No. 11-161

IN THE

Supreme Court of the United States

CHRISTINE ARMOUR, *ET AL.*,
Petitioners,

v.

CITY OF INDIANAPOLIS, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Indiana Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Indiana Supreme Court's opinion in this case. That opinion is reported at 946 N.E.2d 553.

STATEMENT OF THE CASE

A. The City of Indianapolis Forgave Long-Term, Financed Barrett Law Debts as Part of its Transition to a New Taxation Scheme for Future Sewer Construction.

Barrett Law financing is a taxation scheme authorized by Indiana statute wherein the cost of capital improvements including sewer projects are divided among all benefiting homeowners. (Pet. App. 3a.) Barrett Law financing had long been used in Indianapolis for sewer construction and allowed homeowners to either pay up front or finance their assessments over ten to thirty years. (Pet. App. 4a-5a.)

In their Petition, the movants wrongly assert that the City "adopt[ed] a new method of financing [their] sewer project." (Pet. at 2.) Instead, the City adopted a new funding method for future sewer installation projects. (Pet. App, 4a-5a, 44a.) The change was necessary because Barrett Law financing was not a viable option for much needed installations of sewers in economically-depressed neighborhoods served by septic systems. (Pet. App. 4a-5a.) This new funding

system lowered homeowners' up-front fees to a flat $2500 and abandoned long term financing options. (Pet. App. 5a.)

When the City decided to leave the Barrett Law financing scheme, the City had to determine how to handle payments still owed for more than forty prior projects financed through the Barrett Law scheme which were still in collection. (Pet. App. 5a.) These projects involved thousands of taxpayers. (Pet. App. 6a.) The Board of Public Works decided to forgive and assume all remaining debts. (Pet. App. 5a.) Forgiving the debt benefited the City and its rate-payers in several ways:

- Forgiveness created a clear demarcation between the old and new financing methods.
- Forgiveness eliminated administrative costs for administering and collecting those debts over almost thirty years.
- Forgiveness removed the possibility of foreclosure for homeowners unable to pay the debt—the remedy provided by state statute as delinquent amounts became tax liens encumbering the properties. *See* IND. CODE § 36-9-38-28 (2011). At the time, Indiana ranked first in the nation in foreclosed homes. *Foreclosures in Indiana hit new high; Lost jobs, bankruptcies, lending cited as state remains No. 1 in U.S.*, INDIANAPOLIS STAR, March 18, 2006, at 1A.
- Through forgiveness, the City also aspired to aid homeowners who were overly burdened by the prior Barrett Law assess-

> ments. That is, the City considered the existence of a taxpayer's election to pay a Barrett Law assessment over time as evidence of a homeowner's ability to pay. (Pet. App. 4a-5a.)

Forgiving the debt without issuing refunds to the lump sum payers also benefitted the City because it protected the City's limited resources and left at least part of the sewer construction costs with the homeowners who directly benefitted from the construction.

B. Petitioners Are Homeowners Who Did Not Finance their Barrett Law Taxes and Therefore Did Not Benefit from the Forgiveness.

Petitioners are thirty-one homeowners seeking refunds of taxes they paid pursuant to Indiana's Barrett Law for building a sanitary sewer in their neighborhood before Indianapolis changed its funding system. (Pet. App. 4a-6a.) Petitioners live in the final neighborhood financed under the Barrett Law financing scheme. Each homeowner was assessed $9,278 as their *pro rata* share of the sewer construction costs. (Pet. App. 3a.)

Petitioners all elected to pay up front, in one lump sum. (Pet. App. 4a.) When forgiveness occurred the following year, homeowners who selected the thirty-year option had paid only $309.27. (Pet. App. 3a-4a, 48a.) The funds Petitioners paid for their sewer project have already been spent on sewer construction; yet, Petitioners contend the City should compensate them because it forgave the amounts owed by their neighbors who financed the sewer assess-

ments instead of paying in a lump sum. (Pet. App. 5a, 19a.)

In overturning a grant of summary judgment in favor of Petitioners, the Indiana Supreme Court found that Petitioners failed to establish the City's decision to forgive Barrett Law debts without refunding lump sum payers was arbitrary. (Pet. App. 15a-19a.) Instead, the court found this legislative line drawing was rational because it clearly ended the City's reliance on Barrett Law, eliminated costs of continued administration of Barrett Law collections over almost thirty years, removed the threat of foreclosure for non-payment, and aimed to aid poor homeowners. (Pet. App. 15a-19a.)

C. The Same Claims Are Also Being Raised by a Class of 1,459 Taxpayers in Another Suit.

A class of similarly situated homeowners from all Barrett Law projects where some homeowners received forgiveness also sued the City in an action pending in the Southern District of Indiana. *Cox v. City of Indianapolis*, 2010 U.S. Dist. LEXIS 58876 (S.D. Ind. June 14, 2010). In that case, the district court followed the now vacated Indiana Court of Appeals' *Armour* opinion and found that forgiveness without corresponding refunds denied equal protection. *Id*. at *6-19. The district court found 1,459 taxpayers in twenty-one Barrett Law projects should have been refunded $2,783,702, which amounts to average refunds of $1,908. *Cox v. City of Indianapolis*, 2011 U.S. Dist. LEXIS 63748, *8 (S.D. Ind. June 15, 2011) (adopting City's calculation of damages, available on Pacer under cause 1:09-cv-435-TWP-MJD, doc. 98-1). Final judgment has not been issued in that cause.

SUMMARY OF THE ARGUMENT

Petitioners have presented no circumstances meriting certiorari. This case involves unique facts particular to Indiana's Barrett Law financing system for sewer construction and Indianapolis's one-time effort to extricate itself from that scheme. The underlying law regarding how to apply the mere rational basis equal protection analysis to differential treatment in state tax schemes has already been established through *Alleghany Pittsburgh* and *Nordlinger*. Thus, any decision would primarily address these facts, which are not likely to be repeated.

The Indiana Supreme Court correctly found that Petitioners could not establish that the decision to forgive Barrett Law debts without corresponding refunds to lump sum payers was arbitrary. Instead, this legislative line drawing was rational because it clearly ended the City's reliance on Barrett Law, eliminated administrative costs of continued Barrett Law collections over almost thirty years, removed the threat of foreclosure for non-payment, aided financially struggling homeowners, and achieved these goals at a price the City was willing to pay.

There is no conflict between the Indiana Supreme Court's decision and Petitioners' state court cases on forgiveness of illegal or delinquent taxes. Instances where courts have found tax policies arbitrary because a tax was illegal or the forgiveness only benefited delinquent payers are fundamentally different from the present forgiveness of an unchallenged tax. Moreover, the Indiana Supreme Court properly reconciled the City's forgiveness with this Court's

guidance on arbitrary taxation treatment in *Allegheny Pittsburgh*. The court recognized that the more apt precedent from this Court was *Nordlinger* which permitted differential treatment of very similar taxpayers because the legislative line-drawing in that case was rational. The present case involves reasoned line drawing between thousands of homeowners, not arbitrary or invidious discrimination.

Petitioners' also argue for certiorari based on their contention that the City improperly factored "preserving … limited resources" into its legislative line drawing. Petitioners are correct that all of the City's other reasons for forgiveness without refunds would have been accomplished if refunds were also extended. However, Petitioners have presented no authority showing this consideration conflicts with the jurisprudence of this Court, any circuit court, or any other court with precedential effect. Instead, the limitations of the municipal fisc are always a relevant consideration. Legislative bodies do not have unlimited financial resources and are routinely forced to weigh equity and resources with other legislative goals.

REASONS FOR DENYING REVIEW

I. The Indiana Supreme Court's Holding Does Not Conflict with Other State Court Holdings

Petitioners' opening argument for certiorari review is a purported conflict with the decisions of four state courts—interpreting the Equal Protection Clause. However, the alleged conflict is illusory as these

cases are readily distinguishable. Those cases involve tax forgiveness without refunds under very different circumstances—because the tax was illegal or because the taxpayers were in default. While the taxing entities may have had no rational bases in those dissimilar circumstances, a rational basis exists in the present case.

While alleging a conflict with four state courts, Petitioners only develop at any length the alleged conflict with *Armco Steel Corp. v. Dep't of Treasury*, 358 N.W.2d 839 (Mich. 1984). *Armco Steel* is readily distinguishable because it deals with an illegal tax and no party ever put forth a rational basis for differential treatment. *Id.* at 841, 843. There, after a tax was deemed improper, the state did not collect unpaid taxes, but refused to refund amounts already paid. *Id.* at 841. In ending this unequal treatment, the Michigan Supreme Court found there to be no "natural distinguishing characteristic" allowing the state to treat taxpayers who paid the tax before it was found illegal differently from those who had not yet paid. *Id.* at 844.

As the Indiana Supreme Court observed, the illegality of the tax in *Armco Steel* was significant to the Michigan court's decision that the refusal of refunds was a violation of equal protection. (Pet. App. 30a-31a.) "[T]here was in *Armco Steel* a sense of foul play present in that the initial assessment of the franchise fees had been held to be illegal, and although the treasury department gave relief to some who were assessed illegally, it did not grant relief to others who were also assessed illegally." *Id.* Petitioners attempt to disregard this legal versus non-legal tax distinction by incorrectly claiming that the Michigan court specifically found it irrelevant. (Pet.

at 14.) However, the cited "*non sequitor*" provision in the *Armco Steel* opinion only finds it is irrational to discriminate based on whether taxpayers paid an illegal tax before or after it was found illegal. *Armco Steel*, 358 N.W.2d at 844.

The City makes no claim that there is a rational basis to retain an illegal tax. However, the present forgiveness of long-term financed, subsequently owed payments did not imply any impropriety in the underlying tax assessment. (Pet. App. 31a.) Petitioners were assessed equally and all money paid was "used to fund [the sewer construction directly benefiting their properties] and has already been spent in constructing those sewers." (Pet. App. 2a, 19a.)

Armco Steel should also be differentiated because the Michigan Supreme Court cited two independent state grounds for its opinion. *Armco Steel*, 358 N.W.2d at 842 (citing Michigan's State Constitution's Equal Protection Clause and Uniformity of Taxation Clause.) While the Michigan court indicates the analysis is the same, the invocation of the Uniformity of Taxation Clause suggests a strong state partiality to "equal treatment of similarly situated taxpayers." *Id*. The Fourteenth Amendment's Equal Protection Clause, however, permits differential treatment where there is a rational basis for the difference. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602 (2008) ("When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference[.]").

In addition to their discussion of *Armco Steel*, Petitioners briefly enumerate three cases wherein state

courts found that forgiveness of delinquent taxes violated equal protection. (Petition at 12, citing *State ex rel. Stephan v. Parrish*, 891 P.2d 445, 457 (Kan. 1995); *Perk v. City of Euclid*, 244 N.E.2d 475, 477 (Ohio 1969); and *Richey v. Wells*, 166 So. 817, 819 (Fla. 1936).) At most, these cases stand for the proposition that it is arbitrary to differentiate between delinquent taxes and already paid taxes. While there may be no rational basis for that distinction, those cases create no conflict with the Indiana Supreme Court's finding that the City's forgiveness of long-term financed, subsequently owed payments without refunds of legitimate tax payments that had already been spent on improvements directly benefitting the taxpayers survives mere rational basis scrutiny.

Moreover, unlike the present case, all of the cited state cases include patent unfairness—retention of an illegal tax and favorable treatment to delinquent taxpayers. Despite Petitioners' pains to present this case as equally iniquitous, it simply is not. Just like all prior participants in the City's Barrett Law sewer projects, Petitioners paid no more than their fair, *pro rata* share of the sewer construction cost. (Pet. App. 3a.) All of their payments were spent on sewer construction benefiting their land. (Pet. App. 19.) As the district court found in *Cox*, the Petitioners are requesting "extending a tax assessment forgiveness *windfall*, which will be paid by taxes levied on all of the City's taxpayers." *Cox v. City of Indianapolis*, 2011 U.S. Dist. LEXIS 63748, *8 (S.D. Ind. June 15, 2011). While Petitioners did not receive the windfall forgiveness which they claim was necessary to end the Barrett Law program, they did receive the benefit of the tax and were treated the same as genera-

tions of prior Barrett Law taxpayers. This is not equivalent to the arbitrary, demonstrably unfair taxpayer discrimination that occurred in *Armco Steel*, *Parrish*, *Perk*, or *Richey* and does not violate the Equal Protection Clause.

II. Conflict with an Interlocutory Order from a District Court Does Not Merit Certiorari

Petitioners also tout the conflict between the Indiana Supreme Court's opinion and the unpublished memorandum decision of the Southern District of Indiana in *Cox v. Indianapolis*, 2010 U.S. Dist. LEXIS 58876 (S.D. Ind. June 14, 2010). However, this is not a conflict requiring intervention by this Court because a "district court decision binds no judge in any other case, save to the extent that doctrines of preclusion (not stare decisis) apply." *Gould v. Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993). This Court's own rules do not recognize a conflict with a district court as among the likely bases for certiorari review. *See* SUP. CT. R. 10. The *Cox* judgment is only an interlocutory order which may still be revisited before final judgment. Finally, any error in the *Cox* analysis can still be rectified through an appeal to the Seventh Circuit before the case has any precedential value. Only if a conflict persists after that process, then there may be cause for certiorari review.

III. The City Properly Considered Fiscal Responsibility in its Legislative Line Drawing

Without alleging a conflict with any case, Petitioners assert that the City's reasons for its legislative line-drawing lack merit. (Pet. 18-20.) Even if correct, it is unclear how the allegation could support certiorari. *See* SUP. CT. R. 10. Such a determination by its nature would be fact specific and unique to Indiana's taxing scheme and the City's one-time forgiveness. Moreover, their argument is erroneous because fiscal considerations can be a proper consideration in differential treatment. *See Bowen v. Gilliard*, 483 U.S. 587, 596 (1987). The Constitution gives courts "no power to impose upon [legislatures] their views of what constitutes wise economic or social policy, by telling it how to reconcile the demands of needy citizens with the finite resources available to meet those demands." *Id.* A court's entanglement with a city's fiscal decisions would implicate both separation-of-powers and federalism concerns.

Petitioners do not substantially challenge any of the City's reasons for forgiveness, but argue it was irrational to draw the line at forgiving long-term financed, subsequently owed payments without also refunding payments already received. (Pet. 18-20.) Admittedly, their solution of additional refunds would accomplish the same goals, but would have cost the city millions of additional dollars as a result. (Pet. App. 84; *Cox v. City of Indianapolis*, 2011 U.S. Dist. LEXIS 63748, *3, *8 (S.D. Ind. June 15, 2011).)

It is entirely unfair to say the City drew the line where it did because "the City wanted to keep the

money." (Pet. 18.) There was no money to keep—again, all of Petitioners' tax payments were spent on sewer improvements that directly benefitted their own properties. (Pet. App. 19a.) This was not a question of hoarding money, but instead a legislative choice to limit how much money would have to come from other tax sources in order to end the reliance on Barrett Law financing.

Moreover, Petitioners had already received exactly the benefit from their tax payment that was indicated at the time of assessment and the same benefit that generations of prior Barrett Law taxpayers received. (Pet. App. 19a.) The only thing they did not receive was the "windfall" given to their neighbors for the purposes of ending Barrett Law financing. *Cox v. City of Indianapolis*, 2011 U.S. Dist. LEXIS 63748, *8 (S.D. Ind. June 15, 2011).

In sum, Petitioners are asserting that if the City wanted to rid itself of the specter of the unpopular Barrett law financing at any time during the next thirty years while payments were still owed, the only possible avenue was to also provide refunds to others who paid into the same project. However, a legislative body must be permitted to weigh other factors such as cost, equities, and other legitimate municipal goals such as protection of the City's water supply through the elimination of aged septic tanks, in order to arrive at practical solutions. As this Court and the Indiana Supreme Court have both recognized, the government's limited resources are necessarily part of this decision-making process. (Pet. App. 11a-12a.)

IV. The Opinion Is also Consistent with this Court's Jurisprudence

A. Forgiveness without refunds survives rational basis scrutiny.

Despite Petitioners efforts to gain traction by suggesting misapplication of this Court's precedent, the Indiana Supreme Court properly applied this Court's previous decisions. Petitioners do not challenge the state court's holding that the forgiveness without refunds is subject to mere rational basis review. (Pet. App. 8a-9a.) As this Court has found, "[w]hen those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being treated alike, under like circumstances and conditions." *Engquist*, 553 U.S. at 602 (internal quotation omitted). A "classification . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993).

Under that standard, the City had "no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993). "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). If facts do not preclude a rational basis proffered by the government, the

government's actions must be found constitutional. *Fitzgerald v. Racing Ass'n*, 539 U.S. 103, 110 (2003).

As the Indiana Supreme Court found, the City had rational reasons for forgiveness without refunds. First, "it was reasonable for the City to believe that property owners who had already paid their assessments were in better financial positions than those who chose installment plans." (Pet. App. 16a.) "Support of the poor has long been recognized as a public purpose." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 515 (1937). Second, as discussed above, the City could properly consider preservation of limited resources. (Pet. App. 18a-19a.)

B. There is no conflict with **Allegheny Pittsburgh** *or* **Nordlinger.**

Contrary to the assertions of Petitioners and their *amici curiae*, the opinion is a useful elucidation of how to square this Court's opinion in *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n*, 488 U.S. 336 (1989) with *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992).

The Indiana Supreme Court correctly observed that the differential treatment in *Nordlinger* of similarly situated property owners based on when they bought their property was permissible because it furthered a policy intended to protect neighborhoods and expectation interests of long-term homeowners by not tying their taxes to market values. *Nordlinger*, 505 U.S. at 12-13, 16. However, the same differential treatment of new property owners was found unconstitutional in *Allegheny Pittsburgh* because the dis-

crimination did not further any governmental interest, treated only a small group of property owners differently, and was in direct contravention of state law requiring equality in taxation. *Allegheny Pittsburgh*, 488 U.S. at 343-46.[1]

While Petitioners and Amicus Taxpayers Union represent that the Indiana Supreme Court "erred in its reading" of *Nordlinger* and *Allegheny Pittsburgh* (Pet. 21), their real contention is that the Indiana Supreme Court misinterpreted Indiana law to find the differential treatment more akin to *Nordlinger* than *Allegheny Pittsburgh* (Pet. 21, 23; Taxpayers Union Brief at 13-14.) In their discussion of both cases, Petitioners represent that the Indiana statute under which Petitioners were taxed "expressly required" equal taxation. (App. 21, 23.) In effect, Petitioners are attempting to liken the City to the rogue tax assessor in *Allegheny Pittsburgh* whose discrimination was irrational and did not follow state mandates of equality in taxation.

However, there has never been a finding that Indiana State law requires continued equity in Barrett

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[1] Petitioners suggest this case would be a good vehicle for clarification on class-of-one equal protection jurisprudence. (Pet. 24-25.) However, this is not a class-of-one case as the city drew lines among thousands of taxpayers. (Pet. App. 6a.) The Indiana Supreme Court properly rejected Petitioners' efforts to invoke class-of-one cases where small groups without differentiating characteristics were treated differently because the present forgiveness without refunds involved legislative line-drawing between large, readily identifiable groups of taxpayers. (Pet. App. 23a-24a.) Whether viewed as a distinct branch of equal protection jurisprudence or merely a group of analogous cases, the Indiana Supreme Court properly differentiated those cases from the present circumstances.

Law taxation. This is a separate, state-law legal issue which is part of the remaining state legal claim and has not yet been ruled upon. (Pet. App. 50a.) The answer is also far from clear as the Barrett Law statute only requires equality in initial assessments. IND. CODE § 36-9-39-15. Thereafter, long-term financing will create inherent inequalities. Also, a related statute indicates amounts can be "credited, eliminated, or reduced" and those amounts can either be reapportioned to other taxpayers or borne by the municipality. I.C. § 36-9-39-17(c). These questions of Indiana statutory interpretation are not proper for certiorari. When this improper state law claim is removed from Petitioners' argument, Petitioners' allegation of a conflict with this Court all but disappears.[2] The Indiana Supreme Court properly followed the mandates of this Court.

V. Petitioners' Question Presented Is Premised Upon a Faulty Presumption that Petitioners Would Be Entitled to Refunds if Equal Protection Was Violated

Finally, even if successful, Petitioners would not benefit from certiorari review because the only permissible remedy for an equal protection violation

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[2] Petitioners raise the same unanswered question of Indiana law to claim that their "legitimate expectations" for taxation were offended. (Pet. 22-23.) However, it is not clear that Barrett Law taxpayers had a legitimate expectation that their neighbors would not receive windfall forgiveness. The only legitimate expectation was that the initial assessment would be equal and that taxes would be spent on construction of sewers benefitting their property. I.C. § 36-9-39-15. Those legitimate expectations have been met.

would be to strike down the forgiveness. Petitioners' question presented is premised upon the assumption that they would be entitled to refunds if an equal protection violation occurred. (Pet. i.) This Court, however, has instructed that when fashioning a remedy for an equal protection violation, the remedy must not disrupt the intent of the enacting body:

> Although the choice between 'extension' and 'nullification' is within the constitutional competence of a federal district court, and ordinarily extension, rather than nullification, is the proper course, **the court should not, of course, use its remedial powers to circumvent the intent of the legislature**, and should therefore measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.

Heckler v. Mathews, 465 U.S. 728, 739 n.5 (1984) (internal quotations omitted, emphasis supplied).

Petitioners have no evidence indicating the City's Board of Public Works would have spent millions of additional dollars to provide refunds—or even had resources available to pay for refunds—if they knew forgiveness would otherwise violate equal protection. Quite the opposite, the evidence in the class action suit includes affidavits from every board member stating they would not have approved forgiveness if they knew refunds were also required. *See Cox v. City of Indianapolis*, 1:09-cv-435-TWP-MJD (affidavits available on Pacer in doc. 57.) All of Petitioners' payments had already been spent on sewer construc-

tion. (Pet. App. 19.) Therefore, the only permissible remedy would be to invalidate the forgiveness.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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