No. 11-161

IN THE

Supreme Court of the United States

CHRISTINE ARMOUR, *et al.*,
Petitioners,

v.

CITY OF INDIANAPOLIS, *et al.*,
Respondent.

On Writ of Certiorari to the Indiana Supreme Court

BRIEF FOR THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND UNITED STATES CONFERENCE OF MAYORS, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

LISA E. SORONEN
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

JON LARAMORE
Counsel of Record
A. SCOTT CHINN
FAEGRE BAKER DANIELS
300 N. Meridian St.
Suite 2700
Indianapolis, IN 46204
(317) 237-0300
jon.laramore@FaegreBD.com
scott.chinn@FaegreBD.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF INTEREST OF AMICI [1]

The national associations representing state and local governments and governmental officials that join this brief support this Court affirming the Indiana Supreme Court's decision. The members of these associations have the authority to forgive debt citizens owe to state and local government and to make—and change—policy decisions related to infrastructure financing. The Indiana Supreme Court ruled that the City of Indianapolis's decision to forgive the debt of sewer installment payers was subject to—and passed—rational basis review. Further tightening the equal protection standard applied to debt forgiveness and policy changes at the state and local level would rob state and local officials of the discretion they need to provide good governance at the lowest possible cost.

Amici are as follows:

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 of appointed chief executives and assistants serving cities, counties, towns, and regional entities. Its mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

---

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici* and their counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. *See* Rule 37.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 states, its commonwealths and territories. NCSL provides research, technical assistance and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and it regularly submits briefs amicus curiae to this Court, in cases that, like this one, raise issues of vital state concern.

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with populations of more than 30,000. There are over 1,200 such cities in the country today. Each of these cities is represented in the Conference by its chief elected official, the mayor.

SUMMARY OF THE ARGUMENT

This case is a classic example of no good deed going unpunished. The City of Indianapolis forgave the debt of those who paid for sewer connections in installments to relieve a financial burden on its residents least able to pay when the City changed how it financed sewer upgrades. Instead of being applauded for its generosity, the City was sued for allegedly violating the equal protection rights of those who paid for their sewer connections upfront because they did not receive a refund.

This Court should not second-guess a state or local government's decision to forgive debt, particularly when everyone got what they paid for. When a state or local government makes a policy change, some may be favored while others may be disfavored. This is a foregone conclusion, not unconstitutional discrimination. The City in this case relied on a number of rational reasons for forgiving the debt of installment payers—helping less prosperous residents, preserving limited government resources, and administrative efficiency. If these reasons fail rational basis review, numerous economic policy decisions of state and local government may be challenged as unconstitutional. Finally, infrastructure finance is complicated and often needs modification. This Court may discourage state and local government from making much needed changes to infrastructure financing if it invalidates the City's decision in this case.

ARGUMENT

I. Courts should not second-guess state and local governments' decisions to forgive citizens' debts.

State and local governments plan for the long term, particularly when they undertake complex and expensive infrastructure projects. They need certain, stable revenue streams *and* flexibility to modify policies to meet changed conditions. Given this need for flexibility, this Court should not second-guess policy changes made by state and local government in connection with government programs and infrastructure improvements, even if the results are not perfectly equitable.

In this case, the City of Indianapolis made a policy change (by action of its City-County Council, endorsed by its Mayor) and abandoned the method of financing sewer service expansion under Indiana's so-called Barrett Law. It instead adopted the Septic Tank Elimination Program (STEP), which resulted in septic replacement at a lower cost to property owners served by the new sewer service. In implementing this policy change, the City forgave the remaining obligations of those who had elected to pay Barrett Law assessments in periodic payments, and the City gave no refund to those who paid the assessments in a lump sum (often many years before).[2]

---

[2] Although Indiana municipalities no longer fund improvements using Barrett Law assessments, the Barrett Law is just one of many Indiana examples of a special assessment used by a municipality to fund improvements. Indiana law permits local legislative bodies to assess impact fees on new real estate developments over which they have jurisdiction. IND. CODE § 36-7-4-1311. After a local governing body has followed the

All the assessment payers received direct and exclusive benefit from Barrett Law assessments. Neighborhoods benefited from participating because Indianapolis's chronically failing septic systems left counts of bacteria like E. coli very high in ditches in some neighborhoods and because sewer connections generally improve property values.[3] All homeowners were offered a choice of either paying upfront or in installments. All were able to make a rational economic decision in their best interests. Before debt forgiveness, the upfront payers got a better deal. They avoided both interest payments and the placement of a lien on their property.

Where a state or local governmental unit is *forgiving* a debt rather than *imposing* one, courts should be particularly deferential. As this case illustrates, many valid reasons may underlie a government's decision not to collect money it is owed. Within and outside the governmental context, creditors of all

---

procedure required by Indiana law, it may assess an impact fee on new development in a designated geographic area. The fee is intended to cover the cost of infrastructure improvements. *Id.* Impact fees pay for previously unneeded improvements and keep local infrastructure from being overwhelmed when new development outpaces existing services. Indiana law affords local governing bodies discretion and flexibility in determining when such fees are appropriate.

[3] *See* Jane Frankenberger, *E. coli and Indiana Lakes and Streams*, PERDUE UNIVERSITY, https://engineering.purdue.edu/SafeWater/watershed/ecoli.html#sources (last visited Feb. 1, 2012) (listing diseases associated with E. coli bacteria from leaking septic systems); Frank Delano, *Sewer Systems Raising Westmoreland Property Values*, FREDERICKSBURG (VA) FREE LANCE-STAR, Dec. 15, 2009; Marshall Allen, *Sewers Increase Home Value, Realtors Say*, GLENDALE (CA) NEWS-PRESS, May 15, 2002.

kinds forgive debt every day.[4] Recently, for example, Congress passed the Mortgage Forgiveness Debt Relief Act of 2007[5] in response to an economic downturn and widespread mortgage crisis in the United States. The Act allows taxpayers who had mortgage debt forgiven in calendar years 2007-2012 on a loan of $2 million or less for a principal residence to exclude that debt forgiveness from their taxable income.[6] Previously, the canceled amount on such a debt had been taxable. Congress's refusal to tax mortgage debt forgiveness during a five year period per the Mortgage Forgiveness Debt Relief Act, like the debt forgiveness in this case, reflects a change in government policy in response to a change in circumstances.

When the government is forgiving the debts of residents where everyone got what they paid for, a courts' deference should be at its apex. No one is harmed and those disfavored have not been denied a benefit to which they were promised or otherwise entitled. In this case, any homeowner who paid any part of his or her assessment, whether in full or in some number of installments, received the benefit for which he or she paid. The City chose to forgive the

---

[4] One reason a non-government creditor may want to stop collection efforts is that creditors can use the loss to lower their taxable income, which reduces the creditor's tax burden. *See Tax Consequences When a Creditor Writes Off or Settles a Debt*, NOLO.COM, http://www.nolo.com/legal-encyclopedia/tax-consequences-settled-forgiven-debt-29792.html (last visited Feb. 1, 2012).

[5] Pub. L. No. 110-142, 121 Stat. 1803-1808 (2007).

[6] *See* Press Release, Internal Revenue Service, Mortgage Workouts, Now Tax-Free for Many Homeowners; Claim Relief on Newly-Revised IRS Form (Feb. 12, 2008), http://www.irs.gov/irs/article/0,,id=179073,00.html.

debts of those who chose to pay their assessments over time. Citizens have no reliance interest in any law or program remaining static; state and local governments change their policies and programs regularly, for a variety of valid reasons.[7] Reliance is especially unwarranted when the program lasts a long time; in this case some payment plans were for 30 years. For state and local governments to continue to meet constituents' needs, fees that generate revenue over a period of decades must be subject to changes based on current economic and political conditions.

Indiana's rethinking of Barrett Law sewer financing is not the only example of legislative re-examination of longstanding fees. Lawmakers periodically re-evaluate all kinds of revenue generating structures. For example, the Indiana General Assembly recently considered legislation that would eliminate licensing requirements and fees for a variety of now-licensed practitioners, including cosmetologists and private investigators. Some of these currently licensed workers likely invested money in training or tuition to meet licensing requirements. At a minimum, some currently licensed workers have paid licensing fees for as long as they have practiced their profession. But Indiana's Regulated Occupations Evaluation Committee, charged by the Indiana General Assembly with evaluating regulated professions, has recommended that these licensing requirements be

---

[7] *See, e.g.*, Chris Roberts, *San Francisco Suspends Medical Marijuana Licensing Program Indefinitely*, SFWEEKLY.COM BLOG (Jan. 25, 2012, 4:17 PM), http://blogs.sfweekly.com/thesnitch/2012/01/breaking_in_reversal_san_franc.php (San Francisco's suspended its medical marijuana licensing program indefinitely due to uncertainty over whether it is legal).

rescinded.[8] This recommendation was made despite the fact that Indiana's Legislative Services Agency concluded that licensing fees generate net revenue for the State.[9] In other words, the Indiana General Assembly may determine that times have changed and so must the state licensing law, despite the investment some have made in fees and the perceived break that latecomers to affected professions will receive. This is one of countless examples in every state and locality of periodic re-evaluation and change to policies and programs that benefit some and not others.[10]

In short, state and local governments frequently make policy changes that have disparate effects on groups of citizens. Concluding that these discretion-

---

[8] *See* REGULATED OCCUPATIONS EVALUATION COMMITTEE, REGULATED OCCUPATIONS RECOMMENDATIONS REPORT (2011), http://www.in.gov/pla/files/Regulated_Occupations_Recommendations_Report_12_16_2011.pdf.

[9] *See* LEGISLATIVE SERVICES AGENCY, FISCAL IMPACT STATEMENT H.B. 1006 (Jan. 6, 2012), http://www.in.gov/legislative/bills/2012/PDF/FISCAL/HB1006.001.pdf.

[10] *See, e.g.*, Gail Schontzler, *Recession's Silver Lining: Taxpayers Get Break on New School Cost*, BOZEMAN DAILY CHRONICLE, June 22, 2011, http://www.bozemandailychronicle.com/news/education/article_fdd9dc44-9c8d-11e0-a534-001cc4c03286.html (school board asked taxpayers for more money than it ultimately needed to build a school; current homeowners will get the benefit of a lower property tax mil in the next year; those who paid higher taxes in years prior to pay for the school—who are not necessarily the current homeowners—get no refund); Jeff Swiatek, *City to Limit Fee Hike for Business Licenses*, INDY.COM, May 6, 2010, http://www.indy.com/posts/city-to-limit-fee-hikes-for-business-licenses (when the Mayor of Indianapolis formed a new Department of Code Enforcement to consolidate functions in one department, licensing fees that had not been examined in decades were raised).

ary decisions fail equal protection analysis would unduly constrict state and local officials' freedom to change outmoded policies in favor of newer more efficient and effective strategies.

II. The City's reasons for forgiving installment-plan debts while not refunding lump sum payments for sewer access pass rational basis review.

So long as this Court can conceive of *any* plausible reason for the City's classification of property owners, can identify supporting "legislative facts" the City *may* have considered true, and can discern a more than arbitrary or irrational relationship between them, there is no violation of equal protection under rational basis review. *See Fitzgerald v. Racing Association of Central Iowa*, 539 U.S. 103, 109 (2003). Equal protection analysis does not invite "courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). And a classification does not violate the Equal Protection Clause because it lacks precision or causes some inequality. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Fitzgerald*, 539 U.S. at 108-09 (explaining that rational basis review requires only a non-arbitrary relationship between the classification and its goals).

If the City's debt forgiveness in this case failed to meet rational basis review, then numerous state and local government economic decisions will be called into question, and the bar for complying with equal protection will be set too high. The City met its equal protection burden in this case. State and local government have a legitimate interest in reducing financial hardship for middle and low income residents, preserving government resources, and eliminating

administrative burden. These interests are—separately and together—rationally related to forgiving the debt of installment payers in this case.

1. Helping those in need reflects a basic and universally recognized function of government.[11] If equal protection does not allow state and local governments to adopt economic policies that benefit middle and lower income citizens, or even makes adopting such policies more difficult, then numerous federal, state, and local government programs may be challenged as unconstitutional. Everything from direct services (e.g., public health clinics, more bus routes in low-income neighborhoods) to grants (e.g., Pell grants) to need-based tax and welfare schemes (e.g., progressive tax schemes, heating subsidies, food stamps) to tax and investment incentives to locate businesses in economically distressed areas offered by every level of government favors poor and middle income citizens. This Court should not cast doubt on addressing the needs of lower-income citizens as a rational basis for governmental action at all levels, given the long-standing nature and wide spread acceptance of this practice.

The City's decision in this case to forgive installment payers' debt was rationally related to its stated

---

[11] *See, e.g., NPR/Kaiser/Kennedy School Poll, Poverty in America*, NPR ONLINE, http://www.npr.org/programs/specials/poll/poverty/ (last visited Feb. 1, 2012) ("[P]eople [surveyed about poverty] want the government to try [to help poor people]—especially when it comes to programs designed to help people who are trying to help themselves. Large majorities support expanding job-training programs (94%), improving public schools in low-income areas (94%), increasing tax credits for low-income workers (80%), and expanding subsidized day care (85%) and subsidized housing (75%).").

goal of easing the financial burden of sewer conversion on poor and middle class property owners. The City could reasonably conclude that property owners able to pay the entire sewer connection fee at once had greater financial resources than those who chose to spread the same obligation over 20 or even 30 years. The City could rationally—if imprecisely—advance its goal by subsidizing the debtor landowners. *See Fitzgerald*, 539 U.S at 110 (the relationship of the classification to its goal need only be "not so attenuated as to render the distinction arbitrary or irrational") (internal citations omitted).

2. Structuring policies to preserve limited financial resources is another legitimate government interest that is rationally related to not refunding past payments when outstanding debts for the same item are forgiven. *See Bowen v. Gilliard*, 483 U.S. 587, 598-99 (1987) (decreasing federal expenditures is a legitimate Congressional goal). State and local government financial resources are finite but the needs are great. As state and local governments are tasked with making difficult policy choices about how to spend money, they should be able to preserve limited resources for the most important projects.

In this case, the City acted to preserve scarce resources urgently needed for a newer, more far-reaching sewer financing system. Through the STEP program, adopted in conjunction with termination of Barrett Law financing, the City could increase sewer construction, promoting both environmental progress and public health. That the City stood to benefit from federal government incentives to upgrade and expand municipal sewer systems reflects the national significance of these objectives. So limiting subsidy payments to debtor property owners rationally re-

lated to the City's interests in preserving resources for other priorities.

Because policy decisions are complex, especially when there are economic consequences, state and local governments typically have many reasons for making any policy decision. And various policymakers' reasons may diverge, even when they support the same decision. To reflect this reality, all the reasons state and local governments rely on should be considered in total in equal protection analysis. As this Court has explained, "not every provision in a law must share a single objective"—most laws, in fact, balance different or even contrary ends while still serving "the general objective when seen as a whole." *Fitzgerald*, 539 U.S. at 108, 109.

So in this case the City could rationally decide that restricting its Barrett Law debt forgiveness balanced competing goals of ameliorating financial hardship among lower and middle-class property owners, improving public health, and preserving scarce financial resources. The City could even weigh related goals such as stemming foreclosures in the struggling neighborhoods often targeted for sewer construction. Indeed, the City's decision to only forgive debt reflects a quintessential policy choice. It is precisely the balancing of legitimate objectives that equal protection analysis does not second-guess. *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 464 (1981) ("States are not required to convince the courts of the correctness of their legislative judgment"); *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) ("When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude.").

3. Minimizing administrative burdens also is a legitimate state and local government interest that should not be dismissed in rational basis analysis. *See, e.g.*, *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 511 (1937). Administrative demands figure among the most basic concerns in undertaking or continuing any government program. State and local government should be able to make the same common sense cost-benefit calculations that individuals, businesses, and non-profits make every day when deciding what projects to pursue and forgo. In fact, rational basis review requires even less than a well-documented cost-benefit analysis. *See Beach Communications, Inc.*, 508 U.S. at 315 ("a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data").

Thus, the City could forgive Barrett Law debt to eliminate the administrative costs of continuing to collect monthly payments and monitoring and preserving liens for thousands of property owners involved in more than 40 Barrett Law projects. These administrative costs would have included both the necessary employee hours (e.g., mailing and processing invoices, tracking payments and delinquencies, imposing and enforcing liens) and physical resources (e.g., equipment to perform these tasks and maintain accurate records). The City would need to invest hundreds of thousands of dollars in updating failing information systems software merely to continue tracking Barrett Law debts.[12] In calculating administrative costs, the City could include Barrett

[12] Aff. of Charles White ¶ 13, Dkt. #57-3, *Cox v. City of Indianapolis*, S.D. Ind. No. 1:09-cv-435 (S.D. Ind. June 14, 2010) (case related to *Armour*).

Law's intangible costs, such as diverting administrators from other goals that are equal or more significant.

Finally, this Court rejecting in this case the legitimate reasons rationally related to eliminating installment payers' obligations could have a paralyzing effect on state and local government. Virtually any simplification or modernization of an economic program creates winners and losers. The City's transition to the lower sewer connection fees of STEP, for example, favors STEP assessment-payers over Barrett Law assessment-payers. Any government decision to collapse a graduated benefit scheme into fewer categories of beneficiaries would help some and harm others. And even seemingly innocuous decisions to abandon license or permit requirements will disfavor those who have paid government fees. Concluding that inevitable and justified inequalities violate equal protection could perversely shackle state and local government to antiquated tax schemes and economic programs.

III. Successful equal protection challenges to infrastructure funding decisions may deter state and local government from making program revisions that promote important public interests.

State and local governments shoulder most of the nation's burden to modernize infrastructure. Citizens expect state and local government not only to maintain existing infrastructure, but to champion improvements that promote safety, health and recreation, and economic development. Infrastructure

financing is complex.[13] It is driven by many policy interests and practical realities that sometimes compete or even collide. Some funding mechanisms may not take in enough revenue to cover program costs. Others may impose hardships so obvious that relief or revision is reasonably required. Still other funding mechanisms may not actually promote the intended public interests, or worse, may undermine those interests in ways not initially anticipated. So state and local government must examine constantly whether infrastructure financing should be changed.

Revisions to infrastructure funding decisions should be informed by trial and error, public input, and changes in circumstance and technology. Citizens, who elect state and local government leaders to make these decisions, want progress and also care about their pocketbooks. Through public participation and at the ballot box, citizens have the ultimate say in the delicate balance state and local government officials strike in making infrastructure program financing decisions.

Against that backdrop, Petitioners characterize the City's decision to move from Barrett Law financing to the STEP program as creating unfair tax treatment between similarly situated taxpayers. Yet that portrayal is so narrow it obscures the context of the City's decision. The decision to abandon Barrett Law was not designed to confer a benefit on one group of taxpayers over another similarly situated group. Nor was it made just in the narrow context of the Petitioners' Brisbane-Manning neighborhood. Rather,

---

[13] *See generally* NEIL S. GREGG, INFRASTRUCTURE FINANCE: THE BUSINESS OF INFRASTRUCTURE FOR A SUSTAINABLE FUTURE (2010).

the City's decision was designed to modernize its program of funding sewer improvements. In short, the City wanted to move from the old to the new. That there were consequences—even differential ones—to citizens who had selected different payment options prior to the program change is a truism about the legitimate and inevitable effects of program changes, not unconstitutional discrimination. A broader view of the City's decision in this case illustrates that this Court second-guessing one aspect of changing from Barrett Law to STEP financing may discourage other state and local governments from changing infrastructure funding needed to make critical infrastructure improvements.

1. Public Health

This Court should be reluctant to find an equal protection violation in a change to a program that serves critical public health goals. The principal reason the City continues today to convert to sewer systems from septic systems is the negative public health consequences of failing septic systems in older neighborhoods. Failing septic systems breed disease. When septic systems fail, sewage particulates leech to the top of soil in residential yards and run into ditches.[14] According to evaluations performed by Indianapolis's local health department, more than 7,400 septic systems in this county are failing, and more than 20,000 additional septic systems need evaluation.[15]

---

[14] *See Diseases Involving Sewage*, INDIANA STATE DEPARTMENT OF HEALTH, http://www.in.gov/isdh/22963.htm (last visited Feb. 1, 2012) (listing and describing many of the diseases caused by contact with sewage).

[15] *See* Citizens Energy Board Meeting, Minutes of June 2, 2011 Meeting Regarding the Basics of Financing the STEP

That a large city like Indianapolis in 2012 still has neighborhoods on septic systems underscores the need to not restrict local governments' modernization efforts even if they are not perfectly equitable.

2. Septic Conversions

Septic conversions are happening nationally.[16] It is important that courts defer to changes to septic conversion financing so this national trend may be advanced. Communities with septic conversion programs need the flexibility to change the subsidy/benefit component of such programs. The U.S. Environmental Protection Agency (EPA) is pursuing enforcement efforts all across the country to clean up outdated, unhealthy sewer systems and wastewater treatment plants.[17] Many sewer upgrade projects are

---

Program at 7, http://www.citizensenergygroup.com/pdf/directors/6-2-11.pdf.

[16] Septic conversions are made for public health reasons when septic systems fail, as in the case of Indianapolis. In the mid-Atlantic states they are made for nutrient reduction reasons. The Environmental Protection Agency maintains the Mid-Atlantic Nonpoint Source Pollution Initiative that touts septic to sewer conversions as a success in reducing undesirable nutrient levels. *See Inland Bays, Delaware—Nonpoint Source Success Story*, ENVIRONMENTAL PROTECTION AGENCY, http://www.epa.gov/reg3wapd/nps/success/de_inland_bays.htm (last visited Feb. 1, 2012) ("Significant reductions [in nutrients such as nitrogen and phosphorus] were also shown through the removal of over 16,000 septic systems and conversion to central sewer systems.").

[17] *See Keeping Raw Sewage and Contaminated Storm Water Out of Our Nation's Water*, ENVIRONMENTAL PROTECTION AGENCY, http://www.epa.gov/compliance/data/planning/initiatives/2011sewagestormwater.html (last visited Feb. 1, 2012) (review EPA's electronic map entitled "Progress on Compliance and Enforcement Activities").

part of federal Clean Water Act consent decrees entered into by EPA, state environmental regulators, and local governments all over the country.[18] Indeed, because of the environmental and public health benefits, EPA routinely approves septic conversion projects as supplemental environmental projects that offset fines and penalties otherwise imposed as part of Clean Water Act consent decrees with local governments.[19] Simply put, environmental regulators not only support projects like the one at issue in this case, they require them. Local governments need flexibility to finance and implement them—and then change them when it is sensible to do so.

Regulatory requirements imposed on local governments make financing public improvements for the country's aging infrastructure increasingly complex. Financing wastewater treatment improvements typically now involves a mix of wastewater collection and treatment use rates and charges, general government taxes, low or no-interest state and federal loans, and revenue derived from public-private partnerships to operate public works.[20] In the Barrett Law context,

---

[18] For the list of Clean Water Act Consent Decrees currently lodged in federal courts, *see Proposed Consent Decrees*, DEPARTMENT OF JUSTICE, http://www.justice.gov/enrd/Consent_Decrees.html (last visited Feb. 1, 2012).

[19] *See* ENVIRONMENTAL PROTECTION AGENCY, BEYOND COMPLIANCE: SUPPLEMENTAL ENVIRONMENTAL PROJECTS (2001), http://www.epa.gov/compliance/resources/publications/civil/programs/sebrochure.pdf.

[20] *See* RICH ANDERSON, WHO PAYS FOR THE WATER PIPES, PUMPS AND TREATMENT WORKS? – LOCAL GOVERNMENT EXPENDITURES ON SEWER AND WATER – 1991 TO 2005, UNITED STATES CONFERENCE OF MAYORS, http://www.usmayors.org/urbanwater/07expenditures.pdf (detailing aggregate expenditures from state and local revenues); *Clean Water State Revolving Fund*,

the City typically used the lump-sum payments to pay some of the project construction costs and had to finance the rest with debt instruments serviced by the installment payments. In many cases, the periodic Barrett Law payments were difficult to collect from low-income homeowners. Petitioners' simplistic view that they have been discriminated against must be re-evaluated in light of the complexity of funding infrastructure upgrades.[21]

And the bubble of Petitioners' simplistic view is burst by an example only slightly different than this case. Suppose a local government in a watershed prone to flooding required homeowners to pay a

---

ENVIRONMENTAL PROTECTION AGENCY, http://water.epa.gov/grants_funding/cwsrf/cwsrf_index.cfm (last visited Feb. 1, 2012); IND. CODE § 5-23-1-1 (establishing public-private agreements for operation of governmental facilities); ROGER HARTMAN, CONTRACTING WATER AND WASTEWATER UTILITY OPERATIONS, REASON FOUNDATION (1993) (showing that for two decades, "[m]ounting regulatory pressure, scarcity of competent personnel, and significant budgetary problems are leading more and more communities to consider private-sector contract operations and maintenance (O&M) of water and wastewater facilities").

[21] Some communities around the country have private sewer lateral repair and replacement subsidy programs designed to eliminate infiltration and inflow of storm water into septic systems, which causes sewer overflows. *See* CAROLINE ELLERKAMP & ERIN FIFIELD ET. AL, RESIDENTIAL SEWER LATERAL MAINTENANCE PROGRAM ANALYSIS FOR THE CITY OF MILWAUKEE, UNIVERSITY OF WISCONSIN-MADISON (2010), http://v3.mmsd.com/AssetsClient/Documents/PrivatePropertyI&I/La%20Follette%20Sewer%20Report.pdf (among other things, surveying 78 cities' programs for sewer lateral maintenance). These programs can be so individualized and specific to hydrological and sewer capacity factors that they would be especially vulnerable to attack under the Equal Protection Clause if local governments are not free to revise the financing of their programs based on trial and error and new engineering.

special assessment for a badly needed flood mitigation capital project.[22] The local government decides to give affected homeowners a choice; they may pay the assessment in a lump sum or pay over time. As would be typical, the local government uses the lump sum payments to pay for part of the construction costs and finances the balance, with the expectation that it will use the future revenue stream from periodic payers to service the debt. A year later, the state legislature makes flood control in that local government's watershed a top funding priority in the state's new budget. As a result, the state pays the City's outstanding debt incurred for the project.

Under Petitioners' view, the local government must either: (1) continue to accept the periodic payments from residents who elected to pay over time even though the local government has no need for such revenues, or (2) devise a calculation to use the continuing payments to reimburse homeowners who paid by lump sum. Some local governments may choose to pursue one of those options for policy reasons. But the best view of the Equal Protection Clause is that the local government is not required to choose either option. Otherwise, federal courts are put in the uncomfortable position of second-guessing state legislative appropriators.[23] The best way to

---

[22] Special assessments are one way in which flood control projects are financed. For an analysis of flood control project financing methods considered by local governments, *see* SCOTT CHINN & DAVID GOGOL, STUDY OF SHORT AND LONG TERM SOLUTIONS TO FLOOD CONTROL GOVERNANCE IN NORTHWEST OHIO, BAKER & DANIELS (Feb. 2010), http://floodpartnership.org/media/FloodControl_Governance.pdf.

[23] The Indiana Supreme Court has recognized that separation of powers principles under the Indiana Constitution makes state legislative appropriation decisions "unusually unsuitable"

view this example, and Indianapolis's decision to adopt STEP, is as a rationally based infrastructure funding program change—one just like so many such decisions in a complex system that requires matching scarce revenues with local and state government priorities.

3. Other Programs

Not only would accepting Petitioners' view trouble policymakers responsible for financing traditional infrastructure like sewers and flood control projects, but it also would straightjacket even-more-complex infrastructure financing schemes for fiber optics, wireless technology, and green infrastructure, which are rapidly developing and ever changing. For example, the Federal Communications Commission's National Broadband Plan encourages partnerships between local government and broadband providers to make local infrastructure, including sewers, available for broadband expansion and utilization.[24] Some projects locate fiber optic cable in sewer lines or other rights-of-way. Homeowners connected to the cable pay fees to the local governments or the broadband

---

for judicial review. *Bonney v. Indiana Finance Authority*, 849 N.E.2d 473, 482 (Ind. 2006). And principles of federalism likewise ought to be considered. As is true of dormant commerce clauses cases, scrutinizing state government appropriations decisions and local government infrastructure funding programs is an inquiry "ill suited to the judicial function and should be undertaken rarely if at all." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring).

[24] *See National Broadband Plan*, FEDERAL COMMUNICATIONS COMMISSION, http://www.broadband.gov/plan/6-infrastructure/ (last visited Feb. 1. 2012). Wireless and fiber-to-home projects sponsored in part by state and local governments that cater to unserved or underserved populations were allocated more than $7 billion American Recovery and Reinvestment Act funds.

provider working in partnership with the local government. What if a local government partnered with a developer or a broadband provider to connect a neighborhood under an infrastructure financing arrangement for which the homeowners paid a fee to the government-owned utility? Later, if the local government received federal funds to do the same thing in the adjoining neighborhood and did not charge a user fee, residents in the first neighborhood should not possess a viable equal protection claim because of the program change. The relationship among the federal government, local governments, and broadband providers in expanding access to broadband and other services is fostered by permitting local governments to freely change fee structures that support infrastructure improvements.[25]

4. Remedial Conundrums

Few if any state and local governments interested in changing an infrastructure financing program will have the funds to retrospectively reimburse residents who electively paid a fee in full under the prior program. So invalidating the City's decision in this case to forgive assessment debt of residents who chose to pay over time incentivizes the City to simply not forgive the debt. The City would implement changed financing only for new projects, would have

[25] *See* Interview by Dennis Scholl with Graham Richard, former Mayor, as part of the Digital Revolution and Democracy Series, http://www.knight foundation.org/blogs/knightblog/2011 /10/27/focas-series-graham-richard/ (former Ft. Wayne, Indiana, mayor Graham Richard discussing "smart city bonds" based on a "partnership with local, private-sector companies [to] provide[] the financing to install fiber optic systems that help make smart technology that runs your city better and faster").

to administer dual, parallel financing programs, and no one would get a break.

Another remedial conundrum if the Indiana Supreme Court's decision is reversed is if the City must refund payments to lump-sum payers because it forgave the assessment debts of installment payers, to whom would and should that relief be granted? Some previous Barrett Law projects had 20- or 30-year payoff periods. Residents who paid their Barrett Law obligations in a lump sum 30 years ago may not be the current owners or residents of the improved properties and may no longer be alive.

Petitioners argue that the Equal Protection Clause would not be satisfied by a "leveling down" where periodic payers continue to pay as a remedy to avoid alleged discrimination against lump-sum payers, but their argument misses the point. State and local governments will be deterred from making decisions in the public interest if they cannot revise infrastructure funding programs based on changed conditions and priorities. Courts second guessing routine, necessary line-drawing questions will paralyze local and state governments in future policymaking. State and local governments need flexibility to modify program and infrastructure funding schemes in a timely manner without fear of legal intervention when circumstances change.

CONCLUSION

To permit state and local governments the necessary flexibility to implement and change policies, especially those governing infrastructure improvements, this Court should affirm the judgment of the Indiana Supreme Court.

Respectfully submitted,

LISA E. SORONEN
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

JON LARAMORE
Counsel of Record
A. SCOTT CHINN
FAEGRE BAKER DANIELS
300 N. Meridian St.
Suite 2700
Indianapolis, IN 46204
(317) 237-0300
jon.laramore@FaegreBD.com
scott.chinn@FaegreBD.com

Counsel for Amici Curiae

February 2012