No. 11-161

In The Supreme Court of the United States

CHRISTINE ARMOUR, et al.,

Petitioners,

v.

CITY OF INDIANAPOLIS, INDIANA, et al.,

Respondents.

On Writ Of Certiorari To The Indiana Supreme Court

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Institute for Justice (IJ) is a nonprofit public-interest law firm that litigates in support of greater judicial protection for individual rights, including rights that are not presently deemed fundamental – such as private property ownership and occupational freedom – and are therefore subject to rational-basis review. As part of this advocacy, IJ has an interest in ensuring that lower courts properly apply this Court's rational-basis jurisprudence.

All parties in this case have consented to the filing of this *amicus* brief.[1]

SUMMARY OF ARGUMENT

This is a case about the rational-basis test. Specifically, it is about *which* rational-basis test the Court chooses to apply. One rational-basis test is so deferential as to be no test at all – a mere rubber stamp of government action. But there is another rational-basis test: the test this Court actually applies when adjudicating rational-basis cases. Plaintiffs have prevailed in fully 15% of modern rational-basis cases decided by this Court – and that is because, as

[1] Counsel for the parties in this matter did not author this brief in whole or in part. No person or entity other than the Institute for Justice, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

amicus will explain below, the rational-basis test is not the supine caricature of judicial review sometimes described by academics. It is a real (though deferential) standard, requiring real scrutiny.

In rejecting Petitioners' claims below, the Indiana Supreme Court embraced a common misconception of this Court's rational-basis jurisprudence. In short, it decided that "rational basis" review effectively means that "the government always wins," and that any decisions of this Court in which the government did *not* win must be one-off cases that are limited to their facts. *See* Pet. App. 27a-28a (holding that *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989), was "the rare case where the facts precluded any plausible inference that the reason for the unequal assessment was [legitimate]" and had "been narrowed to its facts"); *id.* at 16a (holding that the court was bound to disregard "what the actual facts would show").

But this understanding of the rational-basis test as a mere judicial rubber-stamp cannot be squared with this Court's rational-basis precedents, in which plaintiffs have prevailed in 18 out of 117 cases since 1970. To be sure, this reflects a test that is deferential to the government, but it cannot be reconciled with the complete absence of scrutiny afforded by the lower court in this case. Simply put, the rule of law cannot tolerate a system under which this Court's rational-basis decisions in favor of government count as precedents, while any decisions in which plaintiffs win are automatically "narrowed to [their] facts." It is

incumbent upon lower courts to look beyond *dicta* about how deferential the rational-basis test is to discern the principles that are at work when this Court has determined a government action fails that test.

Looking beneath the rhetoric, there are three specific principles by which this Court invalidates statutory classifications under the equal-protection guarantee in the rational-basis context: (1) the absence of any logical connection between even a hypothetical rational basis and the statutory classification; (2) the public harm imposed by a statutory classification is so vastly larger than any plausible public benefit as to render the classification irrational; or (3) the statutory classification seeks to achieve a goal that is not a legitimate objective of government. It is also clear that the Court applies these principles in light of record evidence and is not bound to accept *post hoc* rationalizations for government classifications when those rationalizations can find no footing in the facts of the case.

As applied to this specific case, these principles demand reversal. The simple fact that the City of Indianapolis could save money by refusing to refund Petitioners' excess tax payments cannot justify the disparate treatment of property owners. The county government in *Allegheny Pittsburgh*, after all, would have had more money if it had been allowed to continue charging wildly disproportionate tax rates to some property owners – as, indeed, would any government entity if it were allowed to arbitrarily single out a particular citizen and demand that he empty

his pockets. And the rationale actually accepted by the Indiana Supreme Court below – that the City could have charged these disparate rates out of a belief that the property owners who had not already paid their taxes in full were poorer than the property owners who had pre-paid their assessment – is exactly the sort of counterfactual *post hoc* speculation that this Court rightly rejects in the rational-basis context.

The rational-basis test, as applied by this Court, is a deferential but real form of judicial review, under which government classifications are required to bear an actual, factually plausible relationship to a legitimate government end. And, applying the rational-basis test as it actually exists in this Court's precedents, the Indiana Supreme Court's decision must be overturned.

ARGUMENT

This brief proceeds in two sections. First, *amicus* demonstrates that the rational-basis test, as applied by this Court, is a meaningful standard of review conducted in light of actual evidence. Second, *amicus* demonstrates that applying the real rational-basis test – as distinct from the caricature of that test applied below – confirms that there is no rational basis for the City of Indianapolis's wildly disproportionate property-tax rates.

I. THE RATIONAL-BASIS TEST IS A REAL STANDARD OF REVIEW.

There are two rational-basis tests in American jurisprudence. Each of them takes the standard form – that government action will be upheld "so long as it bears a rational relationship to a legitimate government interest." *District of Columbia v. Heller*, 554 U.S. 570, 687-88 (2008) (internal quotation marks and citation omitted). But there are two sharply different readings of what that test means. The first, which has been described in *dicta* by this Court and is frequently invoked by commentators,[2] is not even a standard of review but simply an injunction that, in a dispute between the government and a citizen, the government must always win. The second, which is the test actually applied by this Court in its decisions, imposes meaningful limits on how governments may treat their citizens.

There is, to be sure, no shortage of *dicta* in this Court's decisions that appear to describe a test under which the government will always win.[3] Consider, for

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[2] *See*, *e.g.*, Richard H. Fallon, Jr., *The Supreme Court, 1996 Term-Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997) (calling rational-basis review a "virtual rubber stamp").

[3] *Amicus* does not dispute the existence of *dicta* describing, in sweeping terms, the deference required by the rational-basis test. *See*, *e.g.*, *FCC v. Beach Commc'ns*, 508 U.S. 307, 313 (1993) ("[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."); *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) ("[T]he Equal Protection Clause does not

(Continued on following page)

example, the plaintiff's burden "to negative every conceivable basis" for a challenged law "whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (citations and internal quotation marks omitted). Taken at face value, this describes a standard that is metaphysically impossible to meet: The human imagination will always be able at least to *conceive* of a hypothetical basis for a statutory classification that even the most conscientious plaintiff, under even an ideal set of facts, has failed to "negative" in her summary-judgment papers. Thus, if boilerplate like "negative every conceivable set of facts" is taken at face value, then there can be no meaningful judicial review of most government classifications because "rational-basis review" could not possibly mean anything other than "the government always wins."

But the government does *not* always win, which is why there must be more to rational-basis review than

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demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification."); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations . . . ."); *Dandridge v. Williams*, 397 U.S. 471, 485 (1972) ("If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality."). Rather, *amicus* contends that this *dicta*, taken at face value, cannot be squared with the actual holdings of this Court in rational-basis cases.

the caricature sometimes described in law-review articles. Indeed, since 1970, this Court has heard 117 different equal-protection cases in which it applied rational-basis review, and it has found in favor of the plaintiffs in 18 of those cases. In no case has this Court ruled in favor of plaintiffs only after determining that it was literally impossible to conceive of even a hypothetical rationale for the challenged classification that the plaintiffs had failed to "negative." This proves that the actual reasoning employed and outcomes reached by this Court in its equal-protection rational-basis cases are wildly different from what one would predict based simply on the oft-cited *dicta* quoted above.

If the most sweeping *dicta* about the rational-basis test is inaccurate, however, it becomes necessary to look for unifying principles underlying this Court's rational-basis jurisprudence. That is, it becomes necessary to treat the Court's rational-basis cases as *precedents* and, as with any precedents, look for underlying principles that can be consistently applied. A careful examination of the cases where this Court has applied the rational-basis standard makes these basic principles apparent.

When this Court invalidates a government classification under rational-basis review, it does so in three separate circumstances:

> (1) where there is no logical connection between a proffered legitimate interest and the statutory classification;

> (2) where the public harm imposed by a statutory classification is so vastly larger than any plausible public benefit as to render the classification irrational; or
>
> (3) where the statutory classification seeks to achieve a goal that is not a legitimate objective of government.

Moreover, this Court conducts rational-basis analysis in *reality*, not in a fantasy realm of "any conceivable set of facts." In applying the principles above, the Court demands that a proffered rationale be *plausible* – that is, it requires an explanation for the government's action that can actually be squared with the record and with common sense. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").

Below, *amicus* discusses each of the principles used by this Court to decide in favor of rational-basis plaintiffs – lack of logical connection, disproportionate harm, and illegitimate ends – and then explains that the rational-basis test (like any judicial

determination) is conducted in light of record evidence rather than simply in light of any made-up facts or justifications the human imagination can conjure. Finally, *amicus* demonstrates that the principles animating this Court's decisions in rational-basis cases where plaintiffs win are perfectly consonant with the holdings of this Court's rational-basis cases where plaintiffs lose.

A. This Court Rejects Legislative Classifications When There Is No Logical Connection Between the Classification and a Government Interest Offered in Support of It.

A statutory classification will fail rational-basis review when there is no logical connection between the classification and the government interest (or interests) proffered in support of it. In such circumstances, invalidation of the classification is appropriate – deference to legislatures notwithstanding – because an utter absence of logic renders a statutory scheme arbitrary. The authority to legislate, whether exercised by Congress or a village council, has never been understood to include the power to legislate arbitrarily.

A clear illustration of this principle is found in *Zobel v. Williams*, 457 U.S. 55, 61-62 (1982). *Zobel* involved an equal-protection challenge to an Alaskan program that distributed oil revenue each year to citizens based on the length of their state residency.

For every year of Alaska residency since 1959, residents were entitled to one share of the dividends of the state's oil fund. *Id.* at 56-57. In other words, people who had moved to Alaska earlier would receive a special windfall payment – forever. A group of latter-day Alaskans brought suit, alleging that this permanent classification between bona fide residents violated the Equal Protection Clause. *Id.* at 57-58.

Alaska proffered two possible rationales in defense of its unequal treatment of earlier and later residents that the Court rejected on logical grounds. The State argued that the windfall of oil money to earlier residents: (1) encouraged others to move to sparsely populated Alaska; and (2) gave residents a stake in the prudent management of oil reserves. *Id.* at 61.

Alaska's asserted interests – growing its population and managing its natural resources – were clearly legitimate, but this Court nonetheless invalidated the distinction because there was no logical connection between those interests and the challenged statutory classification. *Id.* at 61-63. Giving more oil money to people who already lived in Alaska obviously would not incentivize *new* people to move to Alaska, since new residents were categorically excluded from receiving that oil money. And preserving natural resources by giving Alaskans a financial stake in their use is surely a legitimate interest – but not one that justifies giving that financial stake to *some* Alaskans while arbitrarily excluding others.

The no-logical-connection principle is also evidently at work in other rational-basis decisions of this Court. In *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), for example, this Court acknowledged that a home's being too big could be a valid reason for denying a permit, but found no logical connection between that principle and the City's actions in light of the fact that homes of identical size were routinely granted permits. *Id.* at 449. Similarly, in *Williams v. Vermont*, 472 U.S. 14, 24-25 (1985), the State of Vermont asserted its legitimate interest in encouraging Vermont residents to purchase cars within the state, but this Court found no logical connection between that interest and the State's attempt to levy a tax on a car purchased out of state before its owner had even moved to Vermont. *Id.* at 24-25.[4]

[4] *See also Quinn v. Millsap*, 491 U.S. 95, 108 (1989) (finding no logical connection between an individual's ability to understand politics and an individual's ownership or non-ownership of land); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (same); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (finding no logical connection between stimulating the agricultural economy and providing food stamps only to households containing people who are related to one another); *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971) (finding, where the government had adopted a policy that inability to pay was not a sufficient reason to deny a transcript to a felony defendant, there was no logical reason that policy should not extend to a misdemeanor defendant); *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970) (finding no logical connection between fitness for political office and property ownership).

B. This Court Invalidates Statutory Classifications Where the Harm Caused by the Classification Vastly Outweighs Any Plausible Public Benefit.

This Court also rejects statutory classifications where the government's proffered justifications – such as saving money – are so wildly out of proportion with the harm caused by the classification that no rational legislator would accept them. In *Plyler v. Doe*, for example, the government asserted that denying public education to the children of illegal immigrants could help save government funds, which the Court rejected as a "wholly insubstantial [benefit] in light of the costs involved to these children, the State, and the Nation" of creating a subclass of illiterates. 457 U.S. 202, 230 (1982).

Even more analogous to the instant case is *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989). In *Allegheny*, the state of West Virginia used the most recent purchase price of land to assess property taxes, but because some property had not changed hands for decades this resulted in recent purchasers paying taxes as much as 35 times more than neighbors who had purchased long ago. *Id.* at 340-41. The county argued that, as a general proposition, purchase price was the most precise measure of property value, and that the wild disparities that resulted in some circumstances should be accepted as a necessary evil. *Id.* at 343. This Court, however, rightly refused to allow the county to impose gross disparities simply because doing so was in some

vague sense easier for county officials. *Id.* at 345-46. Thus, the mere fact that some small benefits (like cost savings) could plausibly be attributed to an unequal classification will not save it from invalidation if it achieves those small benefits at the price of imposing grossly disproportionate burdens.[5]

C. This Court Invalidates Statutory Classifications When They Seek to Advance an Illegitimate Government Interest.

Finally, this Court rejects statutory classifications that seek to advance illegitimate ends like animus or sheer favoritism (or disfavoritism) for its own sake. The constitutional impermissibility of this kind of naked, unjustified preference is well illustrated in *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). In that case, this Court held that the government could not justify withholding benefits from households made up of unrelated people on the

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[5] *See also James v. Strange*, 407 U.S. 128, 141-42 (1972) (holding that the state funds saved by denying indigent defendants exceptions to the enforcement of debt judgments was grossly disproportionate to the harms it inflicts on debtors); *Lindsey v. Normet*, 405 U.S. 56, 77-78 (1972) (holding that the cost savings from deterring a few frivolous appeals were insufficient to justify a surety requirement that allowed many frivolous appeals, blocked many meritorious appeals, and showered a windfall on landlords); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (holding that attempting to reduce the workload of the probate courts by excluding women from service as administrators in certain cases would be unconstitutionally arbitrary).

basis of a general animus towards "hippies." *Id.* at 534. In other words, government must justify its classifications by pointing to something beyond a simple desire to make that classification – it may not simply treat people worse for the sheer sake of treating those people badly.[6] *Cf.* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984) (coining the term "naked preference" to describe "the distribution of resources and opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.").

D. A Rational Basis Is One That Is Plausible in Light of Record Evidence.

In applying the principles laid out above, this Court routinely looks at and weighs record evidence. This means, for example, that it accepts proffered rational bases *only* if it is factually plausible that the

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[6] *See also Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding no legitimate interest in criminalizing consensual adult homosexual acts); *Cleburne*, 473 U.S. at 448 (rejecting sheer dislike of people with mental retardation as legitimate government interests); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (finding no legitimate interest in anti-gay animus); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985) (finding no legitimate interest in creating different classes of bona fide residents); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985) (finding no legitimate interest in discriminating against out-of-state companies); *Zobel*, 457 U.S. at 65 (finding no legitimate interest in creating permanent classes of bona fide residents).

suggested rationale could actually have motivated the action in question. *See*, *e.g.*, *Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (explaining that the government prevails in rational-basis cases where government classifications are "narrow enough in scope and grounded in a sufficient factual context for [the Court] to ascertain some relation between the classification and the purpose it served."); *Clover Leaf Creamery Co.*, 449 U.S. at 463 n.7; *Weinberger*, 420 U.S. at 648 n.16. Similarly, the Court will rely on evidence to determine whether there is a logical connection between the government's action and an asserted rational basis. *See*, *e.g.*, *Cleburne*, 473 U.S. at 449 (citing district court's post-trial findings of fact, as well as appellate court's reliance on those findings of fact).

The willingness to examine evidence in the above cases is in no way anomalous. Indeed, even in its earliest articulations of the test, this Court has always assumed that plaintiffs have the right to tender evidence to disprove the purported rationale underlying the government's action. *See*, *e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." (internal citations omitted)).

An important corollary to this principle is that the Court does not actually fabricate rational bases out of whole cloth on appeal. Notwithstanding *dicta* about upholding classifications based on "any conceivable basis," in none of the Court's rational-basis decisions has its decision hinged on a rationale devised out of whole cloth by an appellate judge.[7] Instead, the Court (when deciding in favor of a government defendant) has always been able to point to a rational basis of which the parties were aware – or, at minimum, clearly should have been aware. *Cf. Beach Commc'ns*, 508 U.S. at 317 (suggesting that Congress could have rationally adopted the explanation articulated by the FCC for its prior administrative scheme in passing a law that tracked these earlier regulations).

And there is good reason that this Court does not actually uphold laws based on the *post hoc* speculation of appellate judges: doing so would present serious due-process concerns. The central meaning of due process, as this Court has stressed for over a century, is that parties are entitled to notice and a

[7] While this Court has used similarly sweeping language in other contexts, such as the rule that a complaint will not be dismissed unless "no set of facts" could be proved that would entitle the plaintiff to relief, it regularly stresses that sweeping language like this has to be read reasonably, not literally. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560-63 (2007) (explaining that the "no set of facts" rule must be read reasonably and cannot be interpreted as dispensing with the need for a *plausible* set of facts).

meaningful opportunity to be heard. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)). And, as lower courts have had repeated occasion to point out, litigation by surprise is not a *meaningful* opportunity to be heard. *United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1401 (6th Cir. 1991) (noting that a defendant must have notice of the nature of proceeding to which he is subject); *Care and Protection of Orazio*, 861 N.E.2d 476, 482-83 (Mass. App. Ct. 2007) (finding trial judge's conversion of a custody hearing into a trial on the merits deprived mother of due process).[8]

Allowing classifications to be upheld based on explanations first invented at the appellate level would fly in the face of these bedrock principles. To be sure, the government is entitled to rely on a rational basis that is not directly supported by record evidence (provided that basis is not undermined or shown to be implausible by record evidence), and the government is similarly entitled to rely on a rational basis that may not have actually been the subjective motivation of particular legislators. But plaintiffs are entitled to introduce evidence demonstrating a lack of rational

[8] *Cf. United States v. Phillips*, 540 F.2d 319, 326 (8th Cir. 1976) (rejecting the argument that, in order to introduce evidence from a wiretap, the government first had to prove the "interception was made for *no* criminal, tortious, or other injurious purpose" because this test "would create an impossible burden of proving three negatives").

connection between a challenged classification and the government interest it supposedly advances, and allowing new rational bases to be formulated *ex nihilo* on appeal makes it impossible for even the most conscientious of plaintiffs to build a complete record on summary judgment – to discharge, in other words, their burden of "negativing" potential justifications for the challenged law.[9]

In short, facts matter in rational-basis cases, and rational-basis plaintiffs are allowed to introduce evidence to show courts what those facts are. Because of this, this Court has always evaluated the classifications before it in light of the possible rational bases actually articulated by (or reasonably attributable to) the government, rather than in light of any conceivable justification that could be imagined by an appellate judge.

[9] Taking the current case as an example, it is perhaps conceivable that the City of Indianapolis wanted certain property owners to pay lower taxes because those property owners were more likely to be military veterans, or because they were more likely to have small children, or because their particular homes were more likely to require asbestos removal. But there is no reason to believe any of those things is true, and it would be absurd to penalize plaintiffs for failing to "negative" those possible justifications (along with countless others) when neither the government nor any evidence actually points to them.

E. The Principles Evident in This Court's Rational-Basis Decisions in Favor of Plaintiffs Also Explain This Court's Rational-Basis Decisions in Favor of Government.

In rational-basis cases where the government wins, this Court does not depart from the principles outlined above. Rather, the basic truths of the rational-basis test are consistently applied in all this Court's rational-basis cases.

Even in *FCC v. Beach Communications*, 508 U.S. 307 (1993) – arguably the most-cited case for the proposition that rational-basis analysis is extremely deferential – the Court did not base its decision on wholesale conjecture. Instead, it relied on policy goals articulated by the government and examined the underlying logic of the government's actions.

The plaintiffs in *Beach Communications* had challenged the exemption from cable-television regulations of facilities that provided service to one or more buildings under common ownership without using a public right-of-way. *Id.* at 309. The Court identified two rational bases for this distinction. Most importantly, it identified the policy statement articulated by the FCC, which first promulgated the exemption in regulations before it was adopted by Congress, which justified the exemption by contending that commonly owned facilities of this sort would tend to be smaller and therefore less in need of regulation. *Id.* at 317.

Importantly, the plaintiff-respondents in that case did not refute the underlying factual premises of this distinction – and, indeed, expressly acknowledged that commonly owned facilities (where a single owner would have the incentive to advocate on behalf of his tenants to an outside cable provider) might need less regulation. *Id.* at 318-19. The fact that these premises were plausible – or, in the Court's phrasing, "arguable" – was enough to support a logical connection between the government's classification and the interests it had identified. *Id.* at 320.[10]

To be sure, this Court's opinion in *Beach Communications* is the source of some of the most sweeping *dicta* about the rational-basis test, most notably for its statement that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315. But, read in context, this statement merely stands for the uncontroversial proposition that courts will not engage in factual investigation of what "actually motivated" a legislature or require the

[10] As an alternative possible rational basis, the Court added in a single paragraph that cable distribution across buildings without a common owner could also have been justified by a concern about monopoly power, since the first owner to purchase a satellite dish would be able to connect nearby buildings for only the cost of connecting wire, and nearby owners would be unable to compete without making the hefty investment in a dish of their own. *Id.* at 319-20. This alternative, however, was *dicta* and not essential to the Court's core holding.

government to meet an affirmative evidentiary burden "explaining the distinction on the record." *Id.* (internal citations and quotation marks omitted). It does not purport to invalidate the line of cases reaffirming that courts can and should examine facts and evidence in rational-basis cases, even if the burden of providing that evidence is entirely on the plaintiffs. Indeed, the Court cited *Minnesota v. Clover Leaf Creamery Co.* without finding it necessary to disavow that case's assertion that the Court will reject asserted legislative objectives when "an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'" 449 U.S. at 463 n.7; *cf. Beach Commc'ns*, 508 U.S. at 315 (citing *Clover Leaf Creamery*, 449 U.S. at 464). And, indeed, in the wake of *Beach Communications*, this Court has continued to examine facts in the rational-basis context. *See Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (explaining that the government prevails in rational-basis cases where government classifications are "narrow enough in scope and grounded in a sufficient factual context for [the Court] to ascertain some relation between the classification and the purpose it served.").

The disagreement between the Court and Justice Souter's dissenting opinion in *Heller v. Doe*, 509 U.S. 312 (1993) is also instructive. In that case, the Court upheld Kentucky's rules under which a person with mental retardation could be involuntarily committed based on "clear and convincing evidence" while a mentally ill person could only be committed based on

a showing "beyond a reasonable doubt." *Id.* at 315. The Court upheld this distinction, accepting Kentucky's argument that mental retardation (unlike mental illness) is a developmental disability that becomes evident in childhood, and that it imposed the lower burden of proof because there was less risk of erroneously committing someone for mental retardation than for mental illness. *Id.* at 322. Justice Souter dissented, arguing that the Court was misunderstanding the "principal object in setting burdens of proof," which was not just to avoid error but to balance all the relevant interests at stake in a hearing. *Id.* at 339-40 (Souter, J., dissenting).

This dispute further clarifies what the rational-basis test is – and is not. The dissenting opinion in *Heller* erred because it disputed the legislature's *ends*, and, unless the ends the legislature is pursuing are illegitimate, this Court does not substitute its own policy judgment for a legislature's. Since Kentucky's policy was to use burdens of proof to equalize the risks of erroneous confinement (rather than to use them as part of a broader balancing test) and since its "basic premise that mental retardation is easier to diagnose than is mental illness ha[d] a sufficient basis in fact," the state's classification survived rational-basis scrutiny. *Id.* at 322; *see also id.* at 323 n.1.

The opinions in *Heller v. Doe*, therefore, illustrate the Court's principled approach to the rational-basis test. Because the test is deferential, the Court did not second-guess Kentucky's policy judgments – it accepted the State's end goal of equalizing the risk of

erroneous confinement. In doing so, however, the Court examined the facts to see whether the premises underlying the State's actions were plausible, *and* the Court evaluated whether the State's actions were logical in light of its asserted ends. Sometimes applying these principles yields a victory for the government; sometimes it does not. But the Court consistently applies the same meaningful test in every case.

II. THE CITY'S DISPARATE TAX RATES CANNOT SURVIVE THIS COURT'S RATIONAL-BASIS ANALYSIS.

Armed with the principles outlined above, the analysis of this case is relatively straightforward. The City of Indianapolis created two classes of property owners. The first class, those who elected to pay their tax assessments in full in 2004, paid taxes at a rate of $9,278 per parcel. The second class, those who elected to pay the assessment in installments in exchange for a 3.5% annual interest rate, were forgiven the balance of their debt one year later and paid taxes at a rate between three and 10 percent of the first class's tax rate.

In order to uphold that classification, this Court must be able to identify a factually plausible rational basis for it that does not violate any of the three principles identified in Part I. No such rational basis is evident, and the lower court's judgment should therefore be reversed.

The rational bases accepted by the Indiana Supreme Court fall into two basic categories. First, the court accepted different permutations of the idea that the City's classification could be justified by the City's desire to save money (either directly, by not refunding the Petitioners' overpayments, or indirectly, by avoiding the administrative costs associated with refunding the Petitioners' overpayments). Second, the court endorsed a rational basis of its own invention – the idea that the City's imposition of different tax rates could be justified by the desire to help poorer property owners.

The first category of proffered rational bases has been amply addressed by Petitioners. As demonstrated in Petitioners' opening brief, the fact that a municipality will save money cannot, standing alone, be a rational basis for a particular classification because it lacks any limiting principle. Pet. Br. 41-46. It will always be the case that a government entity will be able to raise more money by arbitrarily selecting citizens and ordering them to empty their pockets than it would by imposing an equitable, non-arbitrary scheme of taxation – but this Court's precedents nonetheless prohibit governments from raising revenue through arbitrary means. *See Allegheny Pittsburgh*, 488 U.S. at 345-46 (citing cases); *see also Williams v. Vermont*, 472 U.S. at 25 (rejecting discriminatory tax on automobiles purchased by non-residents); *cf. Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985) (rejecting the State's desire to incentivize purchase of

government securities as a justification for discriminatory tax on out-of-state insurance companies). Moreover, as Petitioners demonstrate, there is no reason to believe that the administrative burden of refunding Petitioners' overpayment would be anything other than *de minimis*. Pet. Br. 44. As explained above, this Court has regularly rejected the idea that simple cost-savings constitute a rational basis for severely disparate treatment of similarly situated people. *See supra* at 12-13.

Because the first category of rationale accepted below is untenable, it becomes necessary to examine the second justification embraced by the lower court. And this purported rationale – the notion that taxing people who prepaid their taxes at a higher rate would reduce the tax burden on the poor – must also be rejected because it runs afoul of this Court's rational-basis precedents in two independent ways. First, it is not plausible in light of the evidence that the City of Indianapolis was trying to aid low-income property owners by imposing a sewage assessment and then rescinding it while forgiving the outstanding balances of those who were paying on an installment plan. Second, there is no logical connection between the City's actions here and the government's interest in helping the poor.

1. The asserted rational basis is not plausible in light of the evidence. First, it cannot be plausibly asserted that the City's disparate treatment of the two classes of property owners (pre-payers and

installment-plan payers) was motivated by a desire to help the poor. The City has been crystal clear in describing its motivations for its actions, both prior to and during litigation, and those motivations cannot be squared with a desire to help poorer landowners by forgiving their debt. Pet. Br. 37-40. Indeed, the explicit policy of the law under which Petitioners were initially assessed, as well as the explicit policy of the City in refusing to refund their overpayments, was to treat all property owners *equally*. Pet. Br. 3, 8.

To be sure, the rational-basis test allows courts in some circumstances to accept hypothetical rational bases for a law, even if those bases are not evident from legislative history. *See*, *e.g.*, *FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993). But this Court has never held that a hypothetical rational basis can be accepted if it actually conflicts with the legislature's own stated policy. *See supra* at 14-18.

There is good reason for this rule: Allowing courts to hypothesize rational bases that are at odds with the legislature's own explicit policy is the opposite of judicial deference. It is, quite simply, substituting a judge's vision of what good policy might be for the legislature's actual vision of good policy. Here, where both the Indiana legislature and the City of Indianapolis have articulated a specific policy of treating all property owners as equals, the Court should not reject that stated policy and assume that instead the City actually had a contrary, secret purpose of treating property owners differently based on their imagined incomes. To do so would not be judicial

deference to legislative prerogatives; it would be judicial defiance of them.

Legislative actions are entitled to deference, but *deference* is different from *fantasy*. This Court should therefore reject the lower court's invitation to fabricate a government policy at odds with the policy actually articulated by the City of Indianapolis.

2. There is no logical connection between the City's actions and helping poorer landowners. Even if the Court assumes that the City had a secret purpose of helping the poor when it changed its sewer-assessment system and refused to refund Petitioners' overpayments, there is no logical connection between that purpose and what the City actually did. The lower court suggested that the disparate treatment could be justified by a belief that those who had prepaid their tax assessment "were in better financial positions than those who chose installment plans." Pet. App. 16a. But the court's decision is bereft of any explanation of what, exactly, would make this belief reasonable – or, indeed, any more reasonable than believing that exactly the opposite was true.

Simply put, there is no logical reason to assume that people who paid their tax assessment in full were better off than people who chose to pay in installments. The installment plan offered to the affected property owners was, in effect, a loan (over a 10-year, 20-year, or 30-year term) with a statutory interest rate of 3.5% per year. Pet. App. 4a. Accepting a loan at a 3.5% interest rate is not evidence of relative

poverty – it is simply evidence that the property owner could get a better return on her money by placing it elsewhere instead of paying the tax assessment right away.

A property owner could, for example, have decided to accept a loan at such an attractive rate in order to pay off other household debt like a mortgage or to invest money elsewhere. This means that the installment plan could be an attractive option for a property owner *regardless* of her wealth – indeed, historical data shows that the 3.5% rate offered by the City was lower than the contract interest rate on a 30-year mortgage during any month in 2004.[11] The interest rate offered by the City was also lower than the typical municipal-bond interest rate (as reflected in the Bond Buyer 20-Bond GO Index) for any month in 2004.[12] A person's decision to take a cheap loan from

[11] *See* Board of Governors of the Federal Reserve System, CONTRACT RATE ON 30-YEAR, FIXED-RATE CONVENTIONAL HOME MORTGAGE COMMITMENTS, *available at* http://www.federalreserve.gov/datadownload/Output.aspx?rel=H15&series=4c9742f6cd2efded850db98de3f2c75d&lastObs=&from=&to=&filetype=csv&label=include&layout=seriescolumn (last visited Jan. 5, 2012). A compilation of the Federal Reserve data cited herein (as well as other interest-rate data) may be retrieved from the Federal Reserve's website. *See* Board of Governors of the Federal Reserve System, *Selected Interest Rates (Daily) – H.15*, *available at* http://www.federalreserve.gov/releases/h15/data.htm (last visited Jan. 5, 2012).

[12] *See* Board of Governors of the Federal Reserve System, BOND BUYER GO 20-BOND MUNICIPAL BOND INDEX, *available at* http://www.federalreserve.gov/datadownload/Output.aspx?rel=H15&series=19162969f035eea850a9362c9956903a&last

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the government would not be evidence of her relative financial position at all. For many – if not all – people, it would simply be evidence of sound financial planning.

It is worth noting that, just as there is no *logical* reason to believe that taxpayers who prepaid their tax assessments were in a better financial position than those who did not, there is no *factual* reason to believe that either. Indeed, the evidence in the parallel federal-court action over the City's sewer-funding tax showed that, frequently, just the *opposite* was the case. The original sewer-assessment program already had a financial-assistance program for "families who made less than 80% of the City of Indianapolis's median household income . . . ." Mem. in Supp. of Pls.' Mot. for Summ. J. at 12, *Cox v. City of Indianapolis*, No. 09-435 (S.D. Ind. January 4, 2010) (internal quotation marks omitted). So the property owners for whom paying the assessment would be a financial hardship were not the ones paying on the installment plan – they were the ones in the pre-existing financial-assistance program. The evidence further showed that many of the people who paid in full – such as Owen and Evelyn Cox, the named plaintiffs in the federal action – were people on a fixed income who actually took out home-equity loans to pay the full assessment up front. *Id.* at 12-13. Choosing to pay the

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sewage assessment up front instead of taking the City's low-interest loan is not evidence of wealth – it is simply evidence that property owners took one kind of loan rather than another one.

Indeed, accepting this kind of illogical and factually groundless *post hoc* justification for a classification would eviscerate this Court's rule against arbitrary classifications and naked favoritism. It could *always* be asserted that one group of people is financially worse off than another. Insurance companies based in Alabama might have fewer financial resources than insurance companies based outside of Alabama, but that possibility did not give this Court pause in *Metropolitan Life Insurance*, 470 U.S. 869. People who moved to Alaska before 1959 might be poorer than people who moved to Alaska after 1959, but the Court did not feel obligated to make that assumption in *Zobel v. Williams*, 457 U.S. 55. People who purchased cars while residents of Vermont might be poorer than people who purchased cars before moving to the state, but that imaginary justification was not put forward by any of the Justices who heard *Williams v. Vermont*, 472 U.S. 14. If a fact-free assertion that "this group of people might be poorer" is sufficient to create a rational basis for a classification, each of those cases (indeed, *every* case about disparate financial treatment) should have come out in the government's favor. This Court should reaffirm the rational-basis test's requirement of a factually grounded logical connection and reject the unsupported – and insupportable – notion that the different

tax rates charged to Indianapolis property owners here had any connection whatsoever with those owners' financial means.

CONCLUSION

The heart of meaningful judicial review is the exercise of independent judgment rather than blind deference to legislative action, however arbitrary. The Indianapolis Supreme Court's decision below falls short of that standard and contravenes this Court's rational-basis precedents, which must be applied in light of their holdings rather than reduced to cherry-picked *dicta* presenting a caricature of judicial review that amounts to little more than a rubber stamp. The judgment below should be reversed.

Respectfully submitted,

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