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

BRIEF OF NATIONAL TAXPAYERS UNION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The National Taxpayers Union ("NTU") is a nonprofit, nonpartisan membership organization founded by concerned taxpayers in 1969.[1] NTU's mission is to protect the interests of federal, state, and local taxpayers through public education, lobbying, and litigation on tax, spending, regulatory, and economic issues. NTU represents over 362,000 members in all fifty states, and it has frequently participated in matters in this Court. *See Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989); *see also, e.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *DIRECTV, Inc. v. Levin*, No. 10-1322 (petition for certiorari pending).

A fundamental purpose of NTU is challenging improper or illegal taxation on behalf of taxpayers who might otherwise face insurmountable hurdles in attempting to vindicate their legal and constitutional rights. NTU has litigated against efforts by state and local officials to erode restraints on their taxing authority, including both those imposed by citizens through ballot measures and the constitutional

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for amicus timely notified counsel for the parties under Supreme Court Rule 37. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

limitations imposed by the Equal Protection Clause. Based on NTU's experience in the area of taxation, it believes that this Court's review is warranted to correct the Indiana Supreme Court's erroneous decision to permit a local taxing authority to withhold tax refunds from those who paid their tax assessments in full, even as it forgave the tax obligations of otherwise identically situated taxpayers who chose to pay in installments.

SUMMARY OF ARGUMENT

The decision of the court below is irreconcilable with *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989), which reaffirmed that the Equal Protection Clause "'protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.'" *Id.* at 639 (quoting *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946)). The Constitution requires "the seasonable attainment of a rough equality in tax treatment of similarly situated property owners," and disparate tax burdens must be "reasonable" and related to a legitimate government interest. *Id.* at 638. Here, the City of Indianapolis imposed enormously unequal tax burdens on taxpayers who are identically situated in every way but one: The City forgave the outstanding tax liability of taxpayers who paid in installments, while refusing to refund any taxes paid by those who had already paid in full. Such irrational and discriminatory treatment is not reasonably related to any legitimate government interest that the City has articulated, and cannot be squared with *Allegheny Pittsburgh*. The erroneous, contrary decision of the court below has important legal and practical

ramifications that warrant this Court's immediate review.

Specifically, this case presents a significant legal question regarding the interplay between *Allegheny Pittsburgh* and *Nordlinger v. Hahn*, 505 U.S. 1 (1992). Contrary to this Court's own explanation in *Nordlinger*, the court below limited *Allegheny Pittsburgh* to its precise facts. By contrast, other courts have continued to treat *Allegheny Pittsburgh* as good law, and several, in particular, have held that unequal tax policies similar to the one at issue here violate the Equal Protection Clause. This Court's intervention is needed to correct the Indiana Supreme Court's view that *Allegheny Pittsburgh* provides no meaningful constitutional limit on tax decisions.

A proper understanding of *Allegheny Pittsburgh* and *Nordlinger* would apply broadly to tax decisions across the country, and in particular to the tax consequences of the large number of instances where taxpayers have the option of paying immediately or in installments over time. Tax decisionmakers and courts need a clear rule on how to apply the Equal Protection Clause to unequal taxation in these situations.

Finally, there is no rational basis for forgiving the tax obligations of those who had chosen to pay in installments and withholding a refund from those had already paid in full. The court below relied on the supposition that those who paid in full were in a better financial position than those who paid in installments, but there is no evidence to support this speculation, or even to show that the City considered

this possibility when implementing its discriminatory tax arrangement. Moreover, this purpose would conflict with Indiana law, just as a purpose of tax inequality conflicted with state law in *Allegheny Pittsburgh*. This Court should grant certiorari to reverse the court below and reaffirm the validity of *Allegheny Pittsburgh*'s requirement of a real, rational basis for unequal taxation. NTU believes the proper remedy is for all affected taxpayers to receive refunds of past payments and forgiveness of future payments, regardless of whether their overpayment was made in a single lump sum or installments.

ARGUMENT

I. THIS CASE PRESENTS IMPORTANT LEGAL ISSUES THAT AFFECT TAXPAYERS ACROSS THE COUNTRY.

A. This Court should correct the erroneous, outlier interpretation of *Allegheny Pittsburgh* adopted by the court below.

This case presents a fundamental dispute over the interpretation of two of this Court's cases: *Allegheny Pittsburgh* and *Nordlinger*. The court below concluded that *Nordlinger* limited this Court's unanimous decision in *Allegheny Pittsburgh* to its precise facts, making the latter essentially worthless as precedent. This approach—which conflicts with this Court's own explanation of its decisions in *Nordlinger*—is incorrect. This Court should make clear that *Allegheny Pittsburgh* remains good law, and that irrational tax decisions remain unconstitutional.

In *Allegheny Pittsburgh*, this Court held that a county's practice that "resulted in gross disparities in

the assessed value of generally comparable property," and thus in the tax on comparable property, violated the Equal Protection Clause. *Id.* at 338. The county tax assessor decided to value property based on its purchase price, while making only minor modifications in the assessments of land that had not been sold recently. *See id.* As a result, the petitioner "was assessed and taxed at approximately 35 times the rate applied to owners of comparable properties." *Id.* at 341. This Court recognized that a "State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable," but held that "West Virginia has not drawn such a distinction." *Id.* at 344-45. Indeed, West Virginia's differential tax burden contravened the state's constitution, which "provide[d] that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value." *Id.* at 345.

Three Terms later, in *Nordlinger v. Hahn*, 505 U.S. 1 (1992), this Court denied an equal protection claim challenging an amendment to the California Constitution whereby "[r]eal property is assessed at values related to the value of the property at the time it is acquired by the taxpayer rather than to the value it has in the current real estate market." *Id.* at 5.[2] The effect of this "acquisition value" system of taxation was that "longer term property owners pay lower property taxes reflecting historic property

[2] NTU actively supported enactment of the California constitutional amendment (Article XIIIA) at issue in *Nordlinger*.

values, while newer owners pay higher property taxes reflecting more recent values." *Id.* at 6. This Court held that "[t]he appropriate standard of review is whether the difference in treatment between newer and older owners rationally furthers a legitimate state interest." *Id.* at 11. This standard means that "the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Id.* (internal citations omitted). The Court held that there were "at least two rational or reasonable considerations" justifying the differential treatment: (1) "the State has a legitimate interest in local neighborhood preservation, continuity, and stability"; and (2) "the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner." *Id.* at 12.

This Court explained that the "obvious and critical factual difference between [*Nordlinger*] and *Allegheny Pittsburgh* is the absence of any indication in *Allegheny Pittsburgh* that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the Webster County tax assessor's unequal assessment scheme." *Id.* at 14-15. In short, rational basis review "require[s] that a purpose may conceivably or may reasonably have been the purpose and policy of the

relevant governmental decisionmaker"; and, in *Allegheny Pittsburgh*, "the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme." *Id.* at 16 (internal quotation marks omitted); *see also Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 109-110 (2003) (reiterating this basis for reconciling *Nordlinger* with *Allegheny Pittsburgh*).

Instead of accepting this Court's own explanation of why *Allegheny Pittsburgh* remained good law after *Nordlinger*, the court below discarded *Allegheny Pittsburgh*. It provided three grounds for doing so, none of which withstands scrutiny.

First, the court below held that "*Allegheny Pittsburgh* has essentially been narrowed to its facts." *City of Indianapolis v. Armour*, 946 N.E.2d 553, 568 (Ind. 2011). However, nothing in *Nordlinger* or any other decision by this Court suggests that *Allegheny Pittsburgh* should be read so narrowly. Indeed, *Nordlinger* accepted the principles of *Allegheny Pittsburgh*, and held simply that a rational basis was present in one case but not in the other.

Second, the court below reasoned that *Allegheny Pittsburgh* was inapposite because it was purportedly "a class-of-one case—a tax policy directed at a particular taxpayer." *Id.* The court cited no language in *Allegheny Pittsburgh* or *Nordlinger* supporting the idea that *Allegheny Pittsburgh* applies only to a "class-of-one" case. In any event, as this Court has explained, the designation as a "class-of-one" case "is of no consequence because . . . the number of individuals in a class is immaterial for equal

protection analysis." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 n.* (2000) (per curiam). Likewise, the suggestion by the court below that "animus or ill-will toward the plaintiffs" is a *de facto* requirement for a class-of-one equal protection violation, *see City of Indianapolis*, 946 N.E.2d at 565, has no basis in precedent. Indeed, if *Allegheny Pittsburgh* were a class-of-one case, it would belie any such suggestion, because no such finding of animus existed there.

Third, the court below observed that *Allegheny Pittsburgh* "has been criticized by at least one Justice on the Supreme Court and by scholars." *City of Indianapolis*, 946 N.E.2d at 568 (citing *Nordlinger*, 505 U.S. at 18-28 (Thomas, J., concurring in part and concurring in the judgment); William Cohen, *State Law in Equality Clothing: A Comment on Allegheny Pittsburgh Coal Company v. County Commission*, 38 UCLA L. REV. 87, 104 (1990); Robert Jerome Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261, 263 (1990)). Of course, a concurring opinion and a few law review articles provide no basis for a lower court to discard this Court's precedents.

In contrast to the court below, other courts continue to apply the principles underlying *Allegheny Pittsburgh* beyond the particular facts in that case. The most obvious example is the Indiana district court that held unconstitutional the very same tax at issue in this case. *See Cox v. City of Indianapolis*, No. 1:09–cv–435–WTL–DML, 2010 WL 2484620, at *3-*4 (S.D. Ind. June 14, 2010). Likewise, several other courts have held that differential refunds based on whether a tax payment was made in full violate the Equal Protection Clause. *See, e.g.*, *State ex rel. Stephan v. Parrish*, 891 P.2d 445, 457 (Kan. 1995);

Armco Steel Corp. v. Dep't of Treasury, 358 N.W.2d 839 (Mich. 1984); *Perk v. City of Euclid*, 244 N.E.2d 475, 477 (Ohio 1969); *Richey v. Wells*, 166 So. 817, 819 (Fla. 1936).

More generally, outside this particular context, courts have held that *Allegheny Pittsburgh* has broad applicability. For example, the Ninth Circuit has recognized that the key difference between *Allegheny Pittsburgh* and *Nordlinger* is that in the former, the policy "violated a statutory command," and in the latter, the policy "was required by state law." *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1197-98 (9th Cir. 2002). The Ninth Circuit held that this distinction results in a different standard for rational basis review: "*Allegheny Pittsburgh* does not tell us precisely what standard of rationality is required under equal protection to justify a systematic difference in treatment when that difference violates a statutory command, but it is at least clear that the standard is substantially less forgiving than when the difference in treatment is statutorily required." *Id.* at 1198.

In sum, the Indiana Supreme Court has created a significant conflict over the proper interpretation of *Allegheny Pittsburgh* in light of *Nordlinger*. This Court's guidance is needed to correct the view of the court below and to reaffirm that government officials may not make discriminatory tax decisions without any legitimate purpose.

B. The issues in this case are important and will affect tax decisions across the country.

There is enormous variation in tax policies across the country, and the equal protection issues at stake here are crucial in evaluating those policies.

Tax officials—and courts reviewing their decisions—need to know that there must be a legitimate basis for tax decisions, particularly those that differentiate among similarly situated taxpayers. The court below reasoned that administrative convenience and preservation of resources are legitimate bases for a 30-to-1 difference in taxing otherwise similar households. Moreover, it held that an unsupported supposition of different income levels could support different taxes, even absent any evidence of such differential income, and in the face of state law to the contrary. *See infra* Part II. In short, according to the decision below, *Allegheny Pittsburgh* provides virtually no limit on tax decisions. This Court's intervention is necessary to correct these errors and to provide needed guidance on the proper interpretation of *Allegheny Pittsburgh*.

Furthermore, the particular situation here is likely to recur frequently. There are many situations in which a taxpayer has the option to pay in installments or in a lump sum. *See, e.g.*, S.C. Code § 12-45-75 ("The governing body of a county may by ordinance allow each taxpayer owning a parcel of taxable real property within the county the option to pay property taxes in installments . . . ."); Ky. Rev. Stat. § 141.305 ("Installment payments of estimated tax."); St. Louis County Revenue, Property Tax Installment Payment Program, *available at*

http://revenue.stlouisco.com/collection/PropertyTaxInstallmentPaymentProgram.pdf ("To be eligible for the prepayment installment program, . . . [t]he total tax billed amount, based on last year's taxes, must be a minimum of $100 . . . ."); Lee County, Fla., Installment Payment Plan, *available at* http://www.leetc.com/taxes.asp?page_id=txinstallplan ("Property taxes can be paid by the installment method if the prior year's real estate or tangible tax bill is more than $100."). In these circumstances, any time there is a refund, there is a possibility of disfavoring the taxpayers who paid up front. Indeed, government officials in many states discriminated against such taxpayers until (as discussed above) state supreme courts generally held that differential refunds cannot be based on whether the tax payment was made in full. The Indiana Supreme Court's decision now calls that principle into doubt.

Finally, the issue is not only potentially widespread, but plainly of great significance to the people involved—all of whom chose to pay their taxes fully, and without meeting any income criteria for doing so. In short, this case involves not only a significant legal issue, but equally significant practical consequences for taxpayers throughout the country.

II. THE COURT BELOW ERRED IN UPHOLDING THE PLAINLY IRRATIONAL TAX IN THIS CASE.

The court below erred in upholding tax forgiveness for taxpayers who had chosen to pay over time but not a refund for identically situated taxpayers who had chosen to pay in full. Under the

correct reading of *Allegheny Pittsburgh*, an unequal tax practice requires a rational basis that "may conceivably or may reasonably have been the purpose and policy of the relevant governmental decisionmaker." *Nordlinger*, 505 U.S. at 15-16 (internal quotation marks omitted). In addition, a court will not infer that a decisionmaker had a permissible purpose if such action conflicts with state law. *See Allegheny Pittsburgh*, 488 U.S. at 345.

Here, there is no rational basis that was conceivably the actual purpose of the unequal taxation imposed by the City. In upholding the unequal taxation, the Indiana Supreme Court cited "preservation of limited resources" and "administrative convenience," *City of Indianapolis*, 946 N.E.2d at 560, 563, as legitimate government interests—but neither of these bases is remotely plausible. The preservation of resources might explain (though, in NTU's opinion, not necessarily justify on policy grounds) the total amount of reduced taxes, but not the inequality, *i.e.*, the choice to draw the line between those who paid fully and those who did not. Administrative convenience is even more nonsensical because the refund to those who paid in full would involve only basic arithmetic.

The only other explanation offered by the court below is that "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." *Id.* at 562. But there is no evidence that taxpayers who paid fully were in better financial positions, or that the City actually considered this possibility prior to litigation. *See id.* at 572 (Rucker, J., dissenting). The court

below held that the City need not "come forth with proof that all the property owners who had their assessments discharged were actually middle- or low-income" individuals. *Id.* at 562. However, as *Nordlinger* explained, "the Equal Protection Clause is satisfied so long as . . . the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker." *Nordlinger*, 505 U.S. at 11. In other words, for purposes of the rational basis test, courts must accept the government's explanation only if the government actually considered some facts in the first place. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("*Where there was evidence* before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.") (emphasis added).

Here, the City did not provide evidence regarding *any* of the taxpayers who delayed payment or those who paid in full. *See Cox*, 2010 WL 2484620, at *4 ("There is absolutely nothing in the record indicating that the Plaintiffs are not lower to middle income property owners. As such, this argument does not present a plausible reason for the disparate treatment within the class.") (internal quotation marks omitted). Accordingly, there is nothing to show that this purpose was reasonably or conceivably the City's purpose.

In any event, as in *Allegheny Pittsburgh*, the rationale offered by the City in litigation is contrary to state law. The tax was imposed pursuant to Indiana's Barrett Law, which required taxes to be

"apportioned equally among all abutting lands or lots." Ind. Code § 36-9-39-15. The City simply reduced the taxes imposed under this law. However, this reduction was given only to the taxpayers who had chosen to pay by installment. As a result, the taxes were not apportioned equally, as required by law. Indeed, even the new tax scheme that replaced the Barrett Law system—and provided the reason for the tax reduction—does not purport to take income or "financial position" into account in the amount of taxation. *City of Indianapolis*, 946 N.E.2d at 557 n.5. Rather, it mandates a flat $2,500 fee (along with a monthly sewer bill) for all property owners adjacent to new sewer construction projects. *Id.* Thus, the supposed purpose of taxing based on financial position was contrary to state law, just as a purpose of unequal taxation in *Allegheny Pittsburgh* was contrary to state law mandating uniform rates. 488 U.S. at 345. This supposed reason for unequal taxation is not a "conceivable purpose" because it contravenes state law.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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