

No.

IN THE
Supreme Court of the United States

CHRISTINE ARMOUR, ET AL.,

Petitioners,

v.

CITY OF INDIANAPOLIS, ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The Indiana Supreme Court**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are the owners of 31 residential real estate parcels in Indianapolis, Indiana, who were assessed approximately \$9,000 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. Shortly thereafter, the City adopted a new assessment scheme that vastly reduced each taxpayer’s burden. The City forgave the outstanding balances of those taxpayers who were paying in installments, but it refused to refund payments made by those who had already paid in full.

The Indiana Supreme Court—in conflict with decisions of a federal court holding the very same conduct unconstitutional and other state high courts—held that this action did not violate the Equal Protection Clause, even though it allowed the City to retain from each petitioner 30 times as much in assessed 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.” 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; Greg Ballard, Mayor of the City of Indianapolis; Indianapolis Department of Public Works; Indianapolis Board of Public Works; Jeff Spalding, Controller of the City of Indianapolis; Indianapolis Office of Finance and Management; and Billie J. Breaux, Marion County Auditor.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Indiana Supreme Court (App. 1a-39a) is reported at 946 N.E.2d 553. The opinion of the Indiana Supreme Court granting transfer of the opinion of the Court of Appeals of Indiana (App. 40a) is reported at 940 N.E.2d 821. The opinion of the Court of Appeals of Indiana (App. 41a-78a) is reported at 918 N.E.2d 401. The order of the Marion Superior Court granting summary judgment for petitioners (App. 80a-84a) is not reported.

JURISDICTION

The judgment of the Indiana Supreme Court was entered on May 10, 2011. This Court's jurisdiction is invoked under 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 § 36-9-39-15, are reproduced in the appendix to this petition. App. 85a-91a.

STATEMENT

Petitioners are the owners of 31 residential real estate parcels in the Northern Estates subdivision in Indianapolis, Indiana. App. 4a. In April 2001, the

City notified petitioners that their properties would be part of the Brisbane/Manning Barrett Law Sanitary Sewers Project, which sought to connect properties operating on individual septic systems to the municipal sewer. App. 3a. The Indianapolis Board of Public Works, following existing regulatory procedures, approved a tax assessment of \$9,278 for each of the approximately 180 parcels in the project. App. 3a-4a.

The tax was imposed pursuant to Indiana's Barrett Law, Ind. Code § 36-9-39-15, which required such assessments to be "apportioned equally among all abutting lands or lots." App. 85a. The affected owners were given the option of paying the assessment in full, or paying the amount in monthly installments over 10, 20, or 30 years (plus a 3.5% annual interest rate). Most owners chose one of the installment plans: 68 opted for the 30-year plan (paying \$25.77 per month); 27 opted for the 20-year plan (paying \$38.66 per month); and 47 opted for the 10-year plan (paying \$77.27 per month). The owners of 31 of the parcels—petitioners here—immediately paid their entire assessments in full.¹

On October 31, 2005, the City-County Council of Indianapolis adopted a new method of financing this sewer project. The Council passed Ordinance No. 107, which abandoned the Barrett Law as a means of funding new sewer improvements. In its place, the ordinance imposed a connection fee of \$2,500 per dwelling for new connections to the sanitary sewer system. App. 88a.

¹ One of the petitioners, Ms. Buker, had been assessed only one-half of the parcel fee and therefore paid \$4,639. Her reduced assessment was the result of a previous sewer hookup that no longer met City standards. App. 3a n.2.

The Board of Public Works then considered how to dispose of the assessments imposed for this project under the Barrett Law. On December 7, 2005, the Board passed Resolution 101, which forgave “all assessment amounts . . . established pursuant to the Barrett Law Funding for Municipal Sewer program due and owing *from the date of November 1, 2005* forward to the Department of Public Works via the Barrett Law Assessment Bureau.” App. 90a (emphasis added). The Board thus eliminated the outstanding balances owed by 142 owners who had chosen the installment payment plan: Those on the 30-year plan had paid only \$309.27 (3.3%) toward the \$9,278.00 assessment; those on the 20-year plan had paid only \$463.90 (5%); and those on the 10-year plan had paid only \$927.80 (10%).

Petitioners, however, had already paid 100% of their assessments. App. 4a, 69a. On February 4, 2006, petitioners requested a refund of their lump-sum payments equal to the assessments forgiven for the installment taxpayers. App. 48a. On March 8, 2006, the City rejected the request, refusing to offer petitioners any refund. App. 48a-49a.

On July 22, 2007, petitioners filed this lawsuit in Indiana state court against the City of Indianapolis and related entities and officials (respondents here). Petitioners asserted, among other things, a claim under 42 U.S.C. § 1983, alleging that the City’s arbitrary classification of taxpayers, which treated those similarly situated differently, violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. App. 7a, 50a.

The parties later filed cross-motions for summary judgment. Petitioners contended that respondents

lacked a rational basis for refusing to award petitioners the same tax forgiveness given to their similarly situated neighbors who had chosen to pay under the installment plan. The City contended that it had a rational basis for refusing to refund the excess assessments collected from petitioners. After a hearing, the trial court granted petitioners' motion for summary judgment and denied the City's cross-motion. The court entered judgment in favor of each petitioner and against the City and directed the City to pay \$273,391.63 in refunds plus reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988, of \$105,153.00 and expenses of \$2,369.53. App. 84a.

Respondents appealed. On December 18, 2009, the Court of Appeals of Indiana affirmed the trial court's grant of summary judgment on petitioners' Equal Protection claim and remanded with instructions to refund to petitioners an amount that would place them "on equal footing with their similarly situated neighbors who benefited from the City's disparate treatment." App. 76a-77a. Noting that "the parties agree that the material facts are undisputed," App. 52a, the court of appeals explained that the case turned on "the application of various United States Supreme Court cases to this appeal," App. 56a-57a. "The most relevant of those cases," the court concluded, "is *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, 488 U.S. 336 (1989)." App. 57a. That case likewise concerned disparities in real property tax assessments. In an opinion by Chief Justice Rehnquist, this Court unanimously held that "*the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners.*" App. 58a (quoting *Allegheny Pittsburgh*, 488 U.S. at 343) (emphasis added by

court of appeals). The court of appeals noted that the disparity deemed constitutionally impermissible in *Allegheny Pittsburgh* caused the petitioners to pay “roughly 8 to 35 times more than” the owners of “comparable neighboring property.” *Ibid.* (quoting 488 U.S. at 344).

The court of appeals next observed that this Court “has not specifically addressed whether a municipality contravenes the Equal Protection Clause when it forgives an outstanding assessment owed by some property owners while, at the same time, it refuses to refund an equivalent amount to similarly situated property owners who have already paid the same assessment in full.” App. 58a-59a. It determined, however, that “there are at least three state supreme court cases directly on point.” App. 59a. In *Armco Steel Corp. v. Department of the Treasury*, 358 N.W.2d 839 (Mich. 1984), the court explained, “the Supreme Court of Michigan held unanimously that a State agency ‘failed to suggest any persuasive rational basis justifying its disparate treatment of those corporate taxpayers who paid their . . . assessments . . . and those who did not.’” *Ibid.* (quoting 358 N.W.2d at 843). “The Supreme Court of Florida and the Supreme Court of Kansas,” the court further observed, “have reached similar holdings on comparable facts involving special tax concessions and the forgiveness of unpaid tax liabilities.” *Ibid.* (citing *State ex rel. Stephan v. Parrish*, 891 P.2d 445, 457 (Kan. 1995); *Richey v. Wells*, 166 So. 817, 819 (Fla. 1936)).

The court of appeals next examined respondents’ arguments that their refusal to grant petitioners a refund satisfied the requirements of rational-basis scrutiny. The court rejected respondents’ assertion that petitioners were not similarly situated to those

taxpayers whose assessments were forgiven. “[T]he relevant classification for equal protection purposes,” the court explained, “is all the property owners in the group subject to the same July 2004 Barrett Law assessment.” App. 62a (citing *Allegheny Pittsburgh*, 488 U.S. at 346; *Armco Steel*, 358 N.W.2d at 843). Were it otherwise, officials could simply “re-defin[e] the class” to eliminate an equal protection violation. *Ibid.* The court also dismissed respondents’ claim that petitioners’ disparate treatment was the result of a desire to relieve low-income families of a tax burden: “[T]he City has wholly failed to show that the property owners who chose to pay in installments are in any different income class than [petitioners], who paid in a single lump sum.” App. 63a.

The court of appeals then determined that the disparate treatment did not bear a rational relationship to a legitimate government interest. Resolution 101, the court noted, declared that the purpose of abandoning the Barrett Law assessment method was to serve the “best interests of middle- to lower-income property owners.” App. 66a. But that decision was not the decision that gave rise to equal-protection concerns; “[r]ather, [petitioners] challenge 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 as of that date.” App. 67a. “[N]either the Resolution’s findings nor its forgiveness provision,” the court determined, addresses “the City’s decision not to issue a refund to [petitioners].” *Ibid.* Respondents had demonstrated “no nexus” between the abandonment of the Barrett Law assessment and the refusal to issue a refund. *Ibid.*

While “only ‘rough equality’” among taxpayers is required, the court concluded, the short period of time between the 2004 assessment and the 2005 abandonment had produced gross, constitutionally intolerable disparities. Petitioners “have paid from ten to thirty times more than each of their similarly situated neighbors.” App. 68a (citing *Allegheny Pittsburgh*, 488 U.S. at 344). Moreover, respondents’ refusal to issue a refund to petitioners violated the latter’s “legitimate expectation and reasonable reliance” interests.” App. 69a-70a (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 13 (1992)).

After the court of appeals denied rehearing, respondents successfully petitioned for transfer to the Indiana Supreme Court. App. 40a. That court reversed in a closely divided, 3-2 decision. Writing for the majority, Justice Sullivan concluded that respondents had a legitimate interest in the administrative benefits of “simplifying sanitary sewer funding” by forgiving outstanding Barrett Law assessments, and drawing a clear “line” for moving to the new funding system. App. 18a. Noting that the purpose of abandoning the Barrett Law was to aid middle- and lower-income taxpayers, the court further determined 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.” App. 16a. But the court failed to respond directly to the court of appeals’ contention that that was Resolution 101’s stated assertion for abandoning the Barrett Law system; the resolution did not contain a reason justifying the separate decision not to issue an equivalent refund to petitioners.

The court did, however, opine that “the decision not to issue refunds to those who had already paid

implicates another legitimate interest—preservation of limited resources.” App. 18a-19a. Indeed, the court explicitly embraced the notion that respondents were justified in refusing to pay simply because they had already spent the money: “The City clearly has a legitimate interest in not emptying its coffers to provide refunds to those who had already paid their assessment.” App. 19a.

The court then 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.” App. 23a. The court 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.” App. 24a.

The court next examined this Court’s decisions in *Allegheny Pittsburgh* and *Nordlinger*. “The effects of the tax schemes in *Allegheny Pittsburgh* and *Nordlinger* were the same,” inasmuch as both “resulted in gross disparities in the tax burden of similarly situated property owners.” App. 26a-27a. The Court struck down the former scheme but upheld the latter, the court reasoned, because *Allegheny Pittsburgh* “was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was” legitimate. App. 27a-28a. The court dismissed *Allegheny Pittsburgh* as “a class-of-one case.” App. 28a (citing *Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 602 (2008) (per curiam)). “[A]t a minimum,” the court declared, “*Allegheny Pittsburgh* has essentially been narrowed to its facts and stands as a ‘rare case’ where the means did not rationally further the

government's legitimate purpose." *Ibid.* (quoting *Nordlinger*, 505 U.S. at 16).

Finally, the court turned to the conflicting state supreme court cases on which the court of appeals had relied. The court disagreed with *Armco Steel's* "articulation of equal protection law," and also attempted to distinguish it "on its facts" because that case involved "a sense of foul play" in the initial tax assessment at issue. App. 30a. The court dismissed other state decisions as "unpersuasive"—noting that some had been based on state constitutional grounds—and singled out the Florida Supreme Court's decision in *Richey* as "stating only that it was the 'view' of the majority opinion's author." App. 31a-32a. The court also sought to distinguish those decisions because they involved relief granted to delinquent taxpayers, whereas here the property owners granted relief from their Barrett Law assessments were operating under a government-sponsored installment plan. App. 32a-33a. The court acknowledged that a federal district court considering a challenge to Resolution 101 brought by other plaintiffs had reached a contrary result. App. 34a n.22.

Justice Rucker, joined by Justice Dickson, dissented. The dissent echoed the court of appeals' observation that the various reasons given for abandoning the Barrett Law assessment scheme do "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." App. 38a. More particularly, "[t]he stated purpose in Resolution 101 simply fails to express any connection to the" denial of relief to petitioners. App. 39a. "In my view," Justice Rucker concluded, "this disconnect demonstrates that the classification fails to have a 'fair and substantial

relation' to the statutory objective." *Ibid.* (citing *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959)).

REASONS FOR GRANTING THE PETITION

The "core concern of the Equal Protection Clause" is to act "as a shield against arbitrary classifications." *Engquist v. Oregon Dept. of Agric.*, 553 U.S. 591, 598 (2008) (per curiam). Here, petitioners were denied thousands of dollars in tax benefits awarded to their identically situated neighbors solely because petitioners had paid their tax assessments in full. That is the epitome of arbitrariness.

The Indiana Supreme Court upheld that distinction as rationally related to legitimate government interests in "administrative" convenience and—more transparently still—simply "preserving . . . limited resources." App. 19a. That holding squarely conflicts with decisions by four state high courts, as well as with a recent decision by an Indiana federal district court. The decision below is also wrong: It improperly confines this Court's unanimous holding in *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989), "to its facts," App. 28a, and wrongly accepts respondents' assertions that it is simply easier and cheaper to keep petitioners' money than to return it. Even under rational-basis review, that is no answer to an equal protection challenge. The issue presented is of widespread significance. Accepting "limited resources" as a justification for blatantly discriminatory taxation throws open the door to any number of pernicious practices. And upholding this practice will have the perverse effect of limiting authorities' collection options. This Court's review is urgently needed.

I. The Indiana Supreme Court's Decision Squarely Conflicts With Decisions Of Other State Supreme Courts And The Federal District Court In Indiana

A. Four State Supreme Courts Have Held That Discriminatory Tax-Forgiveness Schemes Violate The Equal Protection Clause

The Indiana Supreme Court's decision directly conflicts with decisions of four other state supreme courts. Those courts have held that the Equal Protection Clause prohibits tax-forgiveness measures that differentiate between taxpayers who promptly paid their tax assessments in full and those who delayed full payment.

In *Armco Steel Corp. v. Dep't of Treasury*, 358 N.W.2d 839 (Mich. 1984), the Supreme Court of Michigan struck down on federal equal-protection grounds a discriminatory taxation scheme materially indistinguishable from the one at issue here. The plaintiffs in *Armco Steel* had paid corporate franchise fees pursuant to an auditing procedure that was subsequently invalidated in a series of court decisions. In response to those decisions, the state tax division canceled corporate tax liabilities that remained unpaid, but refused to grant refunds to taxpayers who had paid their assessments in full.

Observing that the two groups of taxpayers were similarly situated, the court explained that the State had "failed to suggest any persuasive rational basis justifying its disparate treatment of those corporate taxpayers who paid their deficiency assessments following unauthorized audits and recomputations, and those who did not." *Id.* at 843. The court therefore held that the State's disparate treatment of

the two groups of taxpayers violated the Equal Protection Clause, which precludes such “persistent discrimination between two groups of taxpayers who are in reality but one class.” *Id.* at 844.

Other state supreme courts agree. In *Perk v. City of Euclid*, 244 N.E.2d 475, 477 (Ohio 1969), the court held that a law authorizing tax forgiveness for cities that failed to pay property taxes but not for those that already paid such taxes violated the Fourteenth Amendment. In *Richey v. Wells*, 166 So. 817, 819 (Fla. 1936), the court ruled that the Equal Protection Clause prohibits States from providing tax concessions to delinquent taxpayers unless “the same benefits” are provided to “those who have already paid their current taxes due.” In *State ex rel. Stephan v. Parrish*, 891 P.2d 445, 457 (Kan. 1995), the court invalidated, under a state constitutional provision “substantially identical” to and given the same effect as the Fourteenth Amendment’s Equal Protection Clause, a statute that waived outstanding tax obligations without conferring an equivalent privilege to timely taxpayers.

The teaching of these cases is clear. A state or municipal taxing authority cannot, consistent with the Equal Protection Clause, implement a discriminatory tax-forgiveness mechanism that punishes taxpayers who pay their taxes in full and rewards taxpayers who delay payment.²

² Numerous state supreme courts have held it to be unconstitutional as a matter of state constitutional law to deny benefits to taxpayers who promptly pay their taxes while granting such benefits to those who do not. See *Snow’s Mobile Homes, Inc. v. Morgan*, 494 P.2d 216, 219 (Wash. 1972); *State ex rel. Tharel v. Bd. of County Comm’rs*, 107 P.2d 542, 548-49 (Okla. 1940); *State ex rel. Hostetter v. Hunt*, 9 N.E.2d 676, 683

The Indiana Supreme Court reached the opposite conclusion in this case. Like the tax-forgiveness measures at issue in *Armco Steel*, *Richey*, *Perk*, and *Parrish*, Resolution 101 divides taxpayers into two groups: those, like petitioners, who timely paid their tax assessments, and those who delayed full payment. See *Armco Steel*, 358 N.W.2d at 844 (“The only distinction existing between [the two groups of taxpayers] is that one group paid their deficiencies while the other group did not.”). And, like the taxation schemes struck down by the other state supreme courts, Resolution 101 treats those identically situated groups dramatically differently, erasing the tax debts of those who delayed payment, while “refus[ing] to grant refunds to those . . . taxpayers who had paid their assessments and later sought repayment.” *Id.* at 841. As a consequence of that disparate treatment, the plaintiffs paid up to 30 times as much in tax assessments as did their neighbors who elected to pay their taxes in installments. The Indiana Supreme Court nevertheless concluded that the City’s grossly discriminatory taxation regime did not run afoul of the Equal Protection Clause.

Although the Indiana Supreme Court attempted to sidestep the conflict it created, its efforts to do so are wholly unconvincing. The Indiana Supreme Court first argued that *Armco Steel* failed to “consider whether there was a legitimate purpose” for treating similarly situated taxpayers differently “and whether the means used were rationally related to furthering such a purpose.” App. 30a. That point is a ground for *disagreement*, not a distinction, and therefore would do nothing to lessen the square conflict even if it were

(Ohio 1937); *State ex rel. Matteson v. Luecke*, 260 N.W. 206, 208 (Minn. 1935).

true. But it is not true in any event. The Michigan Supreme Court expressly concluded in *Armco Steel* that the State had “failed to suggest any persuasive rational basis justifying its disparate treatment” of the two classes of taxpayers and that the State’s disparate treatment of those groups possessed no “*reasonable relationship* to the object of the classification.” 358 N.W.2d at 843-44 (emphasis added).

The Indiana Supreme Court next attempted to distinguish *Armco Steel* on the ground that the initial fees paid by the taxpayers in that case were subsequently held to be unlawful, whereas the plaintiffs here do not challenge the validity of the Barrett Law assessment. App. 30a-31a. But, as the Michigan Supreme Court itself stated in *Armco Steel*, the legality of the original tax assessment is a “*non sequitur*,” 358 N.W.2d at 843: The constitutional question decided in *Armco Steel* was whether the government had a rational basis to distinguish between early taxpayers and non-payers—not whether the government correctly charged the early payers in the first place. That is precisely the question presented in this case, and the fact that the City chose (and was not forced) to abandon the Barrett Law assessment regime does not determine the constitutionality of its separate decision to waive arbitrarily the debts of some taxpayers but not others.³

³ The Indiana Supreme Court also suggested that the Florida Supreme Court’s decision in *Richey* was distinguishable because that case involved disparate treatment of delinquent taxpayers and those who paid their taxes on time. App. 32a. Again, however, that argument misses the point: The question is whether the State can punish taxpayers who paid their assessments on time while rewarding those who did not. *Richey*, like the other state supreme court decisions to address

B. The Federal District Court In Indiana Held That The City’s Discriminatory Tax Treatment Under Resolution 101 Violates The Equal Protection Clause

As the Indiana Supreme Court acknowledged, App. 34a n.22, its decision also directly conflicts with the recent decision in *Cox v. City of Indianapolis*, 2010 WL 2484620 (S.D. Ind. June 14, 2010). In that case, the district court addressed the exact same question as did the Indiana Supreme Court—whether Resolution 101 violates the Equal Protection Clause as applied to plaintiffs who paid Barrett Law assessments—and came to the opposite conclusion.

The plaintiffs in *Cox* were a certified class of Indianapolis property owners who, like petitioners here, had paid in full their Barrett Law assessments for other municipal projects. Because they paid more than did their similarly situated neighbors whose assessments were forgiven, the plaintiffs alleged that Resolution 101 violated their rights under the Equal Protection Clause.⁴ Applying rational-basis review, the district court agreed.

“[F]or the purposes of forgiving an outstanding tax debt,” the court explained, “a state authority acts arbitrarily when it differentiates between similarly

that question, held that such blatant discrimination among similarly situated taxpayers squarely violates the Equal Protection Clause. Indeed, the Indiana Supreme Court admitted that the fact that the taxpayers rewarded by the taxation scheme in *Richey* were delinquent was irrelevant to the constitutional question decided. App. 33a.

⁴ The plaintiffs in *Cox* originally filed suit in state court, but the City removed the case to federal court when the plaintiffs amended their complaint to include a federal equal-protection claim. *Cox*, 2010 WL 2484620, at * 2.

situated, and identically assessed, taxpayers solely on the basis of those who have fully paid their debt and those who have not.” *Cox*, 2010 WL 2484620, at *4 (quoting App. 61a). In reaching that conclusion, the district court relied on this Court’s unanimous decision in *Allegheny Pittsburgh*, which held that the Equal Protection Clause requires “a rough equality in tax treatment of similarly situated property owners.” *Allegheny Pittsburgh*, 488 U.S. at 343. Contrary to that constitutional requirement, the “City did not take any steps to treat the [plaintiffs] in a manner even roughly equivalent to their similarly situated neighbors.” *Cox*, 2010 WL 2484620, at *6 (quoting App. 74a).

The district court considered—and squarely rejected—the City’s putative rationales for implementing Resolution 101, including the City’s alleged interests in minimizing its own administrative costs and reducing the financial burdens on lower-income families. Those “attenuated” justifications, the district court held, do not withstand rational-basis scrutiny because they “bear no rational relationship to the City’s exclusion of the [Plaintiffs] from the forgiveness provision.” *Id.* at *6, *7 (quoting App. 70a, 75a). Accordingly, the district court held that “the City’s differential tax treatment of the [Plaintiffs] violates the Equal Protection Clause.” *Id.* at *7 (quoting App. 75a).

The Indiana Supreme Court could not distinguish *Cox*, which, after all, addressed the constitutionality of the very same resolution at issue in this case. Instead, the Indiana Supreme Court rejected the district court’s analysis on the ground that the federal court relied on the “now-vacated opinion of [the Indiana] Court of Appeals in this case.” App. 34a n.22. The district court, in turn, declined to alter its

judgment in response to the Indiana Supreme Court's decision, noting that decisions of that court are "only persuasive authority on matters of federal law." *Cox v. City of Indianapolis*, 2011 WL 2446702, at *2 n.1 (S.D. Ind. June 15, 2011) (Entry On The Issue Of Damages).⁵

The Indiana Supreme Court's decision therefore not only conflicts with the decisions of other state supreme courts, but also creates an intractable federal-state split within Indiana on the precise question presented by this case. It is difficult to imagine a more intolerable conflict than one pitting a state supreme court against a federal court in the same State on an issue of federal constitutional law. See, e.g., *Johnson v. California*, 545 U.S. 162, 163 (2005). This Court's review is urgently needed to resolve that "significant" conflict. See *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985).

II. The Decision Below Is Erroneous

Twelve judges have addressed the practice at issue here; nine agree that it violates the Equal Protection Clause.⁶ The three-justice majority below stands alone in holding that a taxpayer's having paid her tax bill is a permissible basis upon which to deny her relief granted to those who are otherwise identically situated. The decision below is wrong.

⁵ The district court has deferred ruling on attorneys' fees and on a state statutory issue unrelated to the federal equal-protection claim. See *Cox v. City of Indianapolis*, No. 09-435, Minute Order Regarding Status Conference Held June 16, 2011 (S.D. Ind. June 16, 2011).

⁶ Those twelve judges are the state trial judge, three court of appeals judges, and five Indiana Supreme Court Justices in this action, plus the magistrate judge and two federal district judges involved in the federal class action.

A. This case does not call into question respondents' decisions to abandon the Barrett Law and to forgive tax assessments under that law. It is, of course, entirely rational to conclude that the burdens of a taxation scheme are too onerous, and that prior assessments under that scheme therefore should be eliminated. At issue here is respondents' separate decision to *withhold* that very same relief from petitioners, simply because they had already paid their tax bills in full. Accordingly, respondents' assertions that their actions were justified because the Barrett Law was unfair to lower- and middle-income taxpayers are beside the point. Furthermore, many of those taxpayers who elected to pay the assessments in full are senior citizens with little fixed income (but with assets sufficient to cover the assessments). The burden of the City's arbitrary taxation scheme therefore fell disproportionately on such senior citizens. It is not only perverse, but also directly contrary to the City's stated reason for abandoning the Barrett Law regime in the first place, to punish such taxpayers, who simply chose to pay for their assessments by, in effect, borrowing money from themselves instead of borrowing from the City.

The remaining justifications embraced by the Indiana Supreme Court—that refusing to issue refunds “preserv[ed] limited resources” or offered “administrative” advantages—do serious violence to equal-protection principles. App. 11a. “Preservation of limited resources” is just a nice way of saying that the City wanted to keep the money. But accepting that rationale would eliminate any equal-protection review of even the most egregiously disparate tax treatment claims: Every taxing authority could (and will) claim that it needs the money, which is presumably why it imposed certain taxes in the first

place or refused to refund them. Suppose, for example, that a government imposed greater tax burdens on redheads than on brunettes, or denied refunds to redheads while giving them to similarly situated brunettes. The scheme is no less arbitrary because the result would be to increase the government's coffers. Yet the "resource preservation" rationale accepted below permits precisely that bizarre result.

The Indiana Supreme Court relied on several of this Court's welfare-benefit cases in claiming that "resource preservation" is a constitutionally adequate justification for disparate taxation. App. 11a-12a (citing *Bowen v. Gilliard*, 483 U.S. 587, 599 (1987); *Lyng v. Castillo*, 477 U.S. 635 (1986); *Jefferson v. Hackney*, 406 U.S. 535 (1972)). None can bear such weight.

Those decisions recognized that limited resources require governments to draw distinctions among would-be recipients of government benefits, but none accepted that practical reality as full justification for any classification that followed. Rather, the Court examined whether the distinctions between classes were rationally related to some legitimate governmental interest *other than* just saving the government's money. In *Gilliard*, the Court held that limiting benefits to families receiving child support from noncustodial parents furthered "the Government's separate interest in distributing benefits among competing needy families in a fair way" because those receiving no outside child support were in greater need. 483 U.S. at 599. In *Castillo*, the Court held that distinguishing between households comprising close relatives and those comprising more distant relatives likely reflected different eating and purchasing patterns for such households and reduced

the risk of mistaken or intentionally misstated claims. 477 U.S. at 642. In *Jefferson*, the Court wrote that “the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living.” 406 U.S. at 549. If saving money were a fully satisfactory justification for disparate treatment, the Court could have ended its analysis with the observation that the government saved money in each case, and would not have needed to analyze the additional justifications it cited.

The “administrative convenience” justification fares no better. Once again, recall that the constitutionally relevant action is not the decision to forgo the collection of Barrett Law assessments over a 10-, 20-, or 30-year period, but the refusal to issue refunds to those taxpayers who had paid in full. Petitioners sought a refund equal to the difference of the total amount they paid and the amount paid by taxpayers under the 30-year installment plan.⁷ That required only simple arithmetic based on entirely undisputed facts. Surely a government cannot justify its refusal to rectify disparate tax burdens simply because doing so would require an official to do such basic math and then issue a refund in the appropriate amount. Were it otherwise, then virtually any disparate tax treatment could be justified simply by stating that a remedy would require some additional effort to calculate. Indeed, it is difficult to imagine a case in which the “administrative burdens” could be lighter: Not a single fact or figure is disputed; all that remains is to cut petitioners a check.

⁷ The 30-year plan was the most popular. Substantially more homeowners (68) chose the 30-year plan than the 20-year plan (27) or the 10-year plan (47). App. 4a.

B. The decision below also erred in its reading of this Court’s decisions in *Allegheny Pittsburgh* and *Nordlinger*.

Allegheny Pittsburgh concerned real-property assessments in Webster County, West Virginia. 488 U.S. at 338. West Virginia’s constitution required property taxes to be assessed “in proportion to [the property’s] value,” *ibid.*, but Webster County’s assessor had a practice of assessing recently sold property at its full sales price while making only modest adjustments to property that had not been sold. Over time, substantially identical properties were assessed at vastly different levels—recently sold properties were valued (and therefore taxed) between 8 and 35 times higher.

This Court unanimously held that this practice violated the Equal Protection Clause. The Court first recognized that, as here, the petitioners’ “complaint is a comparative one”—the question was whether their assessments were too high not in the abstract but *relative to their neighbors*’. 488 U.S. at 342. The Court then held that the Equal Protection Clause requires “the seasonable attainment of a rough equality in tax treatment of similarly situated property owners,” *id.* at 343, and it determined that the gross disparities produced by the county’s system failed that test. The disparities at issue here are equally offensive: Petitioner ended up paying between 10 and 30 times the tax charged to their neighbors. *Allegheny Pittsburgh* also rejected the county’s assertion that the policy reflected a rational distinction among taxpayers, noting that state law “has not drawn such a distinction.” *Id.* at 345. So too here—the Indiana statute under which petitioners were taxed expressly required equal taxation for petitioners and other Northern Estates property

owners. App. 85a. There is no evidence that Indiana law varied liability based on the time of payment.

The majority below also misunderstood this Court's decision in *Nordlinger*. *Nordlinger* upheld Proposition 13, a California ballot initiative that limited real property tax assessment increases unless the property had changed ownership. 505 U.S. at 5. Critical to the Court's analysis was the fact that California's voters had declared a statewide policy *against* uniform property taxation—that was the point of the ballot initiative. Here, it bears repeating, Indiana law states that taxation shall be uniform; respondents cannot plausibly claim that the disparate treatment visited on petitioners furthers the State's tax policy. This Court has since reaffirmed the significance of background legal principles against which disparate treatment is measured. See *Engquist*, 553 U.S. at 602. (“What seems to have been significant in [*Village of Willowbrook v. Olech*], 528 U.S. 562 (2000)] and the cases on which it relied was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed.”).

Nordlinger also repeatedly emphasized the need to protect “legitimate expectation and reliance interests.” 505 U.S. at 13. Under the scheme at issue there, existing property owners had a legitimate expectation interest in avoiding spiraling tax bills based on unrealized appreciation in the value of their real estate, while new purchasers entered into transactions fully aware of the ensuing tax burdens. Here, by contrast, petitioners had a legitimate expectation that they would be taxed only equally with their neighbors, because state law said as much. And the installment-plan taxpayers certainly had no

reliance interest in being treated *more favorably* than petitioners.

Moreover, the majority in *Nordlinger* explicitly rejected the contention that its decision could not be squared with the unanimous decision in *Allegheny Pittsburgh*. 505 U.S. at 14-15. The Court explained that the declared policy *against* disparate taxation in *Allegheny Pittsburgh*—like the Indiana law here requiring equal taxation among property owners—rendered the proffered basis for distinguishing among taxpayers implausible. *Id.* at 15-16. The decision below, however, read *Nordlinger* to all-but-overrule *Allegheny Pittsburgh*, claiming that the latter “has essentially been narrowed to its facts.” App. 28a. Indeed, the decision below reads much more like Justice Thomas’s concurring opinion in *Nordlinger*, which asserted that *Allegheny Pittsburgh* simply “cannot be distinguished.” 505 U.S. at 18 (Thomas, J., concurring in part and concurring in the judgment). But that was plainly not the view of the seven Justices in the *Nordlinger* majority. “If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Even if the Indiana Supreme Court’s reading of *Allegheny Pittsburgh* and *Nordlinger* were reasonable, surely it is not the only possible understanding. Indeed, as explained above, other courts do not share the majority’s view of those cases, nor did the trial judge, court of appeals judges, and dissenting Indiana justices in this case. At a minimum, then, this Court’s review is necessary to

clarify any uncertainty surrounding the proper interpretation of these decisions. This Court—not a divided panel of the Indiana Supreme Court—should have the last word on the vitality of decisions like *Allegheny Pittsburgh*.

C. The decision below also erred in dismissing the equal protection principles laid down in this Court’s “so-called ‘class-of-one’ cases,” App. 20a, because, the court observed, “this is not a class-of-one case,” App. 23a. More particularly, the decision below was at pains to distinguish *Allegheny Pittsburgh* on the ground that it “has been characterized as a class-of-one case.” App. 24a (citing *Engquist*, 553 U.S. at 602). Whether *Allegheny Pittsburgh* fits that description is entirely beside the point, because this Court has explained that a “class-of-one” theory is “not so much a departure from the principle that the Equal Protection Clause is concerned with arbitrary government classification, as it was an application of that principle.” *Engquist*, 553 U.S. at 592. The Court stated that point even more emphatically in *Olech*: “Whether 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.” 528 U.S. at 564 n.*. The decision below ignores that principle.

At other points, the decision below appears to suggest that this case would fail if it were framed under a class-of-one theory. The majority claimed that class-of-one claims require proof that the disparate treatment “was motivated by animus or ill-will toward the plaintiffs,” relying on Justice Breyer’s brief concurring opinion in *Olech* and a subsequent opinion by Judge Posner in *Bell v. Duperrault*, 367 F.3d 703, 709-13 (7th Cir. 2004). App. 22a-24a. Whether to impose such an onerous requirement for

class-of-one equal protection claims merits full consideration by this Court—particularly in light of this Court’s pronouncements that proceeding under a class-of-one theory does *not* change the underlying equal-protection analysis.

III. The Question Presented Is Important

The question presented here is, of course, hugely important to the individual taxpayers involved: Northern Estates is a middle-class Indianapolis neighborhood, and the unfair imposition of more than \$8,000 on each petitioner (or couple) imposes a severe burden on them. The question presented is also important to the hundreds of other Indianapolis taxpayers who have been similarly mistreated in connection with numerous other projects financed under the Barrett Law.⁸ But the significance of this case reaches far beyond the city limits: The Indiana Supreme Court decision presents a serious threat to taxpayers nationwide and, perversely, will likely inhibit authorities’ ability to collect revenue.

The decision below gives governments carte blanche to engage in arbitrarily discriminatory taxation. That is because the justifications deemed to satisfy rational-basis review would be available as a complete defense to virtually any disparate tax treatment. Government officials are perpetually facing “limited resources.” If the decision below is left standing, governments will be allowed to justify the most harshly discriminatory action simply by asserting a purportedly “legitimate interest in not emptying [their] coffers.” App. 19a. The administra-

⁸ Those taxpayers are members of the certified class in *Cox v. Indianapolis*. Damages for the class members have been assessed at \$2,783,702. *Cox*, 2011 WL 2446702, at *1, 3.

tive-burden justification accepted below is likewise pernicious in its implications. As explained above, the “burden” imposed by refunding to petitioners an undisputed sum of money is trivial. If this passes muster, what wouldn’t?

The evisceration of any meaningful constitutional scrutiny will make a real difference to millions of ordinary taxpayers. Particularly at the state and local level, tax policy is constantly shifting—assessment methods vary, rates fluctuate, and officials are constantly looking for ways to fund any number of projects. As a result, there are countless lines to be drawn and just as many opportunities to avoid making the often difficult choices that are the hallmark of rational taxation systems. Meaningful rational-basis scrutiny ensures that officials do not abdicate their responsibility and that they actually make a reasoned decision when they draw lines in the exercise of their taxing authority.

This case involves individual taxpayers, but both history and logic show that businesses will suffer too if the sweeping and misguided analysis of the Indiana Supreme Court is allowed to stand. Businesses provide inviting “deep pockets” for taxing authorities. The facts of the *Allegheny Pittsburgh* and *Armco Steel* cases, discussed above, show that it is far from hypothetical to think that taxing authorities will try to use wholly arbitrary distinctions to raise tax revenues from corporations. If the Indiana Supreme Court is right—if revenue enhancement and administrative convenience are enough to save an otherwise-unconstitutional taxing scheme under rational-basis scrutiny—then no business is safe from the arbitrary whim of taxing authorities. If “the power to tax involves the power to destroy,” *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431

(1819) (Marshall, C.J.), then the Indiana Supreme Court has handed taxing authorities a lethal weapon. It is only a matter of time before that weapon is aimed discriminatorily at disfavored businesses.

Finally, the decision below is likely to have the perverse effect of *limiting* governments' options for collecting revenue. If a taxpayer has a choice between paying an assessment up front and paying over time, and the Constitution does not prohibit governments from retaining full payment in the event the assessment is forgiven or reduced, few would take the former option.⁹ A government can require all taxpayers to pay up front, but the practical and political consequences of such a decision will be prohibitive with respect to larger assessments such as the one at issue here. That point is amply demonstrated by the fact that four times as many Northern Estates taxpayers chose an installment plan over payment in full. Conversely, a government could put all taxpayers on an installment plan, but doing so would necessarily delay the collection of proceeds and thus funding for the project. As a practical matter, localities need the ability in certain circumstances to encourage some taxpayers to pay now while allowing some to pay over time. But, if taxpayers inclined to pay in full have no assurance that shifting political winds will not leave them facing grossly disproportionate tax liability, they won't take that risk, eliminating that approach as a viable

⁹ If, as here, the installment option carries with it an interest charge, that rate is unlikely to be sufficiently high to encourage large numbers of taxpayers to pay up front. The whole point of an installment plan is presumably to ameliorate the economic effects of a tax assessment; that objective is undermined if the rate is significant.

option. The decision below thus has the perverse effect of curtailing taxing authorities' options at a time when they need maximum lawful flexibility.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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