

No. 11-161

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IN THE  
**Supreme Court of the United States**

CHRISTINE ARMOUR, ET AL.,

*Petitioners,*

v.

CITY OF INDIANAPOLIS, ET AL.,

*Respondents.*

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

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**REPLY BRIEF FOR PETITIONERS**

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## REPLY BRIEF FOR PETITIONERS

Respondents' attempts to deny the existence of a conflict are insubstantial. The constitutionally relevant question is not why a taxing authority grants relief to certain taxpayers; rather, it is why such relief is *withheld* from those who are similarly situated. Four state high courts (and a federal district court considering this exact Indianapolis scheme) agree that a taxpayer's having paid in full is not a rational basis for denying relief.

Moreover, respondents do not dispute that defending a discriminatory taxation scheme on "cost-saving" grounds would have widespread application to countless taxing authorities. Rather, they acknowledge that saving money is the only reason they refused to provide tax refunds to petitioners (Br. in Opp. 6, 11) and contend that "limitations of the municipal fisc are *always* a relevant consideration" (*id.* at 6 (emphasis added)). The sweeping breadth of that position—which the Indiana Supreme Court embraced (Pet. App. 18a-19a)—is reason enough to grant certiorari.

So too for respondents' contention (at 14) that the Indiana Supreme Court did an admirable job of "squar[ing]" purported inconsistencies between *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989), and *Nordlinger v. Hahn*, 505 U.S. 1 (1992). The Court's opinion in *Nordlinger* expressly disclaimed such conflict. Only this Court may determine whether one of its decisions should be, as the court below said (Pet. App. 28a), "narrowed to its facts." Respondents' suggestion that Indiana state law somehow *contemplates* inequality in taxation is dispatched simply by reading the statute

in question. Finally, respondents' claim that petitioners would not receive a refund is contradicted by *Allegheny Pittsburgh* and beside the point.

**I. Respondents Do Not (And Cannot) Distinguish Any Of The State Supreme Court Decisions That Conflict With The Decision Below**

Four state supreme courts have held that the Equal Protection Clause prohibits tax-forgiveness schemes that discriminate against taxpayers who promptly paid their tax assessments in full. Respondents' efforts to distinguish those cases miss the mark.

Respondents attempt (at 7-8) to dismiss *Armco Steel Corp. v. Dep't of Treasury*, 358 N.W.2d 839 (Mich. 1984), on the ground that the initial tax assessment in *Armco* was subsequently invalidated, whereas the initial Barrett Law assessment mechanism was subsequently abandoned by the City. Along the same lines, respondents argue (at 8-9) that three other decisions that conflict with the decision below—*State ex rel. Stephan v. Parrish*, 891 P.2d 445 (Kan. 1995), *Perk v. City of Euclid*, 244 N.E.2d 475 (Ohio 1969), and *Richey v. Wells*, 166 So. 817 (Fla. 1936)—are distinguishable because they involved government decisions to forgive the debts of delinquent taxpayers, whereas Resolution 101 erased the debts of taxpayers who elected to defer full payment of their Barrett Law assessments.

Those are not even distinctions—much less distinctions with a difference. The action challenged here is not the City's decision to impose the initial assessment pursuant to the Barrett Law. Nor is it

the City's decision to abandon the Barrett Law or the City's decision to forgive the debts of those who delayed full payment of their tax assessments. The action challenged here is respondents' separate decision to *withhold* relief from petitioners simply because they had already paid their tax bills in full. And that was precisely the government action at issue—and rejected as unconstitutional—in *Armco*, *Parrish*, *Perk*, and *Richey*.

For example, the holding of the Supreme Court of Michigan in *Armco* did not turn on whether the State had properly imposed the underlying assessment. Rather, *Armco* simply held that, once the State decided to forgive some tax debts, it could not then withhold that same relief from identically situated taxpayers who had paid in full: “[I]t [is] unconstitutional to benefit or prefer those who do not pay their taxes promptly over those who do.” *Armco*, 358 N.W.2d at 844. That same reasoning applies with equal force in this case, and the fact that the initial Barrett Law assessments were lawful—respondents' purported distinction—is beside the point.

Respondents nevertheless try to distinguish *Armco*, *Parrish*, *Perk*, and *Richey* because those cases dealt with “patent unfairness.” Br. in Opp. 9. That argument suffers from the same fatal flaw: The “unfairness” in question is the unfairness of withholding relief from petitioners simply because they promptly paid their taxes in full. Petitioners and those who elected to pay their assessments in installments both received the same benefit—sewer hook-ups. As respondents concede (at 3), however, petitioners paid \$9278 each for that benefit while most of the other homeowners paid just \$309. It is difficult to

imagine anything less “fair” than the imposition of a thirty-fold penalty on petitioners solely because they chose to pay their taxes when assessed.

Respondents further assert that the decision below does not conflict with *Armco* because in that case “no party ever put forth a rational basis for differential treatment.” Br. in Opp. 7. But that just begs the question. In *Armco*, the Supreme Court of Michigan unequivocally held that the Equal Protection Clause precludes discrimination between two groups of taxpayers when “[t]he only distinction existing between them is that one group paid their deficiencies while the other group did not.” *Armco*, 358 N.W.2d at 844. The Indiana Supreme Court took a fundamentally different view of the Equal Protection Clause. It therefore came to the opposite conclusion: that the Clause allows discrimination against taxpayers who promptly paid their taxes in full. In so holding, the court below also disagreed with *Parrish* and *Richey*, stating that it did “not find these decisions \* \* \* persuasive and decline[d] to follow them.” Pet. App. 33a. But a *disagreement* is not a *distinction* and therefore does nothing to diminish the square conflict with *Armco*, *Parrish*, *Perk*, and *Richey*.

In light of the Indiana Supreme Court’s acknowledgment that its decision created a conflict with decisions of other state supreme courts, respondents’ arguments to the contrary are unpersuasive. Any remaining doubt on that score, however, should be put to rest by the decision of the U.S. District Court for the Southern District of Indiana in *Cox v. City of Indianapolis*, 2010 WL 2484620 (June 14, 2010).

In *Cox*, the district court explained that “there are at least three state supreme court cases *directly* on

point,” *id.* at \*4 (emphasis added and quotation marks omitted)—including *Armco*, which the court characterized as “the most relevant” of those conflicting decisions, *ibid.* The court below rejected those opinions as unpersuasive, but the district court in *Cox* concluded that *Armco* and the decisions of the other state supreme courts were correct. Applying the rule from those cases, the district court held that the City violated the Equal Protection Clause by withholding refunds from homeowners who had paid their Barrett Assessments in full. The *Cox* decision thus confirms that the decision from the Indiana Supreme Court creates a case-dispositive conflict on the meaning of the Equal Protection Clause.

Respondents suggest (at 10) that no certworthy conflict will exist until the Seventh Circuit weighs in on *Cox*. Not so. In downplaying *Cox*, respondents overlook the conflict that the Indiana Supreme Court has *already* created. When the Seventh Circuit decides the *Cox* appeal, it will either agree with the Indiana Supreme Court and reverse, or agree with the Supreme Court of Michigan and affirm. It will therefore merely add one more voice to the pre-existing conflict. A conflict will neither come into existence, nor cease to exist, when the Seventh Circuit rules. The time to grant certiorari to resolve that conflict is now.

## **II. Respondents Concede That The Constitutionally Deficient “Cost Savings” Rationale Is The *Sole* Justification For The City’s Decision To Treat Similarly Situated Taxpayers Differently**

The brief in opposition sows confusion about what government action is at issue. It spills considerable

ink justifying the City's abandonment of the Barrett Law and forgiveness of some tax assessments under that law. As explained above, however, those actions are not challenged. What is challenged is respondents' separate decision to withhold relief from petitioners simply because they had already paid their assessments. And respondents admit that they offer only one justification for that decision: cost savings.

Although respondents contend (at 12) that the City had various goals in mind when it abandoned the Barrett Law system, they acknowledge that "[petitioners'] solution of additional refunds would accomplish *the same goals*, but would have cost the city millions of additional dollars as a result," *id.* at 11 (emphasis added). And the City acknowledges 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). This case therefore squarely presents the question whether the City's desire to protect its coffers constitutes a rational basis for its decision to discriminate against taxpayers who promptly paid their assessments in full. It does not.

Respondents first try to avoid the question altogether by suggesting that there exists no conflict "with any case" on the question whether cost savings alone qualifies as a rational basis for disparate treatment of similarly situated taxpayers. Br. in Opp. 11. But *Armco* is precisely such a case. In *Armco*, the State refused to provide refunds to taxpayers who had paid their deficiencies because the State was "[f]aced with a potential loss to the state treasury of up to \$35 million in taxpayer refund

actions.” *Armco*, 358 N.W.2d at 841. That justification was rejected in *Armco*; it should fail here too.

Attempting to sidestep the significant and recurring question presented by this case, respondents also assert that their cost-savings justification is “fact specific” and somehow “unique” to this case. Br. in Opp. 11. To the contrary, the cost-savings rationale offered by respondents will—if accepted—apply in *every* case in which a state or municipal taxation authority imposes a discriminatory tax-forgiveness scheme. After all, it will always be cheaper for the government to withhold relief from some similarly situated taxpayers.<sup>1</sup> There is little reason to think that governments will refrain from such discriminatory taxation schemes in the wake of the Indiana Supreme Court’s opinion—and every reason to think just the opposite.

Indeed, respondents’ argument lacks any limiting principle. If an interest in saving money constitutes a sufficient basis for discriminatory tax treatment, then every such tax would pass constitutional muster. Accepting that rationale would therefore provide authorities carte blanche to implement arbitrary—but lucrative—taxation schemes with no constitutional check.

Finally, respondents repeatedly protest that petitioners have no cause to complain because they benefited from sanitation improvements funded through Barrett Law assessments. Br. in Opp. 3, 9, 12. But

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<sup>1</sup> Indeed, *Armco* and the other state supreme court decisions cited above are proof that state and municipal taxation authorities often yield to the temptation to save money by denying relief to some taxpayers.

that argument just proves that petitioners are identically situated to the other homeowners who, after all, received the exact same benefit at 1/30th the cost. The mere fact that the City actually *spent* the money it obtained through an unconstitutional taxation scheme cannot justify the underlying constitutional violation. Spending unconstitutionally exacted money cannot undo a violation.

### **III. Respondents' Efforts To Reconcile The Decision Below With *Allegheny Pittsburgh* and *Nordlinger* Are Unavailing**

The Indiana Supreme Court opined that this Court's unanimous decision in *Allegheny Pittsburgh* should be "narrowed to its facts." Pet. App. 28a. Respondents go even further, claiming that "the same differential treatment of new property owners" that was upheld in *Nordlinger* "was found unconstitutional in *Allegheny Pittsburgh*." Br. in Opp. 14.

Nothing could better prove the need for this Court's review than respondents' resort to the argument that a decision of this Court has been tacitly overruled. *Nordlinger* expressly rejected the argument that the circumstances there were "the same" as in *Allegheny Pittsburgh*. See 505 U.S. at 14-15; Pet. 23. Even if those cases are in tension and respondents are correct that the Indiana Supreme Court usefully elucidated ways in which *Nordlinger* limited *Allegheny Pittsburgh*, that is a reason to *grant* certiorari, not a reason to deny it. This Court alone possesses "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). This case thus provides this Court with a golden opportunity to reconcile two lines of precedent that, if respondents

are correct, have caused confusion in the lower courts. (Of course, if petitioners are correct—and the governing precedent is *Allegheny Pittsburgh* and not *Nordlinger*—then certiorari should be granted to resolve the confusion and correct the error of the Indiana Supreme Court.)

Respondents suggest that *Allegheny Pittsburgh* is inapposite because “there has never been a finding that Indiana [s]tate law requires continued equity in Barrett Law taxation.” Br. in Opp. 15-16. But that would surely come as news to the Indiana Supreme Court, which began its opinion by acknowledging that “[t]he costs of Barrett Law projects are generally ‘apportioned equally among all abutting lands or lots’ [benefited] by the improvement.” Pet. App. 3a (quoting Ind. Code § 36-9-39-15(b)(3)). Thus, equality in taxation is, just as in *Allegheny Pittsburgh*, an express basis of the State’s taxation scheme.

Respondents also claim that Indiana law generally provides that sewer assessments can be “credited, eliminated, or reduced’.” Br. in Opp. 16 (quoting Ind. Code § 36-9-39-17(c)). But their selective quotation of that statute conceals the fact that such relief is available only when a property “has already been assessed for sewage works” for an adjoining street or alley or a determination is made that the property cannot be connected to a project or would not fully benefit the property. Ind. Code § 36-9-39-17(a), (b). Thus, the prescribed relief is itself designed to achieve equality among taxpayers by ensuring that burdens correspond to benefits. What is more, the statute further provides that the “amount credited, eliminated, or reduced shall be primarily apportioned over *all the other property assessable for the sewage*

*works.*” Id. § 36-9-39-17(c) (emphasis added). In other words, even the additional costs of fine-tuning initial assessments must be spread evenly across “all” other property owners.<sup>2</sup>

As for *Nordlinger*, respondents embrace the result but completely ignore its reasoning. The Court there upheld California’s taxation scheme precisely because the affected taxpayers purchased their property in full knowledge of how the State’s taxation scheme would operate. Accordingly, they lacked “legitimate expectation and reliance interests” that are the hallmark of the Equal Protection Clause. 505 U.S. at 13. It is self-evident that petitioners legitimately expected that they were not risking the unnecessary expenditure of thousands of dollars by paying their taxes in full; indeed, as explained in the petition (at 27) if the decision below stands few taxpayers will pay in full if given another reasonable payment option. Respondents offer only a question-begging footnote claiming that respondents could legitimately expect only equality in the initial assessment. Br. in Opp. 16 n.2. The fact that petitioners (and thousands of other Indiana citizens taxed for other Barrett Law projects) paid in full proves otherwise.

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<sup>2</sup> Respondents also observe that “long-term financing,” which is authorized by state law, “will create inherent inequalities.” Br. in Opp. 16. But such minor “inequalities” are expressly tolerated under the Equal Protection Clause—only “rough equality in tax treatment of similarly situated property owners” is required. *Allegheny Pittsburgh*, 488 U.S. at 343. That does not even begin to suggest that the thirty-to-one disparity at issue here passes constitutional muster.

**IV. The Question Whether A Refund Is The Proper Remedy For Respondents' Equal Protection Violations Does Not Diminish The Need For This Court's Review**

Respondents' final argument—that, if successful on the merits of their equal protection challenge, petitioners should not be entitled to a refund—need not long detain this Court. Respondents again ignore *Allegheny Pittsburgh*, which held that “[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)).

Petitioners' 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 [of the unconstitutionally withheld benefit], rather than nullification, is the proper course.” *Ibid.* Moreover, *Mathews* involved a legislative declaration that a provision should be severed if later declared invalid. That is qualitatively different from *post hoc* affidavits (submitted in *another case*, no less) asserting that lawmakers “would not have approved forgiveness if they knew refunds were also required.” Br. in Opp. 17. Statements of regret do nothing to remedy this equal protection violation—indeed, respondents do not claim that they will eliminate the discriminatory forgiveness decision. That is why the Indiana Court of Appeals had no difficulty concluding that refunds were the proper remedy. See Pet. App. 76a-77a.

Even if respondents were right that refunds are not required, *Mathews* rejected the assertion that such remedial limitations are a barrier to review: “[W]e have frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute’s benefits from both the favored and the excluded class.” 465 U.S. at 739. And the lack of a refund would only underscore the need for review in this case—future litigants might be discouraged from challenging such patently unconstitutional schemes if authorities could so easily withhold monetary relief. This case is thus a prime opportunity to resolve this important constitutional question once and for all.

### CONCLUSION

For the foregoing reasons and those stated in the petition and amicus briefs, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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