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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

More than seven years after passing Resolution 101, respondents still search in vain for a rational basis for requiring petitioners to pay 30 times more than their neighbors, when state law guaranteed that such burdens would be borne "equally." The real reason remains obvious: It was more expedient to draw an arbitrary line than to pursue even "rough equality" among similarly situated taxpayers. That impulse is precisely what the Equal Protection Clause forbids.

Respondents' brief is largely devoted not to identifying reasons for their conduct, but rather to tacit arguments that no real reason is required. Like the court below, respondents defend at length the decision to discard the Barrett Law, but that says nothing about why petitioners received no refund while their neighbors received 90-97% forgiveness. Respondents say that governments must draw lines, but that does not explain why this line was drawn so arbitrarily. They observe that Resolution 101 applies "evenhandedly" to installment-plan payers, but that begs the question whether it was rational to deny petitioners a similar benefit. Any of these non-answers would condone even the most blatantly discriminatory tax treatment.

In *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336 (1989), this Court followed a long line of cases, unanimously rejected the "anything goes" philosophy of taxation, and held that a State's explicit declaration of equality cannot be jettisoned on a municipality's whim. Respondents claim that *Allegheny Pittsburgh* applies to "nothing

more" than tax "assessments," but that makes as much sense as saying it applies only to coal deposits. Respondents' assertion that the gross inequality imposed by Resolution 101 "fully complied" with state law's promise of equality is fanciful. So is their reading of *Nordlinger* v. *Hahn*, 505 U.S. 1 (1992), which *reaffirmed* rather than eviscerated *Allegheny Pittsburgh*.

When respondents purport to identify specific justifications for their refusal to issue refunds, they offer still more misdirection. Saying that Resolution 101 is "prospective" merely describes—but does not justify—it, and even that label is misplaced. The Barrett Law makes clear that assessments are final and fully payable regardless of the payment method chosen. The "administrative convenience" rationale is no more persuasive here than it was in *Allegheny Pittsburgh*. And respondents' claim that they already spent petitioners' money is, as in any tax case, no answer at all.

Finally, respondents urge an approach to rational-basis review that is subtly but dangerously wrong: that a proffered basis is "plausible" if it is "rational"—without regard to the statutory and factual context of the case. This Court rejected that proposition in *Nordlinger*, when it reaffirmed *Allegheny Pittsburgh*. It is one thing to say that authorities need not articulate a particular reason in advance and that courts should not take sides in policy disputes. It is different to *know*—here, from the City's own mouth and the unambiguous legislative scheme—that a proffered basis had nothing to do with the challenged action. Rational-basis review need not be overly searching, but it is not blind to reality.

I. THE CITY'S REASONS FOR ABANDONING THE BARRETT LAW AND FOR FORGIVING UNPAID ASSESSMENTS ARE IRRELEVANT TO THE QUESTION PRESENTED

Respondents' lead argument is a vigorous defense of the decision to "forgive all outstanding balances" under the Barrett Law. Resp. Br. 26-27. Respondents say they sought a "clean break" from the "*ancien regime*." *Id.* at 27. They reiterate that continuing to collect outstanding Barrett Law balances would have been administratively inconvenient. *Id.* at 28. And they assert—for the first time—that forgiveness was necessary to avoid making installment payers pay higher monthly sewer fees under STEP as well as their monthly Barrett Law assessments. *Id.* at 29.

That is all beside the point. The question is not the rationality of abandoning the old funding mechanism or of forgiving money owed. The question is whether the City had a rational basis for discriminating against homeowners who paid their assessments in full.

Respondents' focus on the forgiveness decision demonstrates the misunderstanding that pervades their brief. The equal-protection inquiry is, intrinsically, comparative. "[T]he 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." *Allegheny Pittsburgh*, 488 U.S. at 346. What matters is whether the government had a rational basis for treating similarly situated taxpayers vastly differently. For the same reason, it does not suffice that petitioners "got exactly what

they paid for"—a sewer hookup. Resp. Br. 42. The crux of the constitutional violation is that, despite an explicit promise of equality, petitioners paid 30 times more than their neighbors for the same benefit. Petitioners' claim thus cannot be dismissed as merely "envy," *ibid.*, of other taxpayers.

Williams v. *Vermont*, 472 U.S. 14 (1985), illustrates that point. The State there had a rational basis for taxing automobile owners to fund road improvements. But the constitutional question was whether the State had a rational basis for imposing that burden on some—but not all—groups of automobile owners. It didn't, this Court held, because "[t]he purpose of the statute would be identically served, and with an identical burden, by taxing each" group similarly. *Id.* at 24. So too here, as respondents have repeatedly acknowledged. Br. in Opp. 6, 11; Resp. Br. 54, 55.

Respondents nevertheless suggest that withholding refunds from petitioners was proper because "there is a rational basis in making a clean break." Resp. Br. 27. That assertion begs the constitutionally relevant question. A legislature's choice to engage in "line-drawing," *id.* at 25, is not in and of itself a justification; the line must be *rationally* drawn. See, *e.g.*, *Quinn* v. *Millsap*, 491 U.S. 95, 107-108 (1989) (unanimously striking down, on "rationality review," state law that limited eligibility for an appointment to those owning real property).

That is true even when that line is based on "timing." In *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985), this Court overturned as irrational a tax-exemption statute that distinguished between veterans who established residence before

and after a specific date. It was irrelevant that the State sought to "draw a line" based on timing because the line drawn had "no rational relationship to one of the State's objectives." *Id.* at 619.

The "line-drawing" cases respondents cite (at 25-26) are not to the contrary. The government classifications were upheld because the government had a rational basis for drawing the line where it did, not simply because it professed a desire to draw one somewhere. *E.g.*, *Vance* v. *Bradley*, 440 U.S. 93, 106 (1979) (retirement-age distinction between Foreign Service officers and other civil servants was rational because of unique "risks connected with having older employers in the Foreign Service"); *Regan* v. *Taxation With Representation*, 461 U.S. 540, 550-551 (1983) (tax statute distinguishing between veterans' organizations and other charities was rational because of unique contributions of veterans).

II. THE CITY LACKED A RATIONAL BASIS FOR DISCRIMINATING AMONG NORTHERN ESTATES HOMEOWNERS

A. Respondents' Efforts To Avoid Constitutional Scrutiny Are Unavailing

Before turning to their *post hoc* justifications for the City's discrimination, respondents again try to avoid the question. First, they argue that the Equal Protection Clause is not even implicated because "petitioners are not similarly situated to the residents who received relief under Resolution 101." Resp. Br. 30. "The very fact that petitioners affirmatively needed to seek a refund, while their neighbors simply had their outstanding balances forgiven without any further action," respondents say, proves that the two

groups are not similarly situated. *Id.* at 37. Respondents further assert that Resolution 101 applies "'evenhandedly to all'" because it treats all installment payers the same (by providing them relief) and it treats all those who paid in full the same (by denying them relief). *Id.* at 38 (quoting *Vacco* v. *Quill*, 521 U.S. 793, 800 (1997)).

This Court has rejected that circular logic. "[T]he fact that all those not benefited by the challenged exemption are treated equally has no bearing on the legitimacy of that classification in the first place. A State cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated." *Williams*, 472 U.S. at 27. "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes." *Rinaldi* v. *Yeager*, 384 U.S. 305, 308 (1966).

Nor is it rational to penalize those who must "seek a refund" while their neighbors get a 90-97% tax reduction through inaction. Resp. Br. 37. In *Metropolitan Life Insurance Co.* v. *Ward*, 470 U.S. 869, 872 (1985), out-of-state insurance companies had to "seek a refund" for past taxes (or invest in state securities to obtain a lower tax rate), whereas in-state companies paid lower taxes "without any further action on their parts." Resp. Br. 37. That difference did not shield the discrimination from constitutional scrutiny.

B. Respondents Cannot Distinguish *Allegheny Pittsburgh* and *Nordlinger*

As we explained (Pet. Br. 23-30), this Court held unanimously in *Allegheny Pittsburgh* that, when a State has declared taxpayers to be similarly situated and subject to equal tax burdens, it must actually achieve "rough equality in tax treatment." 488 U.S. at 343. *Nordlinger* confirmed that core holding but made clear that a State's explicit, *ex ante* selection of a different taxation philosophy was not impermissible simply because it resulted in disparities among taxpayers. Thus, a State's determination at the outset that certain taxpayers are—or are not—similarly situated made all the difference. When respondents get around to addressing *Allegheny Pittsburgh* and *Nordlinger*, Resp. Br. 44-51, they misread those precedents.

1. It is not novel to analyze *Allegheny Pittsburgh* as turning on the State's background policy of equality in taxation. Despite respondents' claim (at 46) that doing so "recast[s]" that "modest case and its modest holding," this Court recently described *Allegheny Pittsburgh* the same way. In *Engquist* v. *Oregon Dep't of Agriculture*, 553 U.S. 591, 602 (2008), the Court examined *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000), and cases cited in *Olech*—including *Allegheny Pittsburgh*. "What seems to have been significant in *Olech* and the cases on which it relied was the existence of a clear standard against which departures * * * could be readily assessed." 553 U.S. at 602. "In *Allegheny Pittsburgh*," the Court continued, "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.

Respondents next note that *Allegheny Pittsburgh* involved only "the assessment process" and claim it therefore "has nothing to do with the obligation to issue refunds for past payments." Resp. Br. 45. But *Allegheny Pittsburgh*'s holding has no such microscopic boundaries; instead, the Court reaffirmed "the constitutional requirement" of attaining "*a rough equality in tax treatment* of similarly situated property owners." 488 U.S. at 343 (emphasis added). When it comes to "property assessment and taxation schemes," this Court later reaffirmed in *Engquist*, "[w]e expect such legislative or regulatory classifications to apply 'without respect to persons.'" 553 U.S. at 602 (quoting 28 U.S.C. § 453).

Respondents claim that *Allegheny Pittsburgh* does not apply because there is no "inconsistency" between Indiana law and Resolution 101: The former, they say, promised equality with respect to *assessments* and "nothing more." Resp. Br. 47 & n.4. That assertion resurfaces repeatedly in their brief (at 20, 45, 46, 47, 49) and is worth debunking.

The Barrett Law requires that "[t]he costs [of the project] shall be primarily apportioned equally." Ind. Code. § 36-9-39-15(b)(3). It specifies methods for reducing a parcel's assessment if it would not receive an equal benefit. See *id.* § 36-9-39-17. But equal burdens for equal benefit remain the norm, and there is no other statutory mechanism for adjusting homeowners' equal burdens—certainly not based on whether a taxpayer elects to pay in installments.

Instead, the law provides that "the municipal fiscal officer *shall* collect and enforce the special assessments" without mention of the payment method chosen. Ind. Code § 36-9-37-4 (emphasis added). It prescribes mechanisms to ensure that installments are fully paid. Installment payers "must, when directed by the municipal works board, enter into a written agreement" promising not to contest the assessment and to "pay the assessment as required by law with specified interest." *Id.* § 36-9-37-8.5(c). A lien attaches to the property. *Id.* § 36-9-36-40, -43; *id.* § 36-9-37-9(b). And the statute explicitly states that installment payers enjoy no special privilege concerning collection: "*If a property owner elects to pay the property owner's assessments in installments, the assessment shall be entered for collection on the improvement duplicate and* ***shall be collected in the same manner as other taxes***." *Id.* § 36-9-37-6 (emphases added).

Furthermore, Article 10, Section 1 of the Indiana Constitution declares that "the General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation." See Pet. Br. 31 (quoting same). Respondents do not address that provision. None of the nine Indiana state judges who examined state law below—even the three Indiana Supreme Court justices who ruled for respondents—read it to require anything less than full equality.

If anything, the departure from state law here is *more* extreme than in *Allegheny Pittsburgh*, because here specific statutory provisions declare that the purported distinction (election of an installment plan) does not place taxpayers on special footing. In *Allegheny Pittsburgh*, there was no similar

instruction; in fact, the statute *required* assessors to use recent sales data in establishing a property's fair market value. See Brief of Respondent 26, *Allegheny Pittsburgh* (No. 87-1303), 1988 WL 1025749 (citing W. Va. Code § 11-4-8).

2. Respondents rely on the result in *Nordlinger*, but overlook portions of the Court's reasoning that contradict their theory. Respondents seize (at 49) on *Nordlinger*'s reference to "the 'assessment scheme' at issue in *Allegheny Pittsbugh*," suggesting that this Court endorsed their myopic reading of the latter decision. But merely describing the factual context in which *Allegheny Pittsburgh* arose does not purport to confine its holding any more than *Nordlinger*'s description of *Kadrmas* v. *Dickinson Public Schools*, 487 U.S. 450 (1988), means that case applies only to "bus service." *Nordlinger*, 505 U.S. at 13.

Respondents observe that *Nordlinger* holds "that 'dramatic disparities in taxation' on comparable properties are not sufficient to make out an equal protection claim." Resp. Br. 49. True enough, but what matters is whether such extreme disparities grossly depart from explicit state-law declarations that those taxpayers are all similarly situated and should be taxed equally. As explained above (*supra* pp. 8-9), the state-law backdrop here is equality among taxpayers within each project. *Nordlinger* confirms the significance of that backdrop.

Respondents claim (at 49) that *Nordlinger* "emphasizes the peculiar facts and extremely narrow holding of *Allegheny Pittsburgh*." But rather than diminish the earlier case, *Nordlinger* relies on the "obvious and critical factual difference" between the background equality norm in *Allegheny Pittsburgh*

and the fundamentally different taxation philosophy at issue in *Nordlinger*. 505 U.S. at 14-15. What respondents really mean—they admit in footnotes 5 and 6—is that the Court in *Nordlinger* should have overruled *Allegheny Pittsburgh*. But *Nordlinger* disclaimed that the decisions are in conflict. See Pet. Br. 26-28. Respondents wisely stop short of asking this Court to overrule *Allegheny Pittsburgh*. Despite their unsupported assertion that "*Allegheny Pittsburgh* was a problematic and unworkable precedent" (Resp. Br. 50 n.5), respondents cite no case evidencing any such difficulty. Recent decisions, such as *Olech* and *Engquist*, reaffirm *Allegheny Pittsburgh*'s long pedigree and current vitality.

Indeed, this case illustrates the importance of *Allegheny Pittsburgh*. That decision does not impose onerous burdens on authorities; it requires only "rough equality" among taxpayers whom state law has explicitly declared to be similarly situated. Accordingly, respondents are simply wrong to suggest that petitioners would give a constitutional remedy to a taxpayer who may "feel disadvantaged" by minor discrepancies—*e.g.,* a 10-year-plan homeowner who "paid $50 more per month" than a 30-year-plan homeowner. Resp. Br. 34. *Allegheny Pittsburgh* forbids *gross inequality*, and respondents do not dispute that the 30-to-1 disparity imposed on petitioners here is of equal magnitude to that struck down in *Allegheny Pittsburgh*. Instead, they say that because *perfection* might be difficult to achieve, they are justified in imposing massively disproportionate burdens on petitioners. But what may be a rational justification for a small disparity is not necessarily a rational justification for a gross one. *Allegheny Pittsburgh*'s sound holding stands as a bulwark

against the most extreme actions of taxing authorities.

C. Respondents' New Justifications For The City's Discriminatory Tax Scheme Are Meritless

Respondents eventually assert three primary justifications for making petitioners pay 30 times as much as their neighbors for the same sewer connection: (1) the City was acting prospectively rather than retroactively; (2) it would have been difficult to calculate and issue refunds to lump-sum taxpayers in *other* Barrett Law projects; and (3) the City had earmarked petitioners' payments for costs associated with the construction project. None is a plausible rational basis for this grossly discriminatory tax scheme.

1. Respondents' main argument is that the City's scheme "is simply an application of the basic divide between legislation that is prospective only and legislation that retroactively revisits past transactions." Resp. Br. 31. Their argument boils down to the assertion that because *some* prospective laws are rational, Resolution 101 is necessarily rational because it, too, has—as they conceive it—prospective effect.

But even assuming for the moment that Resolution 101 is fairly characterized as "prospective," prospectivity is not a rational goal in itself. True, certain government interests are rationally pursued through prospective legislation, and some are rationally pursued through retroactive legislation. A law survives rational-basis scrutiny only if it rationally furthers a legitimate government

interest—regardless of whether it can be described as prospective or retroactive. What matters is the reason underlying the line itself as judged by the context in which it is drawn.

Consider respondents' favorite example: forgiveness of penalties on overdue parking tickets. See Resp. Br. 19, 31, 39, 40, 42, 44, 47. Respondents argue that, because such amnesty programs are presumptively rational, Resolution 101 is necessarily rational because it, too, is a "prospective forgiveness" program. *Id.* at 22. They also assume the inverse is true—that, if Resolution 101 is irrational, no municipality can forgive penalties on outstanding parking tickets without running afoul of the Equal Protection Clause.

But such programs are not rational *because* they are prospective. They are rational because they arise in a fundamentally different context—withholding a small modicum of punishment for wrongdoers, typically to incentivize compliance with a law that would otherwise go unenforced with respect to certain offenders. That legitimate interest in promoting compliance is rationally served by forgiving only unpaid penalties (and thus encouraging payment of overdue tickets).

The City's decision to forgive taxpayers' Barrett Law assessments but not to issue any refunds, however, was not driven by a desire to induce compliance with the Barrett Law. Instead, the goal of Resolution 101 was to *eliminate* compliance with the Barrett Law. Indeed, respondents acknowledge that the justifications for the forgiveness programs they cite—inducing compliance and facilitating recovery of unpaid fines—do not apply in this case.

Resp. Br. 43. But the justification and context are what matters. If the justification for parking-ticket amnesty is different—and it clearly is[1]—then whether such amnesty programs have a rational basis is irrelevant.

Even the most arbitrary government classifications could be justified on the ground that they have prospective effect only. Imagine, for example, that, instead of forgiving the debts of installment payers, the City instead *increased* installment-plan payers' future bills 30-fold (without adjusting other homeowners' assessments). Under respondents' theory, that would be permissible because it operates "prospectively" and involved "open" transactions.

Respondents' reliance on "grandfather clause" cases is equally flawed. Resp. Br. 33. In *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976), this Court upheld an exemption from a ban on pushcart vendors in the French Quarter for vendors who had continuously operated there for eight years. But this Court did not uphold the ordinance just because it was prospective or made a "timing" distinction. Resp. Br. 33. Rather, the Court upheld the ordinance because New Orleans "could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation"

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[1] Amnesty for penalties on overdue parking tickets, moreover, is simply a mitigation of punishment for some who have violated the law. "The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences." W*illiams* v. *Illinois*, 399 U.S. 235, 243 (1970). Taxation of law-abiding taxpayers has always been governed by different standards. See Pet. Br. 28-29.

and that the exempted businesses "had themselves become part of the distinctive character and charm" of the Quarter. 427 U.S. at 305. Neither interest applies here. Indeed, the City's grossly discriminatory tax treatment undermined petitioners' "substantial reliance interests" that all homeowners would be treated equally, however they chose to pay. See Pet. Br. 33.[2]

In any event, this case does not even implicate the prospective-retroactive distinction. As explained above (*supra* pp. 8-9), the installment-plan assessments are not "open" in any meaningful sense under state law; collection is mandatory on equal footing with other taxes and guaranteed by a lien. The only truly "prospective" action here is the adoption of STEP for *future* projects—an action that petitioners do not challenge.

2. Respondents argue that it would have been "immensely difficult from an administrative standpoint for the City to have issued Barrett Law refunds to homeowners who had previously made payments." Resp. Br. 36. Respondents state that "[t]he City no longer even had records of Barrett Law assessments and payments from before the early

[2] Cases dealing with the finality of criminal proceedings are plainly inapposite. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), was not an equal-protection case; it held that a statute requiring federal courts to reopen final judgments violated the Constitution's separation of powers. *Teague* v. *Lane*, 489 U.S. 288 (1989), likewise turned on a unique concern, namely that "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." *Id.* at 309. Moreover, "[n]ew substantive [criminal] rules generally [do] apply retroactively." *Schriro* v. *Summerlin*, 542 U.S. 348, 351 (2004).

1990s." *Ibid.* That argument is implausible on these facts.

The City had all the information it needed. When Resolution 101 was enacted, the City Controller's Office used "information systems software [to] track[] and manage[] Barrett Law debts owed to the City." Aff. of Charles White, ¶ 13, *Cox* v. *City of Indianapolis*, No. 1:09-cv-0435 (S.D. Ind. Feb. 4, 2010), ECF No. 57-3. That software calculates the precise amounts forgiven under Resolution 101 for each homeowner in each project area. Indeed, in the *Cox* litigation the City provided records showing exactly how much each lump-sum payer overpaid in *every* active Barrett Law project. City's Response to Plaintiff's Brief on Damages, Ex. A., *Cox*, No. 1:09-cv-0435 (S.D. Ind. Feb. 8, 2011), ECF No. 98-1.

Although respondents protest that "[t]he City no longer even had records of Barrett Law assessments and payments from before the early 1990s," the existence of such records is irrelevant. The 20-year and 30-year payment options were added to the Barrett Law in 2001; until then, a ten-year payment plan was the longest available. See Ind. Code § 36-9-37-8.5. Thus, when the City passed Resolution 101 in 2005, the *oldest* active Barrett Law project with outstanding balances would have been from 1995. Respondents do not claim that the City lacked records from 1995 forward—in fact, it readily submitted those very records in the *Cox* litigation. That is why the *Cox* litigation was limited to projects that were less than ten years old in 2005.[3] There is

[3] Although respondents assert (at 36) that "[a]t the time Resolution 101 was enacted, there were over forty Barrett Law projects where homeowners had outstanding balances," the

therefore no merit to respondents' assertion that "[t]o provide refunds * * * the City would have had to review records for thousands of homeowners across hundreds of different projects."

The imagined administrative burdens would not provide a rational basis for the City's grossly discriminatory tax treatment anyway. Respondents' argument "is in essence that it is difficult to be just and easy to be arbitrary." *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550, 560 (1935). This Court has rejected the argument that gross disparities of the type imposed here can be justified on administrative-convenience grounds alone. See Pet. Br. 44-45.

The cases respondents cite (at 56) do not hold otherwise. *Bowen* v. *Roy*, 476 U.S. 693 (1986), is not even an equal-protection case. It rejected a First Amendment challenge to the use of Social Security numbers to determine eligibility for welfare benefits, and stands for the proposition that "preventing fraud" by requiring a Social Security number "is an important goal." *Id.* at 709. *Mathews* v. *Lucas*, 427 U.S. 495 (1976), addressed a provision of the Social Security Act providing survivor benefits to dependent

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City's submissions in the *Cox* case demonstrate that there were at most only 24 such projects. See City's Response to Plaintiff's Brief on Damages, Ex. A, *Cox*, No. 1:09-cv-0435 (S.D. Ind. Feb. 8, 2011), ECF No. 98-1 (listing 21 projects with outstanding installment balances plus three projects in which the City forgave delinquent installments). And the City had no trouble pegging the exact dollar amount of refunds at issue; it argued (successfully) in *Cox* that the damages to all lump-sum payers in *all* other active Barrett Law projects totaled $2,783,702. *Cox* v. *City of Indianapolis*, 2011 WL 2446702, at *1 (S.D. Ind. June 15, 2011). Only $273,391 of refunds were owed to Northern Estates homeowners. Pet. Br. 11.

children. The well-fit statutory presumptions of dependency constituted "reasonable empirical judgments." *Id.* at 510. Neither case suggests that administrative convenience constitutes a rational basis for gross disparities in tax treatment.[4]

3. According to respondents, refunds are problematic "since, under the Barrett Law, homeowners' payments had been committed to special funds designed to pay the costs of the very improvements from which those homeowners had benefited." Resp. Br. 35 (citing Ind. Code. § 36-9-37-13). But "dollars are fungible." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 49 n.7 (1989). Indeed, respondents admit that the City could have provided refunds to petitioners by "arrang[ing] for payments from non-Barrett Law sources." Resp. Br. 36.

The City also could have forgiven assessments in a way that would have avoided causing gross disparities in tax treatment without imposing on other funds. For example, contrary to the City's

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[4] *Carmichael* v. *S. Coal & Coke Co.*, 301 U.S. 495 (1937), on which *amici* the International Municipal Lawyers Association rely (at 5), is also inapposite. That case upheld an exclusion from a state unemployment-compensation act for employers of fewer than eight persons. The Court explained, "[w]e cannot say that the expense and inconvenience of collecting the tax from small employers would not be disproportionate to the revenue obtained." 301 U.S. at 511. But in this case the City made no distinction between taxpayers based on the "amount of the tax" owed by each homeowner. *Ibid.* In any event, the Barrett Law itself draws a line at which the burden of collection outweighs the benefit, prohibiting election of installment plans for assessments of less than $100. Ind. Code § 36-9-37-8.5(f). The statute thus refutes the idea that the City forgave millions in installment payments to avoid the burdens of collection.

assertion (at 18) that it "had three basic options," (collect for 30 years, refund all payments, or forgiveness without refunds) collecting Brisbane/Manning assessments for just two-and-a-half more years would have allowed the City to spread the same dollar amount of forgiveness equally among all Northern Estates homeowners, forgiving $6,900 for each. See Pet. Br. 52-53. Because the other Barrett Law projects affected by Resolution 101 were older (and thus the asymmetry between lump-sum and installment-plan taxpayers less severe) even shorter periods would have fully funded the "rough equality" that the Constitution requires. The fact that "a more precise and direct classification is easily drawn"—and need not have cost the City a nickel out of pocket—is telling evidence of irrationality. *Williams*, 472 U.S. at 23 n.8.

4. Respondents appear to abandon both of the principal justifications advanced by the lower court.

First, the lower court held that the City could reasonably have concluded that homeowners who chose to pay their assessments in installments were more likely to be lower- or middle-income taxpayers than those who chose to pay their assessments in full. Pet. App. 15a-16a. Respondents do not attempt to defend that logic. Instead, they briefly suggest an even more convoluted way for the City to have viewed payment method as a proxy for "financial position." "Obviously," respondents declare, "those with no outstanding Barrett Law balances were in a better 'financial position' in terms of liquidity to pay the higher monthly fees [imposed under STEP] than those facing the new fees and the prospect of paying off outstanding balances." Resp. Br. 57. But the

notion that petitioners were somehow more "liquid[]" than homeowners who opted for the installment plan strains credulity—or at least mistakes what "liquidity" means. Petitioners had just paid $9,278 out of pocket, whereas homeowners paying in installments had paid one-tenth to one-thirtieth of that amount. If anything, petitioners were *less* "liquid" than other homeowners, and therefore in a worse "financial position" to pay increased STEP fees.

Second, the lower court held that the City had a legitimate interest in "preservation of limited resources." Pet. App. 18a-19a. Respondents focused exclusively on that argument in their Brief in Opposition, conceding—twice—that all of the City's other reasons for forgiveness without refunds would have been accomplished if refunds were also extended. Br. in Opp. 6, 11. Respondents now characterize those concessions as "isolated remarks," Resp. Br. 54, and decline to address any of this Court's cases rejecting the proposition that "preservation of limited resources" is a sufficient rationale for discriminatory tax treatment. See Pet. Br. 41-43 (citing cases).

D. Respondents' Ever-Shifting Justifications Cannot Plausibly Have Been The Reasons For The City's Grossly Discriminatory Tax Scheme

Respondents repeatedly rely on this Court's statement that rational-basis review does not demand "that a legislature or governing decision-maker actually articulate * * * the purpose or rationale supporting its classification." *Nordlinger*, 505 U.S. at 15. But respondents can take no solace in that proposition. To survive rational-basis scrutiny, a

government cannot simply put forth any *post hoc* justification that could, in theory, constitute a legitimate government objective for *some* amount of disparity. Rather, the Equal Protection Clause requires that the policy reason asserted be "a *plausible* policy reason for the classification." *Id.* at 11 (emphasis added).

Respondents contend that "a 'plausible basis' is simply a rational one." Resp. Br. 51. As this Court made clear in *Nordlinger*, however, rational-basis scrutiny "require[s] that a purpose may *conceivably* or 'may *reasonably have been* the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger*, 505 U.S. at 15 (emphasis added) (quoting *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 528-529 (1959)). Applying that principle, the Court in *Nordlinger* distinguished *Allegheny Pittsburgh* because in that case "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." *Ibid.* (emphasis added). A "plausible policy reason" is thus one that "could *conceivably* have been the purpose" of the government decisionmaker in light of the facts or statutory scheme. *Ibid.* (emphasis added); see *Fitzgerald* v. *Racing Ass'n*, 539 U.S. 103, 110 (2003) ("the facts" did not "preclud[e] an inference that the reason for the different tax rates was to help the riverboat industry") (internal quotation marks omitted).

None of the rationales offered by respondents could "conceivably have been the purpose" of making petitioners pay 30 times as much as their similarly situated neighbors. *Nordlinger*, 505 U.S. at 15. It is implausible that the City distinguished between

Northern Estates homeowners based on their "financial condition"; the Barrett Law demanded equality in assessments and the City confirmed that its "intent [was] to treat property owners within each project area equitably, based upon the scope and value of each specific project." JA51; see Pet. Br. 48. It is implausible that the City withheld relief because it lacked the necessary records; respondents acknowledge that the City possessed all the records pertaining to this Barrett Law project (and all other active projects) when Resolution 101 was enacted. And it is implausible that the City declined to provide refunds because petitioners' payments were already "committed"; respondents cannot deny that the City could have used other funding sources or briefly continued collections to provide refunds. In respondents' view, even indisputably counterfactual justifications are "plausible" bases for gross disparities; this Court has rightly rejected that limitless assertion.[5]

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[5] This Court has made clear that, when statutes "specifically declare[] their purpose," they leave "no room to conceive of any other purpose for their existence." *Allied Stores*, 358 U.S. at 530. Respondents suggest that case "merely" stands for the proposition that "when legislation expressly declares a *suspect purpose*, a government cannot later attempt to disclaim that rationale by advancing a different one." Resp. Br. 52. But this Court has not limited *Allied Stores* in that way. To the contrary, in *Nordlinger* this Court cited *Allied Stores* in support of its conclusion that "*Allegheny Pittsburgh* was the rare case where 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." *Nordlinger*, 505 U.S. at 15 & n.7. Once a government has declared its purpose, it cannot back away from that purpose by offering new rationales that are inherently implausible in light of the statutory scheme.

III. THE PROPER REMEDY FOR THE CITY'S DISCRIMINATORY TAX TREATMENT IS TO PROVIDE REFUNDS TO PETITIONERS

In a last-ditch effort, respondents suggest that, even if this Court holds that the City's discriminatory tax scheme violated the Equal Protection Clause, the City can remedy that violation by rescinding forgiveness without providing refunds to petitioners. Resp. Br. 57-59. As this Court explained in *Allegheny Pittsburgh*, however, "'[t]he Equal Protection Clause is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class.'" 488 U.S. at 346 (quoting *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946)). Relying on that language, the state intermediate court held here that "the proper remedy is not to penalize everyone equally but to grant the benefit given to others to the complaining taxpayer." Pet. App. 76a.

Respondents' selective quotation of *Heckler* v. *Mathews*, 465 U.S. 728, 739 n.5 (1984), is not to the contrary. The Court there *reaffirmed* that "ordinarily extension [of the unconstitutionally withheld benefit], rather than nullification, is the proper course." *Ibid.* (internal quotation marks omitted). There is no reason to depart from that "ordinar[y]" practice here.

Indeed, although respondents argue (at 59) that "a remedial outcome consonant with the [government's] overall purpose is preferable," that very principle militates *against* allowing the City to rescind its forgiveness decision in this case. Citing affidavits submitted in the *Cox* litigation, respondents claim that

lawmakers "would have preferred" not to enact Resolution 101 if they had known that doing so would require refunds. Resp. Br. 59. As the district court in *Cox* held when respondents advanced the same argument, however, "[t]he legislative enactment itself is the best indication of legislative intent"—and certainly a better indication than *post hoc* statements of regret. *Cox* v. *City of Indianapolis*, 2011 WL 96669, at *4 (S.D. Ind. Jan. 11, 2011). Resolution 101's legislative purpose is clear: It was enacted to *eliminate* "financial hardships [presented by the Barrett Law] on many middle to lower income participants." Pet. App. 89a. Reinstating all the forgiven assessments would thwart that objective.

CONCLUSION

The judgment of the Indiana Supreme Court should be reversed.

Respectfully submitted.

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