No. 11-161

IN THE

Supreme Court of the United States

CHRISTINE ARMOUR, *et al.*,

Petitioners,

v.

CITY OF INDIANAPOLIS, *et al.*,

Respondents.

On Writ of Certiorari to the Indiana Supreme Court

BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. IMLA collects and disseminates information to its membership across the United States and Canada and helps governmental officials prepare for litigation and develop new local laws. Every year, IMLA's legal staff provides accurate, up-to-date information and valuable counsel to hundreds of requests from members. IMLA also provides a variety of services, publications, and programs to help members who are facing legal challenges.

IMLA is committed to protecting its members' flexibility under federal law to manage their tax systems and to develop innovative tax and collection policies consistent with the requirements of equal protection. Petitioners, however, urge this Court to adopt an interpretation of the Equal Protection Clause that would unduly constrict the policy choices available to municipal governments. IMLA has a strong interest in ensuring that this Court continues to recognize the legitimate budgetary and administrative concerns that animate policymaking deci-

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

sions and trade-offs that local governments routinely must make.

INTRODUCTION AND SUMMARY

The Equal Protection Clause of the Fourteenth Amendment prohibits a state or local government from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The command of equal protection is not a prohibition on any and all classifications that may result in differential treatment, but "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992). Where the classification at issue does not impinge upon a fundamental right or differentiate among citizens on the basis of a suspect characteristic, "the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.*

The classification under review in this case—a decision by the City of Indianapolis ("City") to provide tax relief on a prospective basis only—plainly satisfies this lenient standard. Prior to 2005, the City funded sewer connection projects under Indiana's Barrett Law, a mechanism that allows cities to finance certain public improvements by apportioning their costs among all benefitted property owners. Ind. Code § 36-9-39-15. Property owners could pay their assessments entirely up-front or in ten-, twenty-, or thirty-year installment plans. *Id.* § 36-9-37-8.5. In 2005, however, the City elected to abandon Barrett Law financing in favor of a different funding method called the Septic Tank Elimination Program ("STEP"). Pet. App. 4a-5a. In order to expedite the transition, the City forgave all outstanding balances on the more than forty Barrett

Law projects in existence at the time but—in light of the significant administrative costs associated with refunding amounts already paid—declined to issue refunds of prior payments, including to those who had paid their assessments in full. J.A. 71-72. While those in this latter group (including Petitioners[2]) may feel that they were treated unfairly, there can be no doubt that the City's decision was based upon, and rationally related to, legitimate fiscal considerations and thus did not violate the constitutional guarantee of equal protection.

Perhaps recognizing that the City's decision could not be challenged as unrelated to these fiscal considerations, Petitioners instead make the extraordinary claim that those concerns were themselves somehow illegitimate. They assert that a government has no valid interest in "not emptying its coffers" or "reducing its administrative costs," and that a classification based upon such economic considerations is justifiable only to the extent that it bears a rational relationship "to some *other* legitimate objective." Petrs. Br. 41, 43 (emphasis in original). This supposed rule—which, in all events, is satisfied in this case, see *infra* Part II—contradicts decades of this Court's precedent and ignores the fundamental realities of policymaking. If it were to be adopted, the result would be to cripple local governments' ability to provide fiscally responsible benefits and services for their citizens.

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[2] Petitioners are a group of homeowners from within a single Barrett Law project—the Brisbane/Manning Barrett Law Sanitary Sewers Project—who each paid his or her entire $9,278 assessment up-front in 2004, but who saw their neighbors receive prospective tax forgiveness that covered most of the cost of their assessments. Pet. App. 3a; Petrs. Br. 2.

Indeed, a rule that required the City to refund previously made payments, if applied uniformly to all Barrett Law projects, would have created an administrative morass and raised a host of issues at least as difficult as the decision of whether to forgive or refund project payments at all. These include, among many others, whether to refund payments for all Barrett Law projects or only for those projects commenced more recently (and, if so, how far into the past), whether to offer refunds only to current property owners or also to prior owners who made Barrett Law payments (and, if so, how to locate those individuals), and how to issue or allocate refunds in circumstances of joint ownership, divorce, or death. None of these options comes without cost, and all implicate a range of burdens—financial, administrative, and otherwise—that would have impacted the City's budgeting policies and priorities for years in the future. These costs, and the complex decision points they entail, fully justify the City's approach in this case. More importantly, they confirm that the decision at issue is quintessentially a policy question that should be resolved through the political process at the ballot box, not though litigation at the courthouse.

The Indiana Supreme Court properly rejected Petitioners' claims as fundamentally inconsistent with this Court's equal protection jurisprudence, and correctly concluded that the City's decision was rationally related to a legitimate interest in preserving municipal resources. That judgment should be affirmed.

ARGUMENT

I. COST IS A PERMISSIBLE CONSIDERATION FOR A CITY DETERMINING THE SCOPE OF ITS PROGRAMS.

This Court has long and consistently held that interests in the preservation of financial resources, *without more*, may support a municipality's decisions regarding tax policy or the allocation of regulatory benefits and burdens. See, *e.g.*, *FCC* v. *Beach Commc'ns*, 508 U.S. 307, 317 (1993). It has recognized in numerous opinions that "[a]dministrative convenience and expense in the collection or measurement of the tax are *alone* a sufficient justification [for a tax classification]," *Carmichael* v. *S. Coal & Coke Co.*, 301 U.S. 495, 511 (1937) (emphasis added), and "afford *adequate grounds* for imposing a tax on a well recognized and defined class," *Fernandez* v. *Wiener*, 326 U.S. 340, 360-61 (1945) (emphasis added). This conclusion follows from the principle that, because fiscal resources are by nature limited and finite, municipalities must have wide latitude in deciding how they should be allocated. *Lyng* v. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 485 U.S. 360, 373 (1988).

Petitioners fail even to acknowledge this precedent, let alone to explain how their approach can be reconciled with it. Nor could they, as their position is directly contrary to those cases. Their approach would, for example, preclude a municipality from excluding certain individuals or businesses from a particular tax based on its judgment that the tax is simply too expensive to collect from those entities, see Petrs. Br. 41-45, whereas this Court has upheld precisely this type of arrangement against an equal protection challenge. See, *e.g.*, *Carmichael*, 301 U.S. at 510-11. Likewise, a municipality would be consti-

tutionally barred under Petitioners' rule from providing a benefit only to those for whom it is most affordable to do so, whereas (again) this Court has expressly stated that government may, consistent with equal protection guarantees, "address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others.'" *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972) (quoting *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955)). A government's interest in making fiscally sound decisions—like any other legitimate interest—can support a chosen classification to the extent that such classification "rationally further[s]" the government's economic purpose. *Nordlinger*, 505 U.S. at 10.[3]

In no decision has this Court ever held that a classification cannot be drawn based on fiscal considerations. Where this Court has rejected such interests as justifying a particular provision, it has done so only after determining that the classification bore no reasonable relationship to the government's stated interest. *E.g.*, *Zobel* v. *Williams*, 457 U.S. 55, 61 (1982) (concluding that the State's interest in "prudent management" of its funds was "not rationally related to the distinctions" made).[4]

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[3] It would hardly offend notions of rationality if, for instance, a municipality that wished to provide sewer connections to its residents, but lacked the funds to connect every property in its jurisdiction, instead chose to connect only those properties for which it was most financially feasible to do so.

[4] *See also Williams* v. *Vermont*, 472 U.S. 14, 24 (1985) ("The purposes of the statute would be identically served, *and with an identical burden*, by taxing each [group].") (emphasis added); *Metro. Life Ins. Co.* v. *Ward*, 470 U.S. 869, 882-83 (1985) (concluding that the State's chosen classifications did nothing to further its purported interest in encouraging capital invest-

This was the case in *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336 (1989), on which Petitioners heavily (and mistakenly) rely. That decision held that a county tax assessor's practice of adjusting assessed property values upon sale, and not otherwise, was not rationally related to the government's stated policy goal of ensuring that all property assessments reflect current market value and that therefore the practice violated the Equal Protection Clause. *Id.* at 339-46. *Allegheny Pittsburgh* clearly *did not* hold that the tax classification at issue was *per se* impermissible or might not be justified under different policy goals—for instance, an interest in preserving resources and avoiding administrative burdens by requiring an assessment only upon a property sale. Indeed, the Court held just three years later that the same assessment practice was permissible and advanced a variety of legitimate governmental interests. *Nordlinger*, 505 U.S. at 14-15.

It is thus clearly not the case, as Petitioners suggest, that if cost considerations are deemed a legitimate interest for equal projection purposes they could then justify "*every* tax—no matter how arbitrary—[because] a desire to raise or preserve revenue is presumably the reason why taxing authorities impose taxes in the first place." Petrs. Br. 43. The relevant question is not the tautological one of whether the imposition of "taxes in the first place" will increase revenue; it always will. Rather, the question is whether the *particular classification* used to determine the incidence or extent of a tax is itself rationally related to the government's interest in

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ment); *Plyler* v. *Doe*, 457 U.S. 202, 229 (1982) (rejecting the State's purported interest in conserving its educational funds by withholding money from students that were "basically indistinguishable" in terms of cost and difficulty to educate).

saving resources. See, *e.g.*, *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527 (1959).

Ultimately, Petitioners' novel approach rests on the notion that some additional limiting principle is necessary to block the path of an implausible parade of horribles that includes tax classifications based on house numbers, hair color, and the alphabet. Petrs. Br. 43, 45. Such distinctions epitomize arbitrariness and have nothing to do with cost (even if their deployment would indeed save the government resources). There is no reason or need to lump such absurdities together with classifications based on differences of real fiscal consequence.[5]

II. MUNICIPAL GOVERNMENTS HAVE LEGITIMATE AND COMPELLING REASONS FOR DIFFERENTIATING BETWEEN TAX REFUNDS AND PROSPECTIVE TAX RELIEF.

The classification at issue in this case—between refunds of payments previously made and forgiveness of payments not yet due—is a manifestly reasonable one that advances a variety of legitimate governmental interests. To be sure, the fact that the City provided differential payment schedules within each Barrett Law project meant that some individuals received tax relief while their neighbors received none. But the Equal Protection Clause imposes no "iron rule of equal taxation," *Bell's Gap R.R.* v. *Pennsylvania*, 134 U.S. 232, 237 (1890), requiring that a property owner may pay no more in taxes than a neighbor. To the contrary, this Court has upheld

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[5] In all events, because the classification utilized by the City here is eminently reasonable and anything but random, *see infra* Part II, this Court has no need to explore such outer limits in this case.

tax classifications that "create[ ] dramatic disparities in the taxes paid by persons owning similar pieces of property." *Nordlinger*, 505 U.S. at 6. The relevant question is whether the tax classification is "reasonable," *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973), not whether it can meet impossible standards of fairness.[6] For a number of reasons, the distinction between refunds and prospective tax forgiveness easily meets the test of reasonableness.

A. Refunds Are More Expensive Than Prospective Forgiveness.

That distinction is justified, first, by financial considerations. It is virtually always more expensive for a government to refund a given amount of previously collected taxes than it is for it to forgive the same amount of taxes owed in the future. In other words, it costs more to *refund* a dollar than it does to *forgive* a dollar.

This reality is driven by two basic principles of government finance. *First*, when a tax debt is not owed to the government until some future time, the government in the meantime must forgo any interest that otherwise could be earned on the money. For that reason, a tax debt payable in a future year has a present value that is less than the full amount owed. See Harvey S. Rosen, *Public Finance* 221-22 (6th ed. 2002). For example, assuming an interest rate of 5%,

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[6] For example, the tax upheld in *Carmichael* imposed a tax on businesses with eight employees but not on those with seven. 301 U.S. at 510-11. Surely employers in the former category would have justifiably perceived some unfairness when comparing themselves to employers identical in every way but with one fewer employee. But such legislative line-drawing is inevitable. *See id.* at 511-12.

$105 payable one year from now has a value today of only $100. *Id.* In that situation, a decision to forgive a $105 tax owed next year would cost the government $100 today, whereas a decision to refund a $105 tax already paid to the government would require the issuance of a $105 check. Under the same principle, a decision to forgive a tax debt of over $8,000, payable over nearly thirty years, is significantly less expensive in present value terms than a decision to refund that same amount.

A government may be able to account for some or all of this difference by charging interest to those taxpayers who make payments over a course of years. For example, the City here charged 3.5% interest to those taxpayers who elected the ten-, twenty-, and thirty-year installment plans. Pet. App. 4a. In many cases, however, a government may choose, for policy reasons, to make tax installment plans available to its citizens at preferential, sub-market rates. This may have been the case here: Petitioners' *amicus* has reviewed historical interest rates and concluded that the 3.5% interest rate offered for Barrett Law financing was actually quite favorable. See Institute for Justice Br. 28. Thus, the forgiveness of outstanding Barrett Law payments, including interest, was likely still less expensive for the City than would have been refunds of the same base tax assessment.

Second, the net revenue that a government can expect to obtain from taxes not yet paid is always less than the full amount owed. In order to generate actual revenues, the government will need to expend some amount of resources on collections, both to process receipts and to pursue cases in which the taxpayer does not comply voluntarily. In addition, it is highly unlikely that the government will be able to

collect 100% of what it is owed. Each year, the government is likely to experience a "tax gap"—*i.e.*, the difference between the total amount of taxes owed to the government and the amount the government is able to collect. See Internal Revenue Serv., *Tax Gap for Tax Year 2006*, at 1 (Jan. 6, 2012), *available at* http://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf. For example, for the 2006 tax year, the federal government reported a net tax compliance rate of 85.5%; similarly, California and Oregon reported net tax compliance rates of 89% and 81.5%, respectively. See *id.*; Cal. Franchise Tax Bd., *Tax Gap Plan: A Strategic Approach to Reducing California's Tax Gap* 4 (2006), *available at* https://www.ftb.ca.gov/aboutFTB/TaxGapStratPlan.pdf; Or. Dep't of Revenue, *Report on Personal Income Tax Compliance in Oregon* 4 (Jan. 30, 2009), *available at* http://www.oregon.gov/DOR/docs/800-552web.pdf.

In light of these variables, a municipal government that complies with generally recommended budget practices will plan on receiving net tax revenues at some amount less than the total amount of taxes owed. See Nat'l Advisory Council on State & Local Budgeting, Gov't Fin. Officers Ass'n, *Recommended Budget Practices: A Framework for Improved State and Local Government Budgeting* § 4.4a (1998), *available at* http://www.gfoa.org/services/dfl/budget/RecommendedBudgetPractices.pdf. As a result, a decision to forgive a given amount in future taxes owed will cause the government to lose less in expected revenues than the total amount forgiven. A refund of the same amount, in contrast, will cost the government exactly that amount.

B. Refunds Impose Budgetary Strains, Planning Challenges, And Other Administrative Burdens That Forgiveness Does Not.

The distinction between tax refunds and forgiveness can be independently justified as a means to simplify budgetary planning. Tax refunds fit much differently into governments' budgets and fiscal plans than do equivalent tax forgiveness programs. Whereas forgiveness involves the cancelation of expected future revenues, refunds require the actual expenditure of cash on hand. It is one thing to revise forecasts for a series of budgets that may be several years—or, in some cases, nearly thirty years—out. It is quite another to find the resources to make a distribution in the current year. The tax proceeds to be refunded may have already been spent, in which case a new source for the funds would need to be identified. Such was the case here. Pet. App. 19a. In the likely event that existing funds have been committed, the government would need to explore other methods of financing, such as the issuance of new public debt (*e.g.*, municipal bonds), that impose their own new costs. These difficulties will be particularly pronounced where, as here, the forgiven tax liability was to be paid in a series of installments, but the refund would be due in a single year.

Under the particular facts of this case, the payment of refunds also would have imposed significant administrative burdens, which are far from trivial and require much more than performing "basic arithmetic" and issuing checks. Petrs. Br. 44. As an initial matter, the task of setting the amount to be refunded would have required the City to balance a number of competing interests. Because the City offered installment plans of ten-, twenty-, and thirty-

year durations, each with its own payment schedule, Ind. Code § 36-9-37-8.5, there were varying amounts outstanding within a given Barrett Law project at the time the City chose to forgive outstanding debts. Before issuing refunds, the City first would have had to determine which of these amounts—if any—to set as the "baseline" for refund payments.

Notwithstanding Petitioners' claim to the contrary, the City could not have simply selected as this "baseline" the maximum amount hypothetically paid by a property owner on an installment plan (*i.e.*, someone on a ten-year plan), and then refunded to individuals who prepaid their taxes the difference between that amount and the prepayment. J.A. 15. That approach would, indeed, have been much *less* rational than the one employed by the City in this case, in that it would have based the availability and amount of tax relief not on an objective distinction related to payment status (*i.e.*, between payments previously made and payments outstanding) but on an entirely arbitrary figure that does not necessarily correlate to the amounts actually paid by any property owner.[7] Moreover, Petitioners' *post hoc* proposal offers no guidance to a governmental official trying to determine whether the requisite level of equality has been achieved. Whatever point on the spectrum the City used as a "baseline" for refunds

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[7] Notably, although the differences in payments between the various installment plans were relatively minor for the Brisbane/Manning Project, those differences would have been significantly greater for older projects. In a project with property owners in their ninth year of payments, for example, individuals on ten-year plans will have just one year of payments outstanding, whereas those on thirty-year plans will have twenty-one years worth of payments available for prospective forgiveness.

would have posed its own unique administrative challenges.[8]

After selecting a baseline, additional challenges would have remained. All claimants would have had to be reimbursed for whatever money they had paid above the City's determined baseline—amounts that would vary individually between those who paid in full and those who paid through certain installment plans. In addition, because forgiveness is less expensive than refunds, see *supra* Part II.A, the City would have had to decide whether and how to account for these differences in the amount of the refunds offered.

The task is complicated further when the full range of Barrett Law projects is considered. At the time the City decided to move away from Barrett Law financing, more than forty projects had been constructed under those terms, over the course of decades. J.A. 51. Issuing refunds to property owners in the older Barrett Law projects would have imposed substantial administrative difficulties above and beyond those discussed earlier. For example, in cases where the property has changed ownership since the payments were made, the City would have needed to

[8] For instance, if the City chose to forgive all debts above the lowest amount that had been paid (*i.e.*, the amount under the thirty-year plans), it would have had to offer refunds both to those who paid the full assessment up front *and* to those who had paid relatively more under shorter-term installments plans. Conversely, if the City chose instead to forgive only those debts above the amount that had already been paid under the ten-year plans, it would have had to continue to collect payments from the longer-term payers until they reached that same level. Of course, if the City set the mark somewhere in between (*e.g.*, at the median amount paid) it would have been saddled with both burdens—*i.e.*, processing additional refunds and continuing payment collections.

decide whether to issue refunds to past owners and, if so, what policies and procedures it should follow in its efforts to locate them. In some instances, such as where assessments were paid by successive property owners or joint property owners who since divorced, the City would have faced the task of properly allocating refunds. In other instances, the property owner may have since deceased.

In addition, any time a government seeks to refund payments made many years in the past, it runs the risk that its own records do not extend far enough back to process the refunds. Indeed, the City apparently faced precisely this issue. See Aff. of Charles White ¶ 14, attached as Exh. C to Defs.' Supp. Cross-Motion for Summ. J. (Dkt. No. 57), *Cox* v. *City of Indianapolis*, No. 09-0435 (S.D. Ind. Feb. 4, 2010) ("White Aff.") ("The Controller's Office did not have records of Barrett Law payments and assessments prior to the early 1990s."). The cost and effort of locating these old records, combined with the difficulty of setting a payment policy in the first place, confirm that Petitioners' requested relief would have resulted in a significant and expensive undertaking for the City.[9]

C. Paying Refunds Would Undermine The City's Ability To Establish A Clean Break From The Old Barrett Law System.

The decision to distinguish between tax refunds and forgiveness is also reasonable in light of the City's stated goal to break cleanly and quickly from

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[9] In contrast, the issuance of prospective relief poses none of these challenges. The amount to be forgiven is simply the amount owed as of a certain date, based on debts currently outstanding in government records.

the old Barrett Law system. J.A. 76. Just as debt forgiveness offered many citizens tax relief, it also relieved the City of the burden of maintaining and administering collections under the Barrett Law system for years to come. *Id.* Paying refunds, however, would have directly undermined that goal by forcing the City to erect an administrative scheme to pay and process refund claims well into the future.

First, as discussed, the City would have had to establish a refund policy and to determine an amount to be repaid for each Barrett Law project. Perhaps more difficult, in establishing these policies, the City would have to determine the source of the funds to be used to support that policy. Unlike prospective relief—which affects only future budgets—these refunds would have had to be paid from current accounts, leaving the City with only two realistic options. The City could have issued new public debt to generate additional revenue, or it could have reallocated existing funds within the City's budget, which likely would have left other programs underfunded. Either choice would have had an impact lasting long beyond the fiscal year in which payments were issued.

Once reimbursement policies and funding were established, the City would have had to assume the task of actually processing individual claims for refunds. All former Barrett Law payers—from projects both new and old—would have had to be notified of the refund policy, which, again, could have been difficult depending on the age of the project, changes in property ownership, and the extent of the City's records. After processing and resolving individual claims for refunds, the City would have faced the task of hearing and resolving disputes relating to individual taxpayers' entitlements to refunds or the

accounting processes used to establish the amounts to be repaid. Such disputes easily could have entangled the City for years to come, especially if (as is almost certain) those disputes took the form of litigation.

Taken together, these requirements reflect a simple reality: If the City had issued refunds to Petitioners and all those similarly situated, it would have been compelled to continue to administer the Barrett Law system well beyond its repeal. These ongoing administrative duties would have undermined the City's goal of establishing a clean break from the outdated Barrett Law system and pursuing an expedient transition to its new methods of financing.

D. Prospective Forgiveness Removes Burdens That Refunds Do Not Alleviate.

Distinguishing between refunds of past payments and forgiveness of outstanding debts also allowed the City to avoid a number of other burdens and secure a number of other benefits. These considerations confirm, again, the rationality and reasonableness of the City's classification scheme.

Most obviously, by forgiving taxes owed in the future, the City was able to avoid the expense and burdens of collecting taxes in the future. In the case of the forgiven Barrett Law assessments, the City in some cases stood to save nearly thirty years of collection costs. In addition, because the STEP program relies on a one-time connection fee, J.A. 75, the City was able to transition immediately away from installment collections for purposes of city sewer connections.

For some governments, the burden of collecting unpaid taxes or assessments may be exacerbated by the particular features of their collection systems.

City officials have indeed confirmed elsewhere that, "[a]t the time of forgiveness, the Controller's Office was beginning to have problems with its information systems software which tracked and managed Barrett Law debts owed to the City." White Aff. ¶ 13. Had the City continued to collect the now-forgiven Barrett Law assessments, it would have had to "invest approximately $200,000 to update the information systems software." *Id.*

The City would have faced added burdens in this case because the properties at issue were subject to statutory liens pursuant to Indiana Code § 6-1.1-22-13.5. Pet. App. 4a. Although such liens provide the City insurance against default, the fact that they run with the property and are "not affected by any sale or transfer of the tract," Ind. Code § 6-1.1-22-13.5(a)(2), means that the nonpayment of outstanding assessments could ensnare the City in foreclosure and bankruptcy proceedings and cause complications in future property sales. A concern regarding these potential costs would have been particularly justified in this case based on the City's determination that tax relief was necessary to relieve burdens on "middle to lower-income participants," J.A. 75, given that lower-income communities have suffered the highest foreclosure rates in recent years. See Joint Ctr. for Hous. Studies of Harvard Univ., *The State of the Nation's Housing 2011*, at 30 (2011), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2011.pdf. In contrast, taxpayers who already paid their assessments in full presented no such risk to the City, regardless of their financial conditions at the time the City made its decision to forgive unpaid Barrett Law assessments.

III. PETITIONERS' INTERPRETATION OF THE EQUAL PROTECTION CLAUSE WOULD SIGNIFICANTLY ENCUMBER MUNICIPALITIES' MANAGEMENT OF THEIR FINANCIAL AFFAIRS.

The classification employed by the City in this case, between paid and unpaid Barrett Law assessments as of a certain date, was entirely reasonable and legitimate, as discussed above. But, even if this Court were to question the particular decision here, it should reject the interpretation of the Equal Protection Clause offered by Petitioners. That interpretation, if accepted, would significantly and unnecessarily constrain the ability of municipal governments to craft sensible tax and regulatory policies.

First, holding that cost-based classifications are impermissible would cripple municipalities' ability to provide benefits and services to their citizens. Every municipality is subject to resource constraints, and any decision to offer a benefit or service—be it social welfare funding, tax relief, public sanitation, or something else entirely—raises a set of complex, interrelated questions. See *Fitzgerald* v. *Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108 (2003). These include, *inter alia*, whether to provide the benefit or service at all, how it can be financed, and the extent to which the benefit or service must be circumscribed in light of the resources available. *Id.*

The legitimacy of cost-based considerations is crucial to maintaining the ability of municipalities to address these issues and make the trade-offs necessary to set policy effectively. For example, a municipality may choose to repair one road rather than another because of differences in construction costs. It may choose to build a library in one part of

town, and not another, because the cost of development on one site is cheaper than the other. Or it may choose to reduce the welfare benefits for one group but not another because it can save more resources with the former cuts than the latter. Cf. *Lyng*, 485 U.S. at 372-73. Under Petitioners' view, any of these decisions would be subject to challenge.[10] The unfortunate reality is that a government that is unable to make such distinctions may not have the resources to expand the benefit but may instead find it necessary not to provide it at all.[11]

The rule advocated by Petitioners would implicate not just decisions regarding the allocation of benefits,

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[10] The burden imposed by such challenges would be exacerbated if this Court were to accept Petitioners' mistaken view that the relevant governmental action for equal protection analysis is only the decision to withhold a benefit or service from some, Petrs. Br. 37, and that the legitimate interests served by offering the benefit to others is therefore irrelevant, *id.* at 44. The Equal Protection Clause requires the assessment of *whole classifications*, not just the burdened side. *See, e.g.*, *Allied Stores*, 358 U.S. at 529 (justifying tax applied only to residents based on benefits of excluding nonresidents from the tax). The tax burden of one group is the tax benefit of another; the two "are but opposite sides of the same coin." *Fitzgerald*, 539 U.S. at 109.

[11] The program at issue here provides a perfect illustration. Every member of the Board of Public Works submitted a sworn affidavit in the related federal class action stating that he or she would not have voted to forgive the outstanding assessments if doing so would have "required the City to reimburse previously paid Barrett Law payments to people who had already received the benefit of a sewer connection." Defs.' Supp. Cross-Motion for Summ. J., Exhs. D, E, F, G, H (Dkt. No. 57), *Cox* v. *City of Indianapolis*, No. 09-0435 (S.D. Ind. Feb. 4, 2010). If this Court were to adopt Petitioners' constricted view of costs, the boards and councils of every municipality would be faced with similar questions.

services, and taxation, but also those establishing a government's enforcement priorities. For example, a government with scarce resources for tax enforcement might choose to concentrate its efforts on those taxpayers with deficiencies above a certain threshold, based solely on the expectation that this approach will maximize the amount of revenue generated.[12] But if this Court were to hold that increasing revenue is an illegitimate interest, such reasonable decisions would become immediately suspect.

Second, Petitioners' approach, if adopted, would impede the development of new and innovative tax policies. Although Petitioners purport to "challenge the consequences the City attached to [the November 1, 2005, cut-off date], not the setting of a date," Petrs. Br. 39, the reality is that the consequences they challenge—*i.e.*, the provision of prospective relief for taxpayers with outstanding debts that is not accompanied by corresponding refunds for payments previously made—are far from unique. Virtually any change in the tax code will impose new consequences on some taxpayers' past financial decisions, with the potential for differential outcomes that would have been unexpected at the time those decisions were made. Cf. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509, 515 (1986) ("[A] substantial portion of all statutes ... alter the value of prior investments simply because the future value of such investments will depend upon what

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[12] Similarly, a government might, for cost reasons, limit the availability of certain payment options depending on the size of a taxpayer's liability. Such limitations are common, including at the federal level. *See* Internal Revenue Serv., *Internal Revenue Manual* § 5.14.1.2 (June 1, 2010), http://www.irs.gov/irm/part5/irm_05-014-001.html (imposing liability thresholds for installment agreements).

rules are then in force."); Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. Pa. L. Rev. 47, 57-58 (1977).

An equal protection doctrine that required governments to provide equal treatment in such circumstances would frustrate a wide range of tax reforms. Imagine, for instance, that a legislature wishes to introduce or expand a tax deduction for interest paid on student loans. If the new deduction applies only to interest paid after the law's effective date, then those taxpayers with debts still outstanding after that date will benefit from tax relief, but other taxpayers who already paid off identical debts will receive none. Or suppose a legislature seeking to generate new revenue decides to terminate an existing deduction, such as one for interest paid on a home mortgage. A taxpayer who just paid off a fifteen-year mortgage will be unaffected by the change, but a taxpayer who took out a mortgage for the same amount on the same day, but on a thirty-year repayment plan, will be adversely affected. In both cases, and in many other instances, taxpayers dissatisfied with the results could argue that the legislature attached consequences to an effective date that resulted in disparate taxation. If the ability of governments to differentiate between prospective and retrospective tax relief is called into question, legal changes such as these will become far more difficult to implement. Such a result would represent a sharp break from the historical latitude that this Court has given to governmental decisions regarding the temporal scope of tax reforms, *e.g.*, *Whitney* v. *State Tax Comm'n*, 309 U.S. 530, 541-42 (1940), and plunge legislative bodies into a sea of uncertainty regarding their ability to update their tax codes.

Petitioners' failure to account for the reality of implementing changes to the tax code also infects their analysis of this Court's precedent. Under their view, the tax relief at issue here is indistinguishable from the assessment practice struck down in *Allegheny Pittsburgh* because the government in both cases departed from a preexisting standard. Petrs. Br. 31-32. At issue in *Allegheny Pittsburgh*, however, was a standard for home valuation that was applicable at all relevant times and was advanced in no conceivable way by the challenged practice. 488 U.S. at 338-42; see *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 602-03 (2008). Here, in contrast, the purpose of the tax relief was to ease the transition from one taxation system to another, J.A. 75-76, and not to implement the policy goals of either system in isolation. Petitioners cite no case in which this Court has assessed the constitutionality of a transitional program by the degree to which it advanced the standards of the policy away from which it was transitioning, and the creation of such a rule here would erect a significant hurdle for any government that seeks to abandon an unpopular or ineffective tax program.

Third, if the forgiveness of outstanding taxes were to trigger concurrent obligations to refund prior taxes paid, tax forgiveness initiatives would become far more expensive for municipalities to implement—in some cases, prohibitively so. Affidavits submitted elsewhere by City officials make all too clear the reality that a municipality unable or unwilling to bear this added cost may simply decide to forgo tax relief altogether. See Defs.' Supp. Cross-Motion for Summ. J., Exhs. D, E, F, G, H (Dkt. No. 57*), Cox* v. *City of Indianapolis*, No. 09-0435 (S.D. Ind. Feb. 4, 2010).

Nor would the effects on tax forgiveness programs be limited to the particular facts at issue here. Governments frequently offer tax amnesty to those taxpayers with outstanding debts without also refunding taxes to those who already paid. Such relief may be offered to ease the transition to a new tax program. For example, in states that adopt the Streamlined Sales and Use Tax (a simplified multi-state tax plan that has been joined, to date, by twenty-four states), businesses that register with the program's online system are eligible for tax forgiveness, but refunds are not offered for businesses without taxes outstanding. See Streamlined Sales Tax Governing Bd., *Streamlined Sales and Use Tax Agreement* § 402 (amended Dec. 19, 2011), *available at* http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%2012-19-11.pdf. Likewise, amnesty may be offered in the form of forgiven tax penalties for taxpayers who voluntarily disclose past noncompliance, without also providing refunds for penalties paid before the disclosure initiative was launched. See, *e.g.*, Internal Revenue Serv., *Voluntary Disclosure: Questions and Answers* (Feb. 9, 2011), http://www.irs.gov/newsroom/article/0,,id=210027,00.html (describing new voluntarily disclosure initiative for taxpayers with undisclosed foreign accounts).[13] If, as Petitioners urge, this Court were to erase the line between prospective relief and refunds, all of these programs would become subject to challenge.

Finally, if providing prospective relief to taxpayers on installment plans were to become prohibitively

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[13] Similarly, many municipalities offer amnesty for motorists with outstanding parking and traffic tickets, without also refunding tickets paid by similarly situated citizens. *See* Resp. Br. 39-40.

expensive, municipalities would find themselves forced to bear the administrative costs of collecting taxes they would have preferred to forgive—a lose-lose situation for governments and taxpayers. Indeed, had the relief at issue here not been extended, the City would have been left collecting taxes under some thirty-year installment plans for nearly twenty-nine years longer than desired. See Resp. Br. 28. A government contemplating such a potential outcome may very well conclude that the most prudent course is simply to withhold the option of extended payment plans altogether. That result should not and cannot be mandated by the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Indiana Supreme Court should be affirmed.

Respectfully submitted,

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