directs "that all persons similarly situated should be treated alike."[10] Thus, even where a regulation does not classify persons or impact protected minorities, this Court has recognized that a plaintiff has an Equal Protection class of one claim if she can show that a public official has "come down hard on a hapless private citizen" with no conceivable basis other than ill-will.[11] The essence of the claim is that the plaintiff has been *singled*-out without a rational justification, and is not part of a class, even a small one, as the court below recognized.[12] Since official motivations are difficult to prove affirmatively, we look to others who are like the plaintiff for comparison, because if someone in substantially similar circumstances was treated differently than the plaintiff, a jury may consider this as evidence of official animus or ill-will.[13] "The purpose of requiring sufficient similarity is to make sure that no legitimate factor could explain the disparate treatment."[14]

Beyond the "substantially similar" formulation, the

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[10] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

[11] *See Olech*, 528 U.S. at 564 (recognizing class of one claims); *Swanson v. City of Chetek*, 719 F.3d 780, 784 (7th Cir. 2013).

[12] *See* Pet. App. 5a ("The crux of his argument is that Hillsborough County has singled him out for disparate treatment[.]").

[13] *See Olech*, 528 U.S. at 565.

[14] *Fortress Bible Church v. Feiner*, 694 F.3d 208, 222 (2d Cir. 2012).

lower courts have been unable to settle on a consistent framework for how class of one claims should be analyzed, and as a consequence, the question of how similar a comparator must be to the plaintiff has dogged litigants for nearly two decades.[15] This case offers the opportunity to clear up one part of that difficult question.

I. UNLIKE OTHER COURTS, THE ELEVENTH CIRCUIT ASSUMED REGULATORY SIMILARITY WHEN REVIEWING COMPARATORS

The Eleventh Circuit and the district court below held that as a matter of law the Petitioner and his proffered comparators were not substantially similar simply because their properties were technically subject to different community plans under the County's zoning regime—regardless of whether they may have been subject to identical or substantially similar land use restrictions.[16] In the Eleventh Circuit's view, the fatal defect in Petitioner's claim was that he did not introduce evidence of another "identical" property owner whom the County treated

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[15] The question of how to apply a "similarly situated" standard has been around for much longer than class of one claims. *See* Giovanna Shay, *Similarly Situated*, 18 Geo. Mason L. Rev. 581, 583 (2011) ("The words 'similarly situated' appeared in equal protection doctrine long before the advent of the modern, 'tiered' form of equal protection analysis, which employs varying levels of scrutiny based on the protected class.").

[16] *See* Pet. App. 6a ("For instance, although he claims that he was treated disparately in relation to others who succeeded in opting out of the Community Plan, he conceded in his deposition that he was not aware of anyone in the Keystone area who was able to opt out.").

as poorly. Meaning an owner "in the Keystone area" whose property was also subject to the same Keystone Community Plan as was he.[17]

The court's cursory analysis may have a superficial appeal. After all, how can an owner whose property is not subject to the Keystone Community Plan be considered situated similarly to someone whose property is subject to the plan? But this misses the point in cases where, as here, the governing entity has multiple regulatory schemes applicable within its jurisdiction, yet the relevant portions of those regulations are substantively similar. Which means the County should have treated Petitioner in the same manner it did these persons.

In cases where the comparators are subject by the *same entity* to the *same regulations*, the comparison is straightforward, and there is no question a jury could conclude that the proffered comparator is substantially similar to the plaintiff in all material respects.[18] This is also the rule in class of one cases

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[17] *See* Pet. App. 6a

[18] *See*, *e.g.*, *Swanson v. City of Chetek*, 719 F.3d 780 (7th Cir. 2013) (comparator neighbor subject to same substantive land use regulations as plaintiff); *Jacobs, Visconsi & Jacobs Co. v. Lawrence*, 927 F.2d 1111 (10th Cir. 1991) (comparators were substantially similar to plaintiff even though their properties are distant from one another; both plaintiff and comparator property owners were subject to "Plan 95"); *Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1032 (10th Cir. 2007) (same governing authority, same applicable rules). By contrast, when the governing entity is different, there is no relevant similarity. *See Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 987 (6th Cir. 2012) (comparator's agreement was with regional transit authority, not the city).

outside of land use.[19] In yet other cases, the presence of official animus obviates the need for evidence of substantially similar comparators.[20]

A. "Materiality Cannot Be Evaluated In A Vacuum"[21]

Here, the proffered comparators were subject by the *same entity* (the County) to *different* community plans. In such cases, the Eleventh Circuit's approach to regulatory similarity diverges from that of other courts because other courts considering similar circumstances also examine the regulatory similarities between the plaintiff and the comparators. But here, the mere fact that the comparators were subject to a different community plan was held dispositive, and Petitioner was not able to have the jury evaluate whether the regulations were substantially similar. Yet there was no explanation as to why this was a meaningful or relevant distinction—or why it should pass muster even under rational basis review.

For example, in *Loesel v. City of Frankenmuth*,[22] the Sixth Circuit concluded that properties which

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[19] *See*, *e.g.*, *Whitmore v. Dep't of Labor*, 680 F.3d 1353 (Fed. Cir. 2012) (comparator was "similarly situated" for purposes of the Whistleblowers Protection Act when he was also employed by the same employer, in the same chain of command).

[20] *See*, *e.g.*, *Paterek v. Village of Armada*, 801 F.3d 630 (6th Cir. 2015) (comparators subject to same regulatory scheme, but "[a] jury could reasonably find, on this admission alone, that [plaintiff] was treated differently, not on account of any rational basis, but instead due to animus").

[21] *Loesel v. City of Frankenmuth*, 692 F.3d 452, 463 (6th Cir. 2012).

[22] *Id.*

were subject to different zoning classifications were substantially similar to the plaintiff's property. The court in that case rejected the city's argument it was entitled to summary judgment because the two compared properties were "zoned differently."[23] In contrast to the Eleventh Circuit here, the Sixth Circuit went beyond the zoning labels, and analyzed the regulations applicable to the plaintiff and to the comparator to examine how similar, and thus how relevant the comparator, was. The court first held that "[i]n determining whether individuals are 'similarly situated,' a court should 'not demand exact correlation, but should instead seek relevant similarity.'"[24] Correctly noting that "[m]ateriality cannot be evaluated in a vacuum,"[25] the court held that context is everything, and "[i]nevitably, the degree to which others are viewed as similarly situated depends substantially on the facts and context of the case," and that "determining whether individuals are similarly situated is generally a factual issue for the jury."[26]

The Sixth Circuit rejected the city's argument that "as a matter of law, there are material differences between the [plaintiffs'] property and the other two

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[23] *Id*. at 463.

[24] *Id*. at 462-63 (quoting *Bench Billboard v. City of Cincinnati*, 675 F.3d 974, 987 (6th Cir. 2012); *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000)).

[25] *Loesel*, 692 F.3d at 463 (quoting *Trihealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 790 (6th Cir. 2005)).

[26] *Loesel*, 692 F.3d at 463 (quoting *Jennings v. City of Stillwater*, 383 F.3d 1199 (10th Cir. 2004); *Eggleston v. Bieluch*, 203 F. App'x 257 (11th Cir. 2006)).

properties,"[27] and held that the different zoning classifications applicable to each—Business District versus Planned Unit Development—were not material:

> The Loesels respond by pointing out that this distinction is not a material one. Indeed, even City Manager Graham conceded that there was "no difference in terms of how the zoning treated the CL-PUD and the B-3" and that "essentially the same regulations" apply to both zones.[28]

Other courts take the same approach as the Sixth Circuit. The Second Circuit, for example, also looks at the substance of the applicable regulations. In *Fortress Bible Church v. Feiner*,[29] that court examined the zoning regulations applicable to the plaintiff's property and to the comparators' properties and held that the relevant provisions related to parking, traffic, and the safety of retaining walls, were substantially similar:

> However, where, as here, a decision is based on several discrete concerns, and a claimant presents evidence that comparators were treated differently *with regard to those specific concerns* without any plausible explanation for their disparity, such a claim can succeed.[30]

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[27] *Loesel*, 692 F.3d at 463.

[28] *Id.* at 464.

[29] *Fortress Bible Church v. Feiner*, 694 F.3d 208 (2d Cir. 2012).

[30] *Id.* at 225 (emphasis added).

B. The Keystone Community Plan And The County's Other Plans Are Substantially Similar

Here by contrast, neither the Eleventh Circuit nor the District Court looked beyond the surface fact that Petitioner's property is subject to the Keystone Community Plan, and the comparators' properties are elsewhere in the County. In opposition to summary judgment, however, Petitioner presented evidence that other property owners in the County did not have their applications for opt out denied,[31] had their rezonings granted, and were permitted to undertake similar improvements to their land whereas he was denied. He also introduced evidence that the substantive requirements of the Keystone Community Plan and the County's community plans applicable to the proffered comparators are similar in all material respects.[32]

None of the County's community plans contains express standards for an owner to opt out. But doing so is permitted on an *ad hoc* basis under County policy.[33] The opting out standard should be uniformly applied across all community plan areas in the County because nothing indicates that property owners in other areas of the County are allowed to

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[31] Doc. 53-2 at ¶¶ 39-40.

[32] *See* Doc. 38 at 53/8-11 ("We have completed a staff guide for doing community plans and updating them[;] . . . about making them more consistent amongst each other, having similar language and, again, the level of what type of strategies should be in there[.]"); Doc. 32-1 at 17, 41, 67 & 86.

[33] Doc. 53-2 at ¶ 40.

opt out of the community plans to which their properties are subject, while properties in the Keystone are not.[34] Neither the County nor the courts below articulated a rational basis for any such distinction. Yet, the County allowed other owners to opt out of their plans, but did not allow Petitioner. Nothing in the Keystone Community Plan calls for a different opt out standard than applicable under other community plans.[35] In its various community plans, the County did not differentiate between one community plan and any another in the process of adoption, opting out, or updating.[36]

Similarly, Petitioner's borrow pit application was substantially delayed, while those of others in the County were promptly granted.[37] There is no difference between the standards for processing and approval of such applications between the various community plans, and these applications are processed by the County pursuant to standards that should be uniform.[38]

What matters for purposes of substantially similar analysis is the substance of these regulations and whether Petitioner and the comparator owners are

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[34] *See* Doc. 32-1.

[35] *Id.*

[36] *See, e.g.,* Doc. 38 at 22/9-21, 24/25-25/2, 90/13-92/6.

[37] Doc. 53-2 at 25-26, ¶ 29.

[38] *See* Hillsborough Cnty, Fla., Land Development Code §§ 6.11.54, 10.00.01, *available at* https://www.municode.com/library/fl/hillsborough_county/codes/land_development_code (visited Apr. 12, 2016).

subject to similar regulatory standards, not a formulaic recitation that one is subject to the Keystone Community Plan, and the others subject to other community plans. To be sure, if different community plans impose substantially similar restrictions then it is arbitrary to treat similarly situated landowners in these respective districts differently. To the extent they are treated differently, the government bears a minimal duty to explain a rational basis for the disparate treatment.

Under Eleventh Circuit's ruling, for example, in an employment class of one claim, a comparator would not be similar as a matter of law if she had a different job title.[39] Or in a selective enforcement situation a plaintiff alleging a class of one claim would be prohibited from proving her case if she was ticketed in a 45 mph zone while comparators were ticketed in 55 zones, even though both were tagged for exceeding the speed limit by 10 miles per hour.

II. CLASS OF ONE EQUAL PROTECTION CLAIMS NEED CLARIFICATION

In the decade and a half since this Court recognized class of one Equal Protection claims in *Olech*, the lower courts have been unable to settle on consistent standards for evaluating such claims, as illustrated by this case. The standards for what qualifies as a similarly situated comparator, and the other standards which govern class of one claims are "amor-

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[39] *See*, *e.g.*, *Whitmore*, 680 F.3d 1373 (comparator was "similarly situated" for purposes of the Whistleblowers Protection Act when he was also employed by the same employer, in the same chain of command).

phous,"[40] have resulted in "a large number of splits,"[41] and the standards are "in flux."[42]

Leaving the standards in disarray has two major negative consequences:

> The central issue here is what degree of similarity is required for two entities to be considered "similarly situated." 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. Conversely, too 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.[43]

The Eleventh Circuit's track record, detailed in the Petition at 15-17, aptly illustrates the too-narrow problem, as it is nearly futile to raise a class of one claim in that Circuit.

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[40] *Tapalian v. Tusino*, 377 F.3d 1, 9 (1st Cir. 2004).

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

[42] *Del Marcelle v. Brown Cnty Corp.*, 680 F.3d 887, 888 (7th Cir. 2012) (en banc) ("The lower courts are divided, and "[t]he law concerning 'class of one' equal protection claims is in flux.").

[43] *Grider v. City of Auburn*, 618 F.3d 1240, 1264 (11th Cir. 2010) (citing *Griffin Indus. v. Irvin*, 496 F.3d 1189, 1203 (11th Cir. 2007)).

The court's approach here leads to the tautology which the authors of the first major scholarly treatment of Equal Protection claims warned about:

> The question is, however, what does that ambiguous and crucial phrase "similarly situated" mean? And in answering this question we must first dispose of two errors into which the Court has sometimes fallen.
>
> First, "similarly situated" cannot mean simply "similar in the possession of the classifying trait." All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test.[44]

This, the authors noted, leads to "the easy dismissal of the equal protection issue on the grounds that the law applies equally to all whom it applies."[45] In other words, "substantially similar" cannot be read so narrowly as to define class of one claims out of existence, especially on summary judgment because whether another is similar enough to the plaintiff that differential treatment is evidence of official ill will is the type of judgment which juries usually make.[46] Yet that is what the Eleventh Circuit has

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[44] Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 345 (1949).

[45] *Id.*

[46] *See*, *e.g.*, *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19-20 (1st Cir. 1989) ("The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the 'relevant aspects' are those factual elements which determine whether reasoned

(…footnote continued on next page)

accomplished by requiring *identically* situated comparators without any requirement of looking beyond the label "Keystone Community Plan." Regulatory similarity, like the other factual similarities between the plaintiff and the proffered comparators, should be one of the things which a trier of fact is entitled to consider.

CONCLUSION

This Court should grant the petition and review the judgment of the Eleventh Circuit.

Respectfully submitted.

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APRIL 2016.

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analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples."); *Barrington Cove, LP v. R.I. Hous. & Mortg. Fin. Corp*., 246 F.3d 1, 18 (1st Cir. 2001) ("The formula for determining whether individuals or entities are 'similarly situated' for equal protection purposes is not always susceptible to precise demarcation.").