No. 11-161

IN THE

Supreme Court of the United States

CHRISTINE ARMOUR, ET AL.,

Petitioners,

v.

CITY OF INDIANAPOLIS, ET AL.,

Respondents.

On Writ Of Certiorari
To The Indiana Supreme Court

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Petitioners are the owners of 31 residential real estate parcels in Indianapolis, Indiana, who were assessed $9,278 each for connection to a public sewer system. Petitioners paid their assessments in full, while their neighbors—owners of approximately 150 other parcels—elected to pay in monthly installments over 10, 20, or 30 years. Just one year later, the City forgave the outstanding balances of those taxpayers who were paying in installments, but it refused to refund any portion of the payments made by those who had paid in full.

The Indiana Supreme Court held that this refusal did not violate the Equal Protection Clause, even though it allowed the City to retain from petitioners 10 to 30 times as much in taxes as identically situated owners paid. In so holding, the 3-2 majority of the Indiana Supreme Court dismissed this Court's unanimous decision in *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336 (1989), as "narrowed to its facts." Pet. App. 28a. The question presented is:

> Whether the Equal Protection Clause precludes a local taxing authority from refusing to refund payments made by those who have paid their assessments in full, while forgiving the obligations of identically situated taxpayers who chose to pay over a multi-year installment plan.

RULE 14.1(B) STATEMENT

Petitioners are Christine Armour; David A. Bird; Alvera C. Buker; Joseph and Rozzetta Cumberland; Alice J. Detzler; James and Renate Donahue; Kenneth J. and Mary Jane Eiler; Sandra Kay Hevron; David A. and Heather R. Fellabaum; Nancy Lee Gahl; David M. Gibson; Ingeborg Haesloop; Robert and June Holt; Frank and Jeanne A. Johnson; Edward J. and Ericka M. Kelly; Leonard and Colleen Kirksey; Carlos and Katrina Kreamer; Frank and Bettye Jo Lloyd; William H. and Sue Ellen Main, Jr.; Wilma Marley; Geoffrey and Dinah Michels; Norma Jean and Paul Morgan; Zora Nathan; Frank and Sharon Neese; Donnie Patton; Viesturs and Carolyn Purvlicis; Susan Moe; Evelyn Rogers; Clifford Short; Louis and Linda Urbancic; and Mary Williams.

Respondents are the City of Indianapolis; Gregory A. Ballard, Mayor of the City of Indianapolis; Indianapolis Department of Public Works; Indianapolis Board of Public Works; Jeffrey L. Spalding, Controller of the City of Indianapolis; Indianapolis Office of Finance and Management; and Billie J. Breaux, Marion County Auditor.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Indiana Supreme Court (Pet. App. 1a-39a) is reported at 946 N.E.2d 553. The opinion of the Indiana Supreme Court granting transfer of the decision of the Court of Appeals of Indiana (Pet. App. 40a) is reported at 940 N.E.2d 821. The opinion of the Court of Appeals of Indiana (Pet. App. 41a-78a) is reported at 918 N.E.2d 401. The order of the Marion Superior Court granting summary judgment for petitioners (Pet. App. 80a-81a) is unreported.

JURISDICTION

The judgment of the Indiana Supreme Court was entered on May 10, 2011. The petition for a writ of certiorari was filed on August 8, 2011, and granted on November 14, 2011. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION, STATUTE, AND ORDINANCES INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides: "[N]or shall any State * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1.

Relevant portions of Resolution 101 of the Indianapolis Board of Public Works; General Ordinance No. 107 of the City-County Council of Indianapolis-Marion County; and Indiana's Barrett Law, Ind. Code §§ 36-9-37, -39, are reproduced in the appendix to this brief. App., *infra*, 1a-27a.

STATEMENT

When the City of Indianapolis needed to fund the expansion of its municipal sewer system to serve a portion of the Northern Estates neighborhood, it invoked an Indiana statute that authorized it to impose a special tax assessment on the owners of the affected homes. That law required that the costs of the sewer project be "apportioned equally." Ind. Code § 36-9-39-15(b)(3). Accordingly, each of the approximately 180 affected parcels was issued a tax bill for $9,278. Petitioners paid their assessments in full. Other homeowners elected to pay in monthly installments over 10, 20, or 30 years.

Just one year later, the City announced that it would not use this unpopular funding scheme for future projects. It then ordered the forgiveness of all outstanding balances under the old funding scheme, including the balances of the Northern Estates homeowners who had elected to pay in installments. The City refused, however, to refund any portion of the full payments petitioners had made. As a result, petitioners paid between 10 and 30 times more than their next-door neighbors. The question here is whether the City's refusal to issue any refund to petitioners violated the Equal Protection Clause's requirement of "a rough equality in tax treatment of similarly situated property owners." *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336, 343 (1989).

A. The Brisbane/Manning Sewer Project And The Barrett Law

1. Northern Estates is a middle-class neighborhood of approximately 550 homes just northwest

of downtown Indianapolis.[1] In 2002, the City approved a plan to connect approximately 180 of those parcels to the municipal sewer system, replacing the individual septic system that each home used. JA59. The project was known as the Brisbane/Manning Barrett Law Sanitary Sewers Project. *Ibid.* "Brisbane/Manning" referred to the street intersection around which the affected homes were clustered; "Barrett Law" referred to the statutory mechanism for paying for the project.

2. The Barrett Law is an Indiana statute that authorizes municipalities to finance sewer projects by assessing taxes directly against the owners of properties benefiting from a particular project. Ind. Code § 36-9-39 *et seq.* The Barrett Law requires that "[t]he costs shall be primarily apportioned *equally* among all abutting lands or lots." *Id.* § 36-9-39-15(b)(3) (emphasis added).

The Barrett Law provides that "adjustments" to those assessments may "be made as provided by section 16 of this chapter." Ind. Code § 36-9-39-15(b)(3). Section 16, in turn, provides methods for calculating the number of lots by which a project's costs are to be equally divided. Section 17 allows for an adjustment to an individual assessment if (1) the parcel abuts

[1] The neighborhood was originally developed in the 1960s. In 2004—before the recent downturn in the housing market—home sale prices ranged from $120,000 to $270,000. JA67. The 2000 Census reported that the median household income in Washington Township, in which the Northern Estates neighborhood is located, was $47,079 and that 23% of township residents collect Social Security income. See U.S. Census Bureau, *Profile of General Demographic Characteristics: 2000*, http://censtats.census.gov/data/IN/0601809780792.pdf

another street or alley and "has already been assessed for sewage works"; (2) the parcel "cannot be reasonably connected with or served by the sewage works"; (3) the sewer project "does not confer benefit on the property"; or (4) the actual benefit "conferred by the sewage works is less than the" amount of the assessment. *Id.* § 36-9-39-17. Any adjustments made under that section must then be absorbed equally by "all the other property assessable for the sewage works" or "assessed against the municipality." *Id.* § 36-9-39-17(c).

Once the roll of assessments is prepared, those numbers "are final and absolute unless changed under sections 23 and 24 of this chapter." Ind. Code § 36-9-39-22(a). Those sections allow property owners to challenge the authority's determination that one or more parcels are "specially benefited in the amounts respectively assessed." *Id.* § 36-9-39-23(b). Any alteration to the assessment "must be based on the works board's findings concerning the special benefits received on account of the sewage works." *Id.* § 36-9-39-23(c). That decision "is final and conclusive on all parties." *Id.* § 36-9-39-25(a).

The Barrett Law further provides for the collection and enforcement of these assessments. It declares that "the municipal fiscal officer *shall* collect and enforce the special assessments," Ind. Code § 36-9-37-4 (emphasis added), and that installment payments "*shall* be collected in the same manner as other taxes," *id.* § 36-9-37-6 (emphasis added). The statute contains no suggestion that taxpayers who elect to pay a Barrett Law assessment under an installment plan may be entitled to preferential treatment.

3. The City issued tax assessments to each of the owners of the approximately 180 properties to be connected in the Brisbane/Manning project. As required by the Barrett Law, the City equally divided the costs by the number of lots involved in the project and imposed an assessment of $9,278 on the owners of each parcel.[2]

Petitioners are owners of 31 of the 39 properties whose owners paid their assessments in full. Most of their neighbors elected to pay in monthly installments over a term of years: owners of 47 properties opted for the 10-year plan (paying $77.27 per month); 27 opted for the 20-year plan (paying $38.66 per month); and 68 opted for the 30-year plan (paying $25.77 per month). Pet. App. 4a.[3] As required by statute, those paying under an

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[2] Parcel 196, owned by petitioner Alvera C. Buker, was assessed only one-half of that amount, or $4,639, because her parcel had a preexisting municipal sewer hookup that did not meet current City standards. JA66-68; see Ind. Code § 36-9-39-17(b)(3) (authorizing reduction in assessment where benefit "conferred by the sewage works is less than" the amount otherwise to be assessed).

[3] This breakdown of installment payers is the same breakdown used by the court below. The precise number of installment and upfront payers may differ slightly from these figures because of a very small number of errors in determining the payment status of some homeowners. The court below stated that there were "approximately 180 parcels covered" by the Brisbane/Manning project. Pet. App. 4a. Nothing in this case turns on the precise number of parcels assessed under the Brisbane/Manning project or on the precise number of installment and upfront payers. This brief will therefore use the same figures relied on by the court below, both with respect to the "approximately" 180 total parcels and with respect to the number of payers under each of the three installment plans.

installment plan were charged interest, which the City set at 3.5% per year. *Ibid.*; see Ind. Code § 36-9-37-8.5(e). As also required by statute, each taxpayer electing an installment plan "enter[ed] into a written agreement stating that in consideration of that privilege [he or she] (1) will not make an objection to an illegality or irregularity regarding the assessment * * *; and (2) will pay the assessment as required by law with specified interest." *Id.* § 36-9-37-8.5(c).

B. The City Abandons The Barrett Law For Future Sewer Projects

The Barrett Law, which the City had used repeatedly to finance various projects over the years, was highly unpopular. See *Cox* v. *City of Indianapolis*, No. 09–435, 2010 WL 2484620, at *1 (S.D. Ind. June 14, 2010) ("No one liked [the] Barrett Law—not the City officials, not the neighborhood organizations, not the general public.") (internal quotation marks omitted). On October 31, 2005, the City announced that it would no longer use the Barrett Law to finance sewer expansion projects. It passed City-County Ordinance No. 107, which adopted the Septic Tank Elimination Program (STEP) to fund future projects. STEP imposed a lower price tag on residents: a $2,500 fee for each new connection to the sewer. To make up for reduced assessments, the City imposed an increased sewer usage fee on *all* residents connected to the municipal sewer system. App., *infra*, 23a-24a.

C. The City Forgives Outstanding Barrett Law Assessments But Refuses Refunds To Taxpayers Who Paid In Full

The City's Board of Public Works then decided to dispose of existing assessments under the Barrett Law. On December 7, 2005, the Board enacted Resolution No. 101, which "forg[a]ve all assessment amounts it established pursuant to the Barrett Law Funding for Municipal Sewer program due and owing from the date of November 1, 2005[,] forward." App., *infra*, 26a. Resolution 101 contained four "Whereas" clauses. The first recited the Board's taxing authority under the Barrett Law. *Id.* at 25a. The second declared that "[t]he Barrett Law Funding for Municipal Sewer program may present financial hardships on many middle to lower income participants who most need sanitary sewer service in lieu of failing septic systems." *Ibid.* The third explained that STEP had included a "rate and fee increase" sufficient to meet the City's needs. *Ibid.* The fourth stated that "[t]he financial model upon which [STEP] was based, considered the current assessments" under the Barrett Law and the need for future projects. *Id.* at 26a. Resolution 101 did not state a reason why only those Barrett Law assessments outstanding on November 1, 2005, would be forgiven.

The November 1 cutoff date meant that homeowners paying their Brisbane/Manning assessments in installments had made just one year's worth of payments. Those under the 10-year plan had each paid a total of $927.80 (10% of their assessment); those under the 20-year plan had each paid $463.90 (5%); and those under the 30-year plan had each paid

\$309.27 (3⅓%). Because petitioners had all paid in full, they had no outstanding balances as of November 1 and thus received no relief under Resolution 101.

The effect of forcing petitioners (and others who did not elect an installment plan) to pay 100% of their assessments, while their neighbors paid 10, 5, or 3⅓%, was dramatic. Of the total amount of funds from Brisbane/Manning assessments that the City collected, the 39 properties that did not use an installment plan contributed roughly 80%, even though they constituted barely more than 20% of the assessed properties.[4]

Petitioners requested refunds from the City for the difference between the full amounts they paid and the amount actually paid by their neighbors who had elected installment plans. The City refused.

The Director of the Department of Public Works, James Garrard, sought to explain the City's decision. Garrard acknowledged that the Barrett Law required that "costs * * * shall be equally apportioned among the affected lots," and stated that "the City's intent is to treat property owners within

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[4] Owners of the 39 properties who had paid their assessment in full paid approximately \$350,000 out of the roughly \$430,000 collected. Although the precise ratio may vary slightly based on the total number and breakdown of parcels and other minor variations in amounts paid, see note 3, *supra*, it is clear that those who paid in full paid the vast majority of the assessments collected for the Brisbane/Manning project. A different perspective on the numbers makes the same point: The City refused petitioners' request for \$273,391.63 in refunds while forgiving roughly \$1,240,000 in assessments imposed on homeowners paying in installments.

each project area equitably, based upon the scope and value of each specific project." JA50. He continued, "[w]e recognize that the time frame would suggest to you that refunds are warranted." JA51 But he asserted that doing so would be unfair vis-à-vis "previous projects constructed" under the Barrett Law. *Ibid.* "Refunding payments made in your project area, or any portion of the payments," he stated, "would establish a precedent of unfair and inequitable treatment to all other property owners who have also paid Barrett Law assessments." *Ibid.*

Garrard's letter did not claim that the treatment of petitioners was fair in comparison to the thousands of dollars in relief granted to petitioners' neighbors, or that there was any difference among the homeowners other than their time of payment. To the contrary, Garrard acknowledged that the November 1, 2005, cutoff date "*might seem arbitrary to you*," but asserted (without further explanation) that "it is essential for the City to establish this date and move forward with the new funding approach." JA51 (emphasis added).

D. This Litigation

1. Petitioners filed this lawsuit in Marion Superior Court against the City and several of its officials. The lawsuit alleged, among other things, that respondents' refusal to issue any refund to petitioners while granting relief to their next-door neighbors violated the Equal Protection Clause of the U.S. Constitution. JA12-24. Both sides moved for summary judgment on that claim.

In support of the contention that its action survived rational-basis scrutiny, the City submitted an affidavit signed by Mr. Garrard, who had "made the policy decision to recommend to the Board [of Public Works]" that it adopt Resolution 101. JA75. Garrard first explained why the City had abandoned the Barrett Law in favor of STEP:

a. The Board determined that the continued use of the Barrett Law funding system may present financial hardships on many middle to lower-income participants who most needed sanitary sewer service in lieu of failing septic systems;

b. The Board enacted the Septic Tank Elimination Program (STEP) based on several interrelated financial, engineering, public health and geographical factors so that all future installation projects would cost one flat rate per connection * * * .

JA75. Garrard then attempted to explain why the City had forgiven outstanding Barrett Law assessments as of November 1, 2005:

c. The City would no longer use Barrett Law statute Indiana Code section 36-9-39-15 for funding of the installation project, consequently the provisions of that statute were inapplicable, and it was essential for the City to establish a clear date for the change and move forward with the new funding approach; and

d. The administrative costs to service and process remaining balances on Barrett Law accounts long past the transition to the STEP program would not benefit the taxpayers and

> [would] defeat the purpose of the flat-rate per connection—namely simplifying things.

JA76. Like his earlier letter, Garrard's affidavit did not attempt to draw any distinction among Northern Estates homeowners—all that mattered to the City was whether a balance was outstanding on November 1, 2005.

After a hearing, the trial court granted summary judgment for petitioners, Pet. App. 80a-81a, and entered judgment in favor of the owners of each property for $8,965.73 (except Ms. Buker, who was awarded $4,329.73), for a total of $273,391.63, Pet. App. 83a-84a. The trial court also awarded attorneys' fees and expenses under 42 U.S.C. § 1988. Pet. App. 84a.

2. The Court of Appeals of Indiana unanimously affirmed. The court held that "the City's refusal to issue a refund to the Homeowners in an amount that would place them in rough equality with their similarly situated, and identically taxed, neighbors violated the Homeowners' right to equal protection of the laws." Pet. App. 43a. The "most relevant" case on point, the court explained, was this Court's unanimous decision in *Allegheny Pittsburgh*, which held that "'the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated owners.'" Pet. App. 57a, 58a (quoting 488 U.S. at 343) (alteration omitted). The fact that some taxpayers had not yet paid their tax in full, the court concluded, was not a legitimate basis for creating this gross inequality among Northern Estates homeowners.

The court rejected the City's contention that petitioners were "not similarly situated" to their neighbors who received relief under Resolution 101: "The City cannot avoid an equal protection claim by subdividing the class and, in effect, re-defining the class as those who 'carried no balances requiring continued administration by the City.'" Pet. App. 62a (quoting Aplts. Br. 10). The court also rejected the City's contention that petitioners had failed "'to show [that] they were similarly situated to the low-income families'" who benefited from the forgiveness of Barrett Law assessments. *Ibid.* "The unstated assumption behind the City's argument," the court explained, "is that only low-income property owners paid their Barrett Law assessments in installments and that only non-low-income property owners paid in full." Pet. App. 63a n.9. Since petitioners had established a "prima facie showing of disparate treatment," however, it was "the City's burden to rebut" that showing. *Ibid.* (citing *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 603 (2008)). "[T]he City designated no evidence [on summary judgment] showing that the Homeowners did not include middle to lower income participants in the Northern Estates Barrett Law program." *Ibid.* (internal quotation marks omitted).

Turning to the reasons set forth in Resolution 101 itself, the court explained that, "when the text of a law 'specifically declare[s] [its] purpose, the [law leaves] no room to conceive of any other purpose for [its] existence.'" Pet. App. 65a (quoting *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 530 (1959)). The court noted that the resolution "identifies only one rationale for the City's decision to forgive outstanding Barrett Law assessments: the transition from Barrett Law funding to STEP is in the best interests of middle- to lower-income property owners." *Id.* at 66a. But that was beside the point—petitioners did "not challenge the City's decision to move from the Barrett Law to STEP." *Id.* at 66a-67a. The constitutionally relevant question was "whether the City can apportion costs equally among similarly situated property owners and then forgive outstanding assessments on an arbitrary date without refunding an equivalent amount to those property owners who had already paid the assessment in full." *Id.* at 67a. "[N]either the Resolution's findings nor its forgiveness provision address the City's decision[] not to issue a refund to [petitioners]." *Ibid.* To the contrary, "there is a remarkable disconnect between those two decisions." *Ibid.*

That disconnect, the court explained, led to "grossly disparate treatment" of petitioners, who "paid from ten to thirty times more than each of their similarly situated neighbors." Pet. App. 69a (citing *Allegheny Pittsburgh*, 488 U.S. at 344). That inequity violated petitioners' "legitimate expectation that all property owners subject to the same assessment would pay the same amount, either outright or in installments, and [petitioners] reasonably relied on the City's invitation to pay their assessments in full." *Id.* at 70a.

The court then examined the Garrard affidavit. As an initial matter, the court explained, it was improper under Indiana law to "impute Garrard's personal opinions, which are not expressed in the language of the Resolution, to the entire Board." Pet. App. 72a (citing *Utility Center, Inc.* v. *City of Fort

Wayne, 868 N.E.2d 453, 459 (Ind. 2007)). In any event, Garrard's statements missed the mark. The professed desire to avoid "administrative costs" of continued collections made no sense, because "there is no evidence or suggestion" that those costs "would be greater than the amount collected," *id.* at 72a-73a, and, of course, no administrative costs would be incurred by refunding a portion of petitioners' fully paid assessments, *id.* at 73a. The court therefore concluded that the City's purported desire to save administrative costs was "not a plausible policy reason for the City's disparate treatment of the Homeowners." *Ibid.* (citing *Nordlinger* v. *Hahn*, 505 U.S. 1, 10-11 (1992), and *Allied Stores*, 358 U.S. at 530). Likewise, the asserted interest in "simplifying things" as the City transitioned to STEP was not "plausibly related to the City's refusal to issue a single refund to [petitioners]." *Id.* at 74a-75a.[5]

Finally, the court rejected the City's contention that the proper remedy for a constitutional violation was to rescind forgiveness rather than to order a refund to petitioners. The court explained that, as this Court had held in *Allegheny Pittsburgh*, the Equal Protection Clause "'is not satisfied if a State does not remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking upward revision of the taxes of other members of the class.'" Pet. App. 76a (quoting 488 U.S. at 346).

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[5] The court also held that the City had abandoned on appeal the justification asserted in Garrard's letter—namely, that granting petitioners refunds would be unfair to other taxpayers in other Barrett Law projects. Pet. App. 72a n.12 (citing Ind. R. App. P. 46(A)(8)(a)).

3. In a 3-2 decision, the Indiana Supreme Court reversed. The majority concluded that several "legitimate governmental interests" supported the City's actions. The first was "[p]roviding relief or support for citizens facing financial hardship." Pet. App 16. The majority did not, however, explain how that reason supported the City's refusal to offer petitioners any refund as opposed to the decisions to abandon the Barrett Law and refund unpaid assessments.

The majority also stated—again without explanation—that "it was reasonable for the City to believe that property owners who had already paid" the full $9,278 "were in better financial positions than those" who had paid a small fraction of that amount because they had "chose[n] installment plans." Pet. App. 16a. The majority acknowledged, however, that "there might be some property owners" who elected installment plans for reasons other than necessity, and that "it is possible that there are some who paid up front that are currently experiencing financial hardship." *Ibid.* But "it does not matter under rational basis review what the actual facts would show," the majority concluded, "so long as the issue was at least debatable when the governmental decision maker acted." The court of appeals had therefore erred, the majority concluded, in holding that the City was required on summary judgment to adduce "proof" of its after-the-fact hypothesis. *Ibid.*

The majority explained that it believed itself entitled to consider justifications other than those stated in the text of Resolution 101. It stated that *Allied Stores* stands only for the proposition that, after articulating an inadequate policy purpose, "[t]he government may not then save the law [by] * * * rely[ing] on a different conceivable purpose that is contrary to or inconsistent with the stated purpose." Pet. App. 17a n.11 (citing *Allied Stores*, 358 U.S. at 529-530). The majority then identified two "other interrelated plausible policy reasons for Resolution 101." *Id.* at 17a. First, "[t]he City could have reasonably believed that the benefits of simplifying sanitary sewer funding outweighed the effort of continuing a collection system for thousands of taxpayers." *Id.* at 18a. The court did not explain how such a desire supported the City's refusal to issue refunds to petitioners; rather, the court stated simply that "the fact that [the City] chose to draw the line at November 1, 2005, was a matter of discretion appropriately exercised by the City and the Board." *Ibid.* (citing *Fitzgerald* v. *Racing Ass'n*, 539 U.S. 103, 108 (2003)).

Second, the majority concluded that "the decision not to issue refunds to those who had already paid implicates another legitimate interest—preservation of limited resources." Pet. App. 18a-19a. "The City clearly has a legitimate interest," the majority continued, "in not emptying its coffers to provide refunds to those who had already paid their assessments." *Id.* at 19a. It was enough that petitioners "each paid for a sewer and received a sewer," even though "[i]t is true that those whose assessments were discharged also received a sewer and did so at a lower price." *Ibid.*

The majority stated that petitioners had "[i]n essence" presented a "class-of-one" equal protection theory, "because they were treated differently than the other residents of Northern Estates." Pet. App.

23a The majority held, however, "that this is not a class-of-one case" because Resolution 101 "makes a broad classification on the basis of a common characteristic—outstanding Barrett Law balances." *Id.* at 23a-24a. In any event, the majority continued, "there is no evidence that the City's action was motivated by animus or ill-will toward [petitioners]," which it held ought to be required for "class-of-one" claims. *Id.* at 24a.

The majority then examined this Court's decisions in *Allegheny Pittsburgh* and *Nordlinger*. "The effects of the tax schemes in *Allegheny Pittsburgh* and *Nordlinger* were the same," the majority observed, but this Court struck down the former and upheld the latter. Pet. App. 26a. *Allegheny Pittsburgh* "was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was" legitimate. *Id.* at 27a-28a. Far more important, the majority held, was this Court's supposedly "contrasting" decision in *Nordlinger*. *Id.* at 28a. The majority dismissed *Allegheny Pittsburgh* as "a class-of-one case," "which, again, the case before us is not." *Ibid.* (citing *Engquist*, 553 U.S. at 602; *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000); and *Bell* v. *Duperrault*, 367 F.3d 703, 712 (7th Cir. 2004) (Posner, J., concurring)). "[A]t a minimum," the court declared, "*Allegheny Pittsburgh* has essentially been narrowed to its facts." *Ibid.*

Justice Rucker, joined by Justice Dickson, dissented. "[M]erely declaring that Barrett Law funding 'imposed financial hardships on middle- and low-income property owners who were often most in need of sanitary sewers due to failing septic systems,'" the dissent observed, "does nothing to explain why the City treated differently residents who elected to pay their assessments in a lump sum versus those who elected to pay in installments." Pet. App. 38a. Rather, the dissent agreed with the court of appeals that "[t]he stated purpose in Resolution 101 simply fails to express any connection to the" denial of relief to petitioners. *Id.* at 39a. The dissent also agreed with the court of appeals that, when a statute specifically declares its purpose, "it is inappropriate to consider other conceivable or even expressed rationales for the purpose of 'saving' an inadequately justified classification." *Id.* at 36a. "In my view," Justice Rucker concluded, "this disconnect demonstrates that the classification fails to have a 'fair and substantial relation' to the statutory objective." *Id.* at 39a (citing *Allied Stores*, 358 U.S. at 527).

SUMMARY OF ARGUMENT

I.A. As this Court unanimously held in *Allegheny Pittsburgh*, the Equal Protection Clause requires "rough equality in tax treatment of similarly situated property owners." *Nordlinger* reaffirmed *Allegheny Pittsburgh*; what matters most, the Court explained, is the backdrop against which each claim of unequal treatment is judged. In *Allegheny Pittsburgh*, West Virginia law explicitly required that all property be assessed at current market value; in *Nordlinger*, California law just as explicitly declared that property should be assessed based on the taxpayer's purchase price. Once a State has made a clear decision to treat a particular group of taxpayers as similarly situated, neither the State nor its organs or officials may thereafter subject them to grossly unequal treatment, even if there might have been some basis for differentiating them from each other in the first instance. The common theme of these cases, this Court has more recently confirmed, is "the existence of a clear standard against which departures * * * could be readily assessed." *Engquist*, 553 U.S. at 602.

B. Here, Indiana law unequivocally declared that homeowners within each project must be treated equally. The City's refusal to grant petitioners refunds, however, left petitioners paying between 10 and 30 times more than their neighbors—indeed, homeowners who paid their assessments in full contributed roughly 80% of the funds the City actually collected for this project. This is the same kind and level of gross inequality struck down in *Allegheny Pittsburgh*, in a State that (like West Virginia in *Allegheny Pittsburgh*) promised equality. It should meet the same fate here.

C. The Indiana Supreme Court wrongly dismissed *Allegheny Pittsburgh* as a class-of-one case. The equal-protection analysis does not change based on the number of plaintiffs. This Court has so held, and it has rejected the requirement of specific animus that the Indiana Supreme Court suggested should govern "class-of-one" claims.

II.A. The City's asserted justifications for this severely unequal treatment are insufficient, even under rational-basis scrutiny. Much of what the City has said consists of efforts to defend actions *other than* the one that is actually challenged, *i.e.*, the denial of refunds. This litigation does not place into dispute the City's desire to help low-income taxpayers by abandoning the Barrett Law, its decision to adopt a new financing method, its need to set a clear date for doing so, or the purported administrative burdens of collecting unpaid assessments. When the City gets around to offering up a reason that actually has something to do with the refusal to grant refunds to petitioners, the only reason the City invokes is that granting refunds "would have cost the city millions of additional dollars." Br. in Opp. 11.

B. Saving money is not a rational basis for such extreme disparities. Discriminatory taxation always "preserves resources," but that has never been accepted by this Court as sufficient to defeat an equal-protection challenge. The Indiana Supreme Court's apparent suggestion that refunds would impose administrative costs on the City is likewise misguided because it contradicts *Allegheny Pittsburgh* and because any burden here would be trivial.

C. The Indiana Supreme Court asserted that petitioners are not similarly situated to their neighbors who paid in installments because the latter are (in that court's view) of lesser financial means than the former. That suggestion is neither plausible in theory nor supported by an iota of record evidence. The Barrett Law operates on the exact opposite premise, and the City itself has acknowledged that a purported difference in financial means had nothing to do with its decision. Resolution 101 spoke only of the impact that the Barrett Law *generally* had on all taxpayers. The City also affirmatively told petitioners that its intent was to treat *all* taxpayers within the Brisbane/Manning project equally, and the City has conceded that "all of the City's other reasons for forgiveness without refunds"—other than cost savings—"would have been accomplished if refunds were also extended."

In any event, this purported distinction is far too attenuated from the goal of helping low-income homeowners. As with other taxing schemes that have run afoul of the Equal Protection Clause, the City's actions are significantly overinclusive and underinclusive. Taxpayers could choose to pay in installments for any reason, or for no reason at all. And it blinks reality to assume that homeowners who actually paid $9,278 are *better off* than those who paid 1/30th of that amount. Moreover, the City could easily have favored the lowest-income homeowners through "more precise and direct classification[s]"—the City need only have made some legitimate effort to determine taxpayers' relative financial positions. If timing of payment were an adequate proxy for wealth, any number of bizarre distinctions—*e.g.*, whether taxpayers paid by check or credit card—would pass constitutional muster.

ARGUMENT

Other than the court below, every state supreme court to address the issue has held that the Equal Protection Clause prohibits tax-forgiveness measures that favor taxpayers who delayed full payment over those who promptly paid their tax assessments in full. *State ex rel. Stephan* v. *Parrish*, 891 P.2d 445 (Kan. 1995); *Armco Steel Corp.* v. *Dep't of Treasury*, 358 N.W.2d 839 (Mich. 1984); *Perk* v. *City of Euclid*, 244 N.E.2d 475, 477 (Ohio 1969); *Richey* v. *Wells*, 166 So. 817, 819 (Fla. 1936). Those decisions rest on the proposition—equally applicable here—that a taxing authority acts arbitrarily when it "prefer[s] those who do not pay their taxes promptly over those who do." *Armco*, 358 N.W.2d at 844. That proposition is firmly grounded in this Court's precedents, and this Court should reverse the contrary decision of the Indiana Supreme Court.

I. THE CITY'S DISCRIMINATORY TAXATION SCHEME DENIES THE "ROUGH EQUALITY OF TAX TREATMENT" REQUIRED BY THE EQUAL PROTECTION CLAUSE

In *Allegheny Pittsburgh*, this Court held unanimously that a State, having declared that all property within a given class should be taxed equally, may not deny "rough equality in tax treatment" to the property owners in that class. 488 U.S. at 343. The City here flouted that principle. State law expressly required equal taxation, but the City's actions left petitioners paying between 10 and 30 times more than their next-door neighbors.

In upholding that gross disparity, the Indiana Supreme Court cast aside the teaching of *Allegheny Pittsburgh*, relying instead on the supposedly "contrasting" decision in *Nordlinger* and suggesting that *Allegheny Pittsburgh* had been "narrowed to its facts." Pet. App. 28a. Not so. The factual contexts in which those two cases arose were different, but this Court's reasoning was the same: A State's clearly articulated determination that taxpayers are similarly situated and should be taxed equally cannot be cast aside at a taxing authority's whim.

The court below also claimed that *Allegheny Pittsburgh* is "inapposite" because it was a "class-of-one" case. Wrong again. This Court has made clear that the number of individuals in a class is irrelevant to the equal-protection analysis. The principle animating *Allegheny Pittsburgh*, and reaffirmed in *Nordlinger* and other cases, compels the conclusion that the City's discriminatory tax scheme violates the Equal Protection Clause.

A. Under *Allegheny Pittsburgh* And *Nordlinger*, A State's Explicit Requirement Of Equal Taxation Forbids Grossly Disparate Burdens On Taxpayers Within That Same Class

This Court has long recognized that "'[t]he equal protection clause * * * protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.'" *Allegheny Pittsburgh*, 488 U.S. at 345-346 (quoting *Hillsborough Township* v. *Cromwell*, 326 U.S. 620, 623 (1946)). That requirement—and the role that state-law principles play in determining that particular property owners are within the same class for tax purposes—drove this Court's decisions in *Allegheny Pittsburgh* and *Nordlinger*.

Allegheny Pittsburgh involved a challenge to property assessments in Webster County, West Virginia. West Virginia's "Constitution and laws provide[d] that all property of the kind held by petitioners shall be taxed at a rate *uniform* throughout the State according to its estimated market value." 488 U.S. at 345 (emphasis added); see W. Va. Const. Art. X, § 1 ("[T]axation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law."). The Webster County assessor, however, updated property assessments only when the property in question had been recently sold (while making negligible adjustments to other property). *Allegheny Pittsburgh*, 488 U.S. at 338. As a result, gross disparities existed in the valuation—and therefore taxation—of otherwise entirely comparable properties: Properties that had recently been sold were assessed at values 8 to 35 times greater than were comparable properties that had not recently been sold. This Court held unanimously that the assessment practice violated the Equal Protection Clause.

The Court first made clear that the petitioners' complaint was a comparative one: It was grounded not in a claim that their tax assessments were too high in some abstract sense, but rather in the fact that the assessments were greater than the assessments of comparable properties of their neighbors. 488 U.S. at 342. As a result of that gross disparity, Webster County had failed to achieve the "seasonable attainment of a rough equality in tax treatment of similarly situated property owners" required by the Equal Protection Clause. *Id.* at 343.

This Court acknowledged States' freedom to divide property into different classes for tax purposes (provided, of course, that the classification is supported by a rational basis). West Virginia, however, had *not* made any such distinction among its real-property owners. See 488 U.S. at 344-345. To the contrary, as noted above, state law demanded "uniform" taxation of property "according to its estimated market value." *Id.* at 345. The case thus fell comfortably within the established line of authority recognizing that systematic unequal treatment of property that the State had already placed within the same class deprived owners of the equal protection of the laws. See, *e.g.*, *Sunday Lake Iron Co.* v. *Wakefield Twp.*, 247 U.S. 350, 352-353 (1918). That was so even though the county assessor had an articulated basis—the timing of a property's most recent sale—for differentiating among property owners.

Three years later, this Court in *Nordlinger* confronted a question expressly left open in *Allegheny Pittsburgh*: whether the disputed assessment scheme "would stand on a different footing" if a State *had* expressly chosen to adopt a generally applicable assessment system based on a property's historical acquisition value rather than its current market value. See *Allegheny Pittsburgh*, 488 U.S. at 344 n.4. That is, would it matter that the State had chosen the assessment practice at issue in *Allegheny Pittsburgh* from the outset? Yes.

The State of California had, through the ballot initiative commonly known as Proposition 13, adopted just such a system of acquisition-value-based property taxation. See 505 U.S. at 3-4. That system resulted in the same disparities between otherwise comparable properties that existed in *Allegheny Pittsburgh*. But the scheme set a different baseline against which to measure the "rough equality" demanded by the Equal Protection Clause. Proposition 13 explicitly favored homeowners who had purchased at historically lower prices over those who had purchased at more recent, higher prices.

This Court held that Proposition 13 furthered two legitimate policy considerations. First, the assessment scheme served the legitimate state purpose of "neighborhood preservation, continuity, and stability" by discouraging rapid turnover in the ownership of homes and businesses. 505 U.S. at 12. Second, the State could reasonably conclude that a new owner who had just purchased a property fully cognizant of the accompanying tax burden has less of a reliance interest in a lower level of taxation than a long-term owner. *Id.* at 12-13. The classification therefore served the purpose of protecting the "legitimate expectation and reliance interests" of the citizenry, *id.* at 13, interests that are not just "'a legitimate governmental objective'" but in fact "'an exceedingly persuasive justification'" for a State's classification, *ibid.* (quoting *Heckler* v. *Mathews*, 465 U.S. 728, 746 (1984)). California's assessment scheme therefore survived rational-basis scrutiny.

Nordlinger thus arose in a markedly different *factual* context than *Allegheny Pittsburgh*, but the Court's *legal* inquiry was the same: Was there a plausible basis, judged in relation to the background policy choice the State had made, for the taxing authority to impose significant inequality among otherwise similarly situated property owners? The answer in *Nordlinger* was "yes," because Proposition 13 reflected a state determination that the petitioner (who had bought her property relatively recently and with full knowledge of Proposition 13's operation) was *not* similarly situated to her neighbors who had purchased their homes years earlier.

Nordlinger rejected the suggestion that the equal-protection principle it espoused was in conflict with *Allegheny Pittsburgh*. To the contrary, the Court in *Nordlinger* stressed that there was "an obvious and critical *factual* difference between" the two cases.

505 U.S. at 14-15. In *Allegheny Pittsburgh* there was no "indication * * * that the policies underlying an acquisition-value taxation scheme could *conceivably* have been the purpose for the Webster County tax assessor's unequal assessment scheme." *Id.* at 15 (emphasis added). That is, even if Webster County had claimed in *Allegheny Pittsburgh* that it was pursuing such policies, the claim would have been untenable. That is because such a purported interest was entirely inconsistent with the baseline standard of market-value equality established by West Virginia law, and there was "'no suggestion' that 'the State may have adopted a different system in practice from that specified by statute.'" *Ibid.* (quoting *Allegheny Pittsburgh*, 488 U.S. at 345). Indeed, the county in *Allegheny Pittsburgh* had even claimed (as here, see p. 48, *infra*) that the challenged assessment practice somehow *furthered* the equal-taxation norm set forth in state law. *Ibid.* The facts in *Allegheny Pittsburgh* therefore "precluded any *plausible* inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme." *Ibid.* (emphasis added).

Unlike the court below, seven of the nine Justices participating in the *Nordlinger* decision therefore recognized that *Nordlinger* and *Allegheny Pittsburgh* are consistent.[6] Read together, both cases confirm that there is significance to a State's declaration that

[6] Justice Thomas wrote separately to explain that he "agree[d] with Justice Stevens," the lone *Nordlinger* dissenter, "that *Allegheny Pittsburgh* cannot be distinguished." 505 U.S. at 18 (Thomas, J., concurring in part and concurring in the judgment).

certain taxpayers are—or, as in *Nordlinger*, are not—similarly situated. Such a declaration is not fully dispositive in either direction—merely "violating state law requiring uniformity of taxation of property" does not necessarily make out an equal protection violation, 505 U.S. at 16 n.8, nor is a State's classification scheme necessarily rational, which is why the Court in *Nordlinger* assessed for rationality the State's proffered justifications, *id*. at 12-13, 16-17. But a taxing authority's effort to deny that taxpayers are similarly situated must be judged in reference to background principles of state law and what the authority itself has said on the matter.

This principle has a long pedigree. It was well established before *Allegheny Pittsburgh* that the Equal Protection Clause acts as a bar against "state action which selects [an individual] out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough*, 326 U.S. at 623. Indeed, this Court recognized almost a century ago—and has consistently reiterated—that "it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property." *Sunday Lake Iron Co.*, 247 U.S. at 352-353; see *Louis K. Liggett Co.* v. *Lee*, 288 U.S. 517, 539-540 (1933); *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments*, 284 U.S. 23 (1931); *Chicago Great W. Ry.* v. *Kendall*, 266 U.S. 94, 98 (1924); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 447 (1923); *Southern Ry.* v. *Watts*, 260

U.S. 519, 526 (1923).[7] *Allegheny Pittsburgh* represented a straightforward application of that principle.

This Court has reaffirmed the continuing vitality of *Allegheny Pittsburgh* since *Nordlinger*. In *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000), for example, the Village required a 15-foot easement from all property owners seeking access to a municipal water supply. The Village allegedly departed from that uniform requirement, however, by requiring the petitioner to grant a 33-foot easement for the exact same benefit. Relying on *Allegheny Pittsburgh* and other cases, *id.* at 564, this Court held that the complaint stated a claim "under traditional equal protection analysis," *id.* at 565. The purpose of the Equal Protection Clause, this Court reaffirmed, "is to secure every person within

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[7] In *Cumberland Coal*, for example, this Court faced a situation similar to that in *Allegheny Pittsburgh* and resolved the case in an identical fashion. There, several Pennsylvania townships had adopted a taxation scheme whereby all virgin coal—which was supposed to be assessed based on market value—was assessed at a fixed price per acre in each township. Assigning the same value to all such coal, however, ignored the fact that its actual value varied greatly depending on its proximity to transportation facilities. See 284 U.S. at 25. This Court concluded that the townships' actions violated the Equal Protection Clause, explaining that "the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property." *Id.* at 28. Thus, the Court held, the petitioners were entitled to a reassessment of their property, "put[ting] these assessments upon a basis of equality, with due regard to differences in actual value, with other assessments of the coal of the same class within the tax district." *Id.* at 30.

the State's jurisdiction against intentional and arbitrary discrimination." *Id.* at 564 (internal quotation marks omitted).

As this Court even more recently explained, "[w]hat seems to have been significant in *Olech* and the cases on which it relied"—including *Allegheny Pittsburgh*—"was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed." *Engquist*, 553 U.S. at 602. Thus, the Court continued in *Engquist*, "[i]n *Allegheny Pittsburgh* * * * the applicable standard was market value, but the county departed from that standard in basing some assessments on quite dated purchase prices." *Id.* at 603.[8] As discussed below, here the City departed from the "applicable standard" that state law unequivocally established—equality among neighbors—and its departure resulted in gross disparities in tax treatment (a 30-fold difference in assessments paid). *Allegheny Pittsburgh* forecloses such discriminatory tax treatment.

[8] The Court in *Engquist* likewise explained that *Sioux City Bridge Co.*, on which *Allegheny Pittsburgh* relied, "was the same sort of case, recognizing an equal protection claim when one taxpayer's property was assessed at 100 percent of its value, while all other property was assessed at 55 percent, without regard to articulated differences in the properties." 553 U.S. at 603.

B. The City's Discriminatory Tax Treatment Violates The Equal-Protection Principles Articulated In *Allegheny Pittsburgh* And *Nordlinger*

This case is on all fours with *Allegheny Pittsburgh*. In *Allegheny Pittsburgh*, the State's "Constitution and laws provide[d] that all property of the kind held by petitioners shall be taxed at a [uniform] rate." 488 U.S. at 345. So too here. The Indiana Constitution provides that "the General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal." Ind. Const. Art. 10, § 1.

The Barrett Law itself expressly required that all costs for sewage projects be "apportioned equally among all abutting lands or lots." Ind. Code § 36-9-39-15(b)(3). And the City (initially) complied with that directive: The properties included in the Brisbane/Manning project area were all assessed an equal share of the project's cost—$9,278.

Homeowners were free to choose—for any reason or no reason—whether to pay the assessments immediately or in installments. But again the Barrett Law left no doubt that an installment-plan taxpayer was firmly on the hook for the assessment. When a taxpayer selected installments, he or she was required to execute a binding agreement not to dispute the tax and to pay the amounts owed (with applicable interest) promptly. The City also retained a lien on the taxpayer's property (just as it held a lien on the property of those electing a lump-sum payment until that obligation was discharged). Ind. Code § 36-9-36-40; *id.* § 36-9-36-43.

Even as the City transitioned from the Barrett Law to STEP, equality remained the norm. Homeowners connecting to the municipal sewer system now pay a flat fee of $2,500. App., *infra*, 24a. In other words, as in *Allegheny Pittsburgh*, the City here specifically determined—multiple times, in multiple ways—that petitioners' and their neighbors' property should be assessed equally regardless of whether the homeowners chose to pay in full or in installments.

As in *Allegheny Pittsburgh*, however, the City reversed course and wildly "departed from that standard." *Engquist*, 553 U.S. at 603 (citing *Allegheny Pittsburgh*, 488 U.S. at 341). When the City abandoned the Barrett Law funding mechanism, it forgave all assessments owed by those homeowners who had elected to pay their assessments in monthly installments. But the City refused to provide *any* refunds to those homeowners who had paid their assessments in full.

That decision resulted in precisely the same "gross disparities in the assessed" taxes on "generally comparable property" produced by the assessment practice in *Allegheny Pittsburgh*. 488 U.S. at 338. There, the petitioners' properties were taxed on the basis of an assessment that was 8 to 35 times as great as that assigned to comparable neighboring properties. *Id.* at 341. Here, petitioners were required to pay 10 to 30 times as much as their neighbors whose property was identically situated with respect to the City's sewer project.

As a result of the City's decision, the owners of the 39 properties forced to pay their full assessments (including petitioners) contributed roughly 80% of the total sum collected by the City. See note 4, *supra*. And, just as in *Allegheny Pittsburgh*, "there [is] no suggestion that the 'dramatic differences in [tax burdens]' for similar"—indeed, functionally *identical*—"property parcels were based on subjective considerations of the sort on which [taxing authorities] often rely." *Engquist*, 553 U.S. at 603 (quoting *Allegheny Pittsburgh*, 488 U.S. at 341). Rather, the tax burden was precisely if arbitrarily calculated—whatever amount had been paid by November 1, 2005—and the Garrard affidavit makes clear that fairness as between petitioners and their similarly situated neighbors was not a factor that the City even considered, subjectively or otherwise.

Nor is this a case like *Nordlinger*, where the classification served "to protect legitimate expectation and reliance interests." 505 U.S. at 13. Quite the opposite: The City's 180-degree change of course directly undermined taxpayers' "legitimate expectation and reliance interests." *Ibid.* The City gave homeowners the choice of how to pay their assessments—up front or in installments—and it assured all homeowners that they would (as state law required) be assessed equally, regardless of *how* they elected to pay. By imposing a draconian 30-fold penalty on homeowners who elected to pay their assessments in full—and *only* because they elected to pay their assessments in full—the City's disparate tax treatment undermined taxpayers' legitimate expectation and reliance interests.

The Indiana Supreme Court stated, as if it somehow were a justification for the disparate treatment at issue, that "[t]he plaintiffs each paid for a sewer and received a sewer, along with all the attendant public health benefits associated with sanitary sewers." Pet. App. 19a. In other words, the court below deemed it sufficient that petitioners "got what they paid for." That argument misses the point entirely. As this Court explained in *Allegheny Pittsburgh*, "[v]iewed in isolation, the assessments for petitioners' property may fully comply with West Virginia law. But the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings." 488 U.S. at 346; see *id.* at 342 (noting that petitioners' complaint "is a comparative one").

"The right invoked is that to equal treatment." *Iowa-Des Moines Nat'l Bank*, 284 U.S. at 247. Thus, the supposition that petitioners "got what they paid for" is, like the fact that a given property happens to be assessed at its actual market value, irrelevant to the equal-protection analysis.

C. The Indiana Supreme Court Wrongly Dismissed *Allegheny Pittsburgh* As Relevant Only To "Class-of-One" Cases

The Indiana Supreme Court did not dispute that in this case, as in *Allegheny Pittsburgh*, Indiana and the City required uniform assessments for homeowners in the Brisbane/Manning project area. And the court did not dispute that in this case, as in *Allegheny Pittsburgh*, the City then treated taxpayers within the class it established differently by forcing some taxpayers to pay 30 times more than others. The Indiana Supreme Court suggested, however, that *Allegheny Pittsburgh* is irrelevant because that case was supposedly a "class-of-one" case, whereas this case is not.

There is, however, no separate category of "class-of-one" cases in which a different analysis applies. This Court has made clear that class-of-one cases represent "not so much a departure from the principle that the Equal Protection Clause is concerned with arbitrary government classification, as * * * an application of that principle." *Engquist*, 553 U.S. at 602. Thus, "[w]hether the complaint alleges a class of one or of five is of *no consequence* because we conclude that the number of individuals in a class is *immaterial* for equal protection analysis." *Olech*, 528 U.S. at 564 n.* (emphasis added). Shoehorning a case into that supposed category therefore does nothing to distinguish *Allegheny Pittsburgh*.

Accordingly, the Indiana Supreme Court's only suggested distinction of the City's refund decision—that the decision "makes a broad classification on the basis of a common characteristic—outstanding Barrett Law balances" (Pet. App. 24a)—is no answer at all. The purported breadth of the "classification" in this case is a vice, not a virtue: Subjective considerations sometimes have a legitimate role to play in tax assessments. *Engquist*, 553 U.S. at 604. Here, just as in *Allegheny Pittsburgh*, the broad, objective, and utterly arbitrary "classification" is a purported distinction irrationally grafted onto a group of properties already recognized as identically situated for purposes of the tax in question.

The court below also suggested that "class-of-one cases" require plaintiffs to demonstrate that "underlying the government's decision is animus or ill-will toward the plaintiffs." See Pet. App. 22a-23a (citing *Olech*, 528 U.S. at 566 (Breyer, J., concurring in the result), and *Bell*, 367 F.3d at 709-713 (Posner, J., concurring)). But the "animus" requirement embraced by the court below comes from an opinion concurring in the result in *Olech* and has never been endorsed by this Court, which instead has declared the number of individuals in a class "immaterial." In any event, *Allegheny Pittsburgh* itself involved a uniformly applied but arbitrary rule and did not turn on—or even contain hints of—any perceived animus. The application of that case to this one therefore cannot be conditioned on such a showing.

II. THE PROFERRED *POST HOC* JUSTIFICATIONS FOR DISCRIMINATING AMONG NORTHERN ESTATES HOMEOWNERS ARE MERITLESS

Determining the reason for the City's refusal to grant petitioners relief even roughly equivalent to that afforded to their neighbors requires no guesswork. The City has acknowledged that it picked November 1, 2005, as the cut-off date because it would cost too much money to grant petitioners refunds. But that does not even begin to suggest a rational basis for treating petitioners so much worse than their identically situated neighbors—were it otherwise, even the most blatantly discriminatory tax could be justified on the ground that doing it another way would cost more. The Indiana Supreme Court's (conclusory) suggestion that petitioners—who already paid the full $9,278—are *better off* financially than their neighbors who paid 3⅓%-10% of that amount is implausible on this record, particularly considering the City's repeated disavowals of any purpose other than saving money and picking a date certain to end the Barrett Law.

A. The Only Reason The City Has Asserted For Refusing Refunds To Petitioners Is The Desire To Save Money

It is important to recall the government action that is actually at issue in this case. The action challenged here is not the City's decision to impose the initial assessment under the Barrett Law. It is not the City's decision to abandon the Barrett Law funding mechanism and replace it with STEP. And, most important for present purposes, it is not the City's decision to forgive the debts of those who delayed full payment of their tax assessments. The sole decision challenged here is the City's separate decision to *withhold* similar relief from petitioners simply because they had already paid their tax bills in full. And the primary justification the City has offered for that decision was the City's interest in preserving financial resources.

The prefatory language in Resolution 101 states that "[t]he Barrett Law Funding for Municipal Sewer program may present financial hardships on many middle to lower income participants who most need sanitary sewer service in lieu of failing septic systems." App., *infra*, 25a. The Indiana Supreme Court accepted that declaration as a rational basis for the City's action here. But that observation—that the Barrett Law as a whole presented a burden on lower- and middle-income homeowners—explains only the City's decision to abandon the Barrett Law funding mechanism. It says nothing about what to do with those who had already paid their Barrett Law assessments in full, and those who had not. The City's *subsequent* decision to let one group have sewer services despite having paid only a small fraction of their cost, while leaving the other group much worse off just because they didn't elect the installment plan, is what is at issue here, not the universally applauded abandonment of the Barrett Law.

The additional justifications that the City put forth on summary judgment in the Garrard Affidavit (which were accepted by the Indiana Supreme Court) likewise miss the mark. That affidavit—prepared for litigation more than two years after the Board passed Resolution 101—provides four justifications for Resolution 101. JA75-76. As the affidavit itself makes clear, however, those justifications support only the City's decision to "eliminate the Barrett Law method of financing" and its decision to "forgive money owed." JA75. The Garrard Affidavit does not purport to justify the City's decision to discriminate between taxpayers who delayed full payment of their assessments and those who paid in full.

The first two justifications set forth in the Garrard Affidavit simply restate the City's reasons for abandoning the Barrett Law funding system and adopting STEP. JA75. As noted, both legislative determinations are beside the point.

Third, the Garrard Affidavit explains that "it was essential for the City to establish a clear date for the change [to STEP] and move forward with the new funding approach." JA76. The court below agreed that "the fact that [the City] chose to draw the line at

November 1, 2005, was a matter of discretion appropriately exercised by the City." Pet. App. 18a. But petitioners challenge the consequences the City attached to that date, not the setting of a date. All new government programs must, of course, have a starting point. But the City could have set a date for the transition to STEP without discriminating between taxpayers who paid in full and those who paid in installments: It could have waived whatever nondiscriminatory portion of the Barrett Law assessments it saw fit to forgo, for both groups of taxpayers or for neither group. Instead, the City chose to treat similarly situated people differently, forgiving the debts of taxpayers who elected to pay their assessments in installments but withholding refunds from those who paid them in full. That distinction bears no relationship to the goal of moving forward with the STEP funding mechanism.[9]

Finally, the Garrard Affidavit states that "[t]he administrative costs to service and process remaining balances on Barrett Law accounts long past the transition to the STEP program would not benefit the taxpayers and [would] defeat the purpose of the flat-rate per connection—namely simplifying things." JA76. Those administrative-convenience

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[9] Indeed, the $2,500 STEP fee applied to *new* projects only; taxpayers who had partially paid for prior projects pursuant to the Barrett Law installment plan saw their debts completely erased—with no obligation to make any STEP payments to the City. App., *infra*, 24a. Thus, the City's purported interest in transitioning to STEP was not even furthered by the City's decision to forgive the debts of installment-plan payers—much less by its decision to treat such taxpayers differently from those who chose to pay their assessments in full.

rationales explain the City's decision to forgive the debts of taxpayers who owed money under the abandoned Barrett Law regime; they do not provide any basis for the City's decision to withhold refunds from taxpayers who had paid their Barrett Law assessments on time.

To withstand scrutiny under rational-basis review, the classification challenged must "be rationally related to a legitimate state interest." *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). Here, however, the City's classification—early vs. late payers—bears no relationship whatsoever to *any* of the government interests advanced in either Resolution 101 or the Garrard Affidavit. That is because each of those rationales serves only to justify decisions separate from the City's decision to discriminate against taxpayers who timely paid their assessments in full.

Indeed, the City has conceded in this Court that *all* of its purported goals for enacting Resolution 101 would have been equally served by providing refunds to taxpayers who paid their Barrett Law assessments up front. In its Brief in Opposition, the City acknowledged that "[petitioners'] solution of additional refunds would accomplish *the same goals*, but would have cost the city millions of additional dollars as a result." Br. in Opp. 11 (emphasis added). And the City likewise conceded that "[p]etitioners are correct that *all* of the City's *other* reasons for forgiveness without refunds *would have been accomplished* if refunds were also extended." *Id.* at 6 (emphasis added).

In other words, the City has admitted that the only interest advanced by its decision to withhold refunds was its interest in keeping petitioners' money. Pet. App. 19a. As explained below, that cannot constitute a rational basis for this discriminatory taxation scheme.

B. The City's Interest In Cost Savings Cannot Justify Its Arbitrary Distinction Between Similarly Situated Taxpayers

The Indiana Supreme Court held that "[t]he City clearly has a legitimate interest in not emptying its coffers to provide refunds to those who had already paid their assessments." Pet. App. 19a. The court also determined that the City had a legitimate interest in "reducing its administrative costs." *Ibid.* A long line of this Court's authority holds otherwise.

1. "[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler* v. *Doe*, 457 U.S. 202, 227 (1982). This Court has applied that commonsense principle with particular force in the taxation context. In *Williams* v. *Vermont*, 472 U.S. 14 (1985), for example, this Court addressed a taxation scheme that provided a tax credit exclusively to automobile owners who were Vermont residents at the time they paid their automobile use tax. Revenue raised through the tax was intended to improve the State's highway system and pay the principal and interest on government bonds. This Court explained that "the only plausible justification for imposing the tax on those in appellants' position in the first place—*apart from the simple desire to raise funds*—is the principle that those using the roads should pay for them." *Id.* at 25 (emphasis added). Applying rational-basis review, the Court held that the State's user-fee rationale was not

rationally furthered by the discriminatory tax. *Id.* at 25-27. The Court therefore rejected the argument that "the simple desire to raise funds"—the same basic goal embraced in this case by the Indiana Supreme Court—constituted a rational basis for discriminatory tax treatment.

Similarly, in *Metropolitan Life Insurance Co.* v. *Ward*, 470 U.S. 869 (1985), the Court rejected as irrational purposes asserted to justify a statute that taxed in-state and out-of-state insurance companies at different rates. The disparity was reduced for out-of-state companies that invested in government securities. The trial court ruled (and the appeals court agreed) that the statute did not run afoul of the Equal Protection Clause because, in addition to raising revenue, the statute served to encourage investment in government securities. *Id.* at 873. This Court reversed, explaining that the State's desire to encourage investment in government securities was not "a legitimate state purpose when furthered by discrimination." *Id.* at 882. It was undisputed that the challenged statute worked to the State's financial advantage; if protecting a City's coffers were a sufficient interest, this Court would have upheld the distinction.

And in *Zobel* v. *Williams*, 457 U.S. 55 (1982), Alaska residents challenged a statutory scheme that distributed natural-resources income from the State's "Permanent Fund" to citizens based on their length of residence. Striking down the law under rational-basis review, this Court dismissed the State's asserted interest in "assuring prudent management of the Permanent Fund"—*i.e.*, its interest in saving money used to provide government benefits. *Id.* at 61.

The clear lesson from those cases is that a mere desire to preserve resources cannot justify a discriminatory taxation scheme if the classifications themselves lack any rational relationship to some *other* legitimate objective. The reason for that rule is self-evident. The "core concern of the Equal Protection Clause" is to act "as a shield against arbitrary classifications." *Engquist*, 553 U.S. at 598. If an interest in raising (or preserving) revenue constitutes a sufficient basis for discriminatory tax treatment, however, then *every* tax—no matter how arbitrary—would pass constitutional muster. After all, a desire to raise or preserve revenue is presumably the reason why taxing authorities impose taxes in the first place. Such circular logic—that a tax scheme intended to save money is rational because it was intended to save money—cannot possibly serve as a rational basis for a discriminatory tax.

The Indiana Supreme Court's "preservation of resources" rationale therefore lacks any limiting principle in the tax context. A government could impose a greater property tax on houses with even-numbered street addresses than houses with odd-numbered addresses. Or it could deny tax refunds to redheads while providing refunds to similarly situated brunettes. In both cases, the result of the taxation scheme would be to bolster the government's coffers. If the cost-savings rationale advanced by the Indiana Supreme Court is accepted, such "palpably arbitrary" taxation schemes would evade constitutional scrutiny. *Allied Stores*, 358 U.S. at 527.

2. The "administrative convenience" rationale fares no better. For starters, it is not entirely clear (because the Indiana Supreme Court did not say) what administrative burden it had in mind. If the court was concerned simply with the costs of collecting unpaid assessments, that goes only to the decision to forgive, not to the decision to refuse to issue refunds to petitioners. If the court believed that issuing refunds would impose these costs, that concern should not long detain this Court.

For starters, it is difficult to imagine a case in which the administrative burden could be lighter. Petitioners sought a refund equal to the difference between the amount they paid and the amount refunded to their neighbors. Those figures were not seriously in dispute, and all that remained for the City to do was cut a check. Surely an aversion to basic arithmetic cannot justify the City's refusal to rectify a 30-fold disparity in tax treatment.

In any event, *Allegheny Pittsburgh* forecloses "administrative convenience" as a justification for unequal tax treatment of similarly situated persons. There, the County argued that the "administrative costs" of assessing property values—including "expensive mineral exploration procedures"—justified the decision to base assessments on a property's purchase price rather than on its assessed value. Brief of Respondent at *22, *Allegheny Pittsburgh*, 488 U.S. 336 (1989) (No. 87-1303), 1988 WL 1025749. That argument (which rested on an administrative burden far greater than any present in this case) failed to sway this Court—and for good reason. As the taxpayers in *Allegheny Pittsburgh* observed, the "administrative convenience" rationale is "routinely the last refuge of arbitrary decisionmakers in equal protection cases." Joint Reply Brief for Petitioners at *16, *Allegheny Pittsburgh*, *supra*, 1988 WL 1025750. But "convenience alone can hardly justify unconstitutional discrimination. Otherwise, a system imposing the entire tax burden on all those whose names begin with 'A,' or on all those who live in one county, would be constitutional as easier to administer than other systems." *Ibid.*

Like the simple cost-savings justification, then, the Indiana Supreme Court's administrative-convenience theory proves far too much. It is easier to withhold refunds than it is to pay them. It is easier to tax one person $200 than it is to tax two people $100 each. It is easier to assess a property's value based on its last purchase price than it is to assess it in reasonable relation to its current market value. If accepted as a rational basis for discriminatory tax treatment, the administrative-convenience rationale would give taxing authorities carte blanche to implement wholly arbitrary taxation schemes and schemes this Court has unanimously struck down.[10]

[10] In many respects, the administrative-costs rationale is just the cost-savings rationale by another name. Administrative burdens are often purely financial in nature. See, *e.g.*, Brief of Respondent at *22, *32, *Allegheny Pittsburgh*, *supra* (arguing, unsuccessfully, that the "expens[e]" required to accurately assess property values justified the County's decision to use an easier—and cheaper—valuation method); cf. *Judulang* v. *Holder*, No. 10-694, slip. op. 21 (Dec. 12, 2011) ("Cost is an important factor for agencies to consider in many contexts. But cheapness alone cannot save an arbitrary agency policy. (If it could, flipping coins would be a valid way to [make a decision].").

C. The Indiana Supreme Court's *Post Hoc* Rationale For The City's Decision To Withhold Refunds Cannot Sustain The City's Discriminatory Tax Treatment

The Indiana Supreme Court stated (without explanation) that it would have been "reasonable for the City to believe that property owners who had already paid their assessments were in better financial positions than those who chose installment plans." Pet. App. 16a. But it is inconceivable on this record to believe that such a distinction had anything to do with the City's refusal to issue petitioners refunds. Indeed, as noted above, the City has conceded that "*all* of the City's *other* reasons for forgiveness without refunds" besides cost savings "*would have been accomplished* if refunds were also extended." Br. in Opp. 6 (emphasis added).

The Equal Protection Clause requires that there be "a plausible policy reason for the classification," that "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision-maker," and that "the relationship of the classification to its goal [not be] so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, 505 U.S. at 11; see *Fitzgerald*, 539 U.S. at 110. The rationale offered by the Indiana Supreme Court—that it would have been reasonable for the City to believe petitioners were "in better financial positions than those who chose installment plans," Pet. App. 16a—flunks this test.

First, the justification offered for a classification must have been a "*plausible* policy reason for the classification." *Nordlinger*, 505 U.S. at 11 (emphasis added); see also *Williams*, 472 U.S. at 25 (requiring a "plausible justification"). For example, in *Allegheny Pittsburgh* the "facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme" because the State had a policy that properties be taxed at a uniform rate. *Nordlinger*, 505 U.S. at 16.[11]

Here, too, the "facts preclude[] any plausible inference" that the City's purpose for withholding refunds from petitioners was that it believed that petitioners should bear a disproportionate share of the costs of sewer upgrades. That is because the City itself has expressly—and repeatedly—repudiated the notion that Northern Estates property owners are differently situated from one another based on their respective financial positions.

As noted above, the Barrett Law under which petitioners were assessed required that all costs for sewage projects be "apportioned equally among all abutting lands or lots." Ind. Code § 36-9-39-15(b)(3). The Barrett Law also required the costs incurred for each project to correspond to the benefit received. *Id.*

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[11] See also *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, *unless* an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation.") (emphasis added and internal quotation marks omitted); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").

§ 36-9-39-17(a), (b); *id.* § 36-9-39-23(b). Consistent with those requirements, the City treated all homeowners within the Brisbane/Manning project equally, assessing each owner $9,278.[12] That assessment was no less binding on homeowners who opted for the installment plan than on those who paid up front. See pp. 3-4, *supra* (detailing strict enforcement regime for all Barrett Law assessments).

In its letter responding to petitioners' request that the City refund their excess Barrett Law payments, the City reiterated that, "[i]n establishing project areas, the City's *intent is to treat property owners within each project area equitably*, based upon the scope and value of each specific project." JA50 (emphasis added). The *only* rationale the City offered for its decision was its desire to "move forward with the new funding approach" on November 1, 2005. JA51. Thus, even after enacting Resolution 101, and even after refusing to refund excess payments, the City maintained that its policy goal was to treat *all* property owners within each project "equitably," and that the burden assessed on each homeowner was based only on the "scope and value of each specific project"—not on the finances of each individual homeowner.

In other words, the City declared a policy of *equal* tax treatment of all homeowners within the Brisbane/Manning project area and made an express

[12] The STEP funding mechanism that replaced the Barrett Law also required equal tax treatment: Under that program, all property owners are charged the same flat fee of $2,500 for a new sewer connection. App., *infra*, 24a.

determination that all such homeowners were *similarly* situated in all relevant respects (*i.e.*, with respect to their required contribution for the benefit received). The Indiana Supreme Court's theory, however, requires one to believe the exact opposite: that the City had a policy of *unequal* treatment and believed that homeowners within the same project area were *not* similarly situated.

In addition, the text of Resolution 101 itself declared that the Barrett Law *generally* was burdensome to lower- and middle-income families. It did not state that the decision to withhold refunds was based on any belief that petitioners were "in better financial positions than those who chose installment plans." Pet. App. 16a. This Court has made clear that, when statutes have "specifically declared their purpose," they leave "no room to conceive of *any other purpose* for their existence." *Allied Stores*, 358 U.S. at 530 (emphasis added); see *Nordlinger*, 505 U.S. at 16 n.7 (citing *Allied Stores*).

Even after litigation commenced, the City did not contend that there was a connection between its disparate treatment of the two groups of taxpayers and any putative difference in their financial means. Indeed, when attempting to justify the City's actions on summary judgment, the Garrard Affidavit simply reiterated that the City sought to "establish a clear date for the change" to the STEP funding mechanism. JA76. Thus, the City stated that the only purpose for distinguishing between taxpayers who had paid their assessments in full and those who had delayed full payment was its desire to draw an arbitrary line.

Moreover, as noted above, the City has conceded in this Court that, other than its goal of preserving limited resources, "*all* of the City's other reasons for forgiveness without refunds would have been accomplished if refunds were also extended." Br. in Opp. 6 (emphasis added); see also *id.* at 11.[13] The City has therefore disclaimed the existence of any *other* rational basis for that distinction—including any rationale predicated on the assumption that "property owners who had already paid their assessments were in better financial positions than those who chose installment plans." Pet. App. 16a.

Second, the rationale offered by the Indiana Supreme Court violates this Court's command that "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 446 (1985); see *Nordlinger*, 505 U.S. at 11. This

[13] In between these multiple concessions, the Brief in Opposition (at 14) quotes the Indiana Supreme Court's assertion that "'it was reasonable for the City to believe that property owners who had already paid their assessments were in better financial positions than those who chose installment plans.'" But respondents stop short of claiming that they had made this argument in the trial court or actually relied on it in the Indiana Supreme Court. Respondents' tactic is reminiscent of the respondent in *Allegheny Pittsburgh*, who "obliquely referred in a footnote to the advantages of historical cost accounting," which did not suffice as "an assertion of the general policies supporting acquisition-value taxation." *Nordlinger*, 505 U.S. at 15 n.6. Furthermore, the half-hearted argument is—again, as in *Allegheny Pittsburgh*—"nonsensical given its inherent inconsistency with [respondents'] principal argument that" their decision was driven solely by the need to save money. *Ibid.*

Court has often applied that rule in rational-basis cases to strike down classifications that are significantly "underinclusive" or "overinclusive." *Jimenez* v. *Weinberger*, 417 U.S. 628, 637 (1974).

In *Lindsey* v. *Normet*, 405 U.S. 56 (1972), for example, this Court invalidated under rational-basis review a state statute that required some appellants to post a greater appeal bond than others. The Court rejected the State's argument that the requirement served to screen out frivolous appeals, noting that the statute "not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." *Id.* at 78.

Along similar lines, in *Williams* v. *Vermont*, *supra*, the State argued that its decision to limit an automobile tax credit to Vermont registrants who were residents of the State at the time of their automobile purchase rationally furthered the State's interest in maintaining and improving its roads. This Court held that residence at the time of purchase was a "wholly arbitrary basis," 472 U.S. at 23, because the "purposes of the statute would be identically served" by taxing Vermont registrants who were State residents when they purchased their car *and* those who were not, *id.* at 24. In reaching that conclusion, this Court explained that even on rational-basis review the "choice of a proxy criterion * * * cannot be so casual as this, particularly when a more precise and direct classification is easily drawn." *Id.* at 23 n.8.

Here, the Indiana Supreme Court "rel[ied] on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. The court stated that the City's distinction between taxpayers who had paid their assessments in full and those who had paid in installments advanced the City's interest in aiding the poor because the City could have reasonably believed that the early payers were in a better financial position than the late payers. As in *Williams*, however, the "purposes of the statute would be *identically* served" by forgiving the debts of those who paid in installments *and* providing refunds to those who paid in full. *Williams*, 472 U.S. at 24 (emphasis added). Refunding excess payments to petitioners, after all, would do nothing to diminish the relief enjoyed by installment-plan taxpayers whose debts were erased.

And here, too, there is "a more precise and direct classification easily drawn": If the City wanted to discriminate on the basis of financial position, it could have just discriminated on the basis of financial position. That is, the City could have waived (through forgiveness and refunds) Barrett Law assessments for taxpayers who were *actually* lower- and middle-class relative to all Northern Estates homeowners—regardless of whether they chose to pay their assessments in full or over time.

Or suppose the City had determined that it could afford to grant only a certain amount of relief—say, the approximately $1.24 million in forgiveness it awarded to the installment-plan homeowners. Achieving equality was well within reach. If the City had spread that benefit equally among the approximately 180 parcels in the Brisbane/Manning project, each homeowner would have received roughly $6,900 in forgiveness or refunds and paid about $2,400 toward the project—which is almost exactly what *all* homeowners now pay for sewer connections under the STEP plan that replaced the Barrett Law. That is, if the Brisbane/Manning project were built today, all 180 homeowners would pay about the same amount as if the City had granted petitioners their requested refunds. Thus, any suggestion that granting petitioners refunds would have prevented the City from offering necessary relief to the supposedly lower-income homeowners paying in installments rings hollow.

The problem with the City's decision is not just that the Barrett Law explicitly declared that all homeowners should be treated equally or that there is nothing in the record to suggest any correlation *at all* between timing of payments and wealth. Even if some correlation does exist, the City's scheme denied refunds to some of the very lower- and middle-income taxpayers that it supposedly aimed to assist, and forgave the debts of some taxpayers who were in a better financial position—as the court below acknowledged. Pet. App. 16a.[14]

It bears repeating that the taxpayers who were denied relief were out of pocket thousands more than those who received it—yet the City supposedly concluded that those homeowners were *better off* than those who'd paid only a fraction of that amount.

[14] Indeed, in the parallel class action filed in federal court, discovery confirmed that many of those taxpayers were senior citizens with limited fixed incomes (but sufficient assets to cover the assessments), and others took out home equity loans to pay their assessments up front. Memorandum in Support of Plaintiffs' Motion for Summary Judgment 12-13, *Cox* v. *City of Indianapolis*, No. 09-435 (S.D. Ind. June 14, 2010).

The City's classification is therefore wildly underinclusive and overinclusive.

The attenuated correlation embraced by the court below would authorize wholly arbitrary disparities in tax treatment. Consider, for example, the fact that nearly every State and many localities allow taxpayers to pay income and/or property taxes by either credit card or by check. Suppose that, after collecting taxes, a county changes its tax scheme in an effort to reduce the financial burden on lower- and middle-income homeowners. The county determines that it can afford to refund taxes to some, but not all, homeowners. Can it provide refunds only to those who paid their taxes by credit card—and thus can pay their bill over time—and deny refunds to those who paid by check?[15]

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[15] Even more attenuated proxies can be imagined, if (as the Indiana Supreme Court supposed) it does not matter on rational-basis review how tight or loose the fit is or whether any actual facts have been examined. For example, a legislator might conclude from her experience that people whose last names begin with the letter "V" are more likely than the average person to be of northern European (specifically, Dutch or German) extraction and especially unlikely to be of African descent; that people of northern European extraction tend, on the whole, to be better off economically than people of African descent; and that, therefore, tax debts should be forgiven for everyone except people whose last names begin with "V." Because there is no heightened scrutiny for laws that discriminate against people with V-surnames, the standard of scrutiny would be rational-basis review, yet the classification would be a paradigm of irrationality and would surely be struck down, even if adopted in complete good faith and even if some weak correlation between wealth and V-surnames could be demonstrated.

The court below suggested (Pet. App. 16a) that *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), supports the after-the-fact use of attenuated proxies to justify inequalities on rational-basis review. The court went so far as to say that *Clover Leaf Creamery* stands for the proposition that "it does not matter under rational basis review what the actual facts would show." Pet. App. 16a. But that case is quite different. The Minnesota statute at issue expressly stated that the legislature had made various factual findings regarding the costs and benefits of plastic milk containers. What this Court rejected was excessively intrusive scrutiny, on rational-basis review, into whether the legislature's express factual findings turned out to be right. The Court did not say that a court may imagine, after the fact, a factual premise that the legislature *could have* acted on but did not, and that the same court may then say that it does not matter whether the facts necessary to support that premise are actually true. In this case, there is no indication that the City even *sought* to distinguish between the two groups of taxpayers on the ground that those who paid their assessments in full were better off than those who delayed full payment—much less that the City actually *considered* any evidence related to that question.

In sum, the Indiana Supreme Court's theory is reminiscent of Dr. Pangloss's insistence that the human nose is shaped as it is so that it can support spectacles. The court below essentially reasoned that, *because* the City gave the money to some taxpayers but not others, the City *therefore* could reasonably have believed that the beneficiaries needed the money more. But we know that the City's discriminatory tax scheme was not—and could not plausibly have been—based on a belief that petitioners could (and should) bear a disproportionate share of the cost of sewer upgrades. That is because the City told us that its legislative purpose was to treat all taxpayers within the Brisbane/Manning project equally, not unequally. And the City told us that the sole justification for its decision to withhold refunds from petitioners was its desire to preserve financial resources. This Court should not turn a blind eye to the purposes actually articulated by the City by accepting this implausible and attenuated *post hoc* justification.

CONCLUSION

The judgment of the Indiana Supreme Court should be reversed.

Respectfully submitted.

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