No. 11-161

In the Supreme Court of the United States

CHRISTINE ARMOUR, ET AL.,

Petitioners,

v.

CITY OF INDIANAPOLIS, ET AL.,

Respondents.

On Writ of Certiorari to the Indiana Supreme Court

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a city's decision to forgive all outstanding balances related to a discontinued public works program violates the Equal Protection Clause because the city chose not to reopen closed transactions and refund payments already made before the effective date of the transition away from the discontinued program.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

BRIEF FOR RESPONDENTS

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State * * * deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

For decades, the City of Indianapolis financed the construction of sewers pursuant to an Indiana state law known as the "Barrett Law." The Barrett Law authorizes Indiana municipalities to finance neighborhood sewer improvements by imposing and collecting assessments on benefited homeowners following completion of a project. Each assessment constitutes a determination by the municipality that an affected homeowner was specially benefited by the sewer project in that amount. Homeowners are given the option of paying their assessment in a lump sum or in installments. Over the years, the City employed the Barrett Law method to finance hundreds of projects, and thousands of residents paid Barrett Law assessments in exchange for the benefit of a sewer. The Barrett Law method eventually proved to be politically unpopular, however, and in October 2005, as part of a sweeping overhaul of its sewer financing system, the City stopped relying on it. In conjunction with its abandonment of the Barrett Law approach, the City passed a resolution forgiving all outstanding Barrett Law balances as of November 1, 2005.

Petitioners are homeowners whose neighborhood received a sewer in 2003 as part of a Barrett Law-financed project and who, following the project's completion, paid their assessment in a single lump-sum payment. Two years later, after the City forgave all outstanding Barrett Law balances, petitioners demanded a refund of their Barrett Law payments, claiming that because of the forgiveness program, homeowners in their neighborhood who opted to pay in installments had, effectively, paid less for their sewer than petitioners. The City denied petitioners' request. Petitioners then sued, claiming, *inter alia*, a violation of the Equal Protection Clause. The trial court granted summary judgment for petitioners, Pet. App. 80a–81a, and the court of appeals affirmed, *id.* at 41a–78a. The Indiana Supreme Court granted transfer and reversed. *Id.* at 1a–40a.

A. The Barrett Law

Enacted in 1889, Indiana's Barrett Law "authorizes municipalities to provide or require public improvements and fund those improvements by levying special assessments against the benefitted properties." Pet. App. 3a. A sewer project financed under the Barrett Law begins with the passage of a resolution by the municipality's works board. Ind. Code § 36-9-39-3. After obtaining an engineer's estimate of the project's total cost, the board must then provide notice and conduct a hearing for "all interested persons," including "persons whose property is affected or will be affected by the proposed sewage works," on the question of "whether the special benefits that will accrue to the property to be assessed will be equal to

the estimated cost of the works." *Id.* § 36-9-39-4. That inquiry seeks to avoid improvements whose costs outweigh the benefits. The board must subsequently determine that the "benefits accruing to the abutting property are equal to the estimated cost of" the project, a finding that is "final and conclusive on all parties." *Id.* § 36-9-39-5(b). A contractor is then selected for the project and construction begins. *See id.* § 36-9-39-7.

To cover the costs of a Barrett Law sewer project, a municipality may levy assessments against benefiting properties. Ind. Code § 36-9-39-13. Properties are assessed "primarily for the cost of the sewage works." *Id.* § 36-9-39-15(b)(1). For assessment purposes, the costs of the sewer are "primarily estimated according to the total number of lots" abutting the sewer and "primarily apportioned equally among all abutting lands or lots." *Id.* § 36-9-39-15(b)(2)–(3). Each abutting lot's assessment is determined by "dividing the estimated total cost of the sewage works by the total number of lots." *Id.* § 36-9-39-16(a). If the board determines that the sewer's benefit to a particular property is "less than the amount" determined by the general assessment formula, it may reduce the preliminary assessment accordingly. *Id.* § 36-9-39-17(b).

After construction of the sewer is completed, the board prepares an assessment roll listing each affected property's respective preliminary assessment. Ind. Code § 36-9-39-21. Such assessments are "considered the special benefits accruing to the land assessed" unless modified following a public hearing. *Id.* § 36-9-39-22(a). The board must provide notice and a hearing to "[r]eceive

and hear remonstrances against the amounts assessed on the assessment roll" and to determine whether the listed properties "have been or will be specially benefited by the sewage works in the amounts listed" on the roll. *Id.* § 36-9-39-22(b)(6).

At the hearing, an owner may object to his preliminary assessment; the board, in turn, must determine whether each property on the roll is "specially benefited in the amount[] respectively assessed against" it. Ind. Code § 36-9-39-23(a)–(b). The board "shall sustain or modify, in whole or in part," each preliminary assessment; at all times, its decisions must be based on its findings "concerning the special benefits received" by each property. *Id.* § 36-9-39-23(c). Absent modification, the board confirms the assessment roll, which "[s]how[s] the amount of special benefits" accruing to each homeowner from the project, and it delivers the confirmed roll to the municipality's financial officer. *Id.* § 36-9-39-24. Homeowners who objected to their preliminary assessments may appeal their final assessments, but in all other respects, the board's decisions regarding assessments are "final and conclusive on all parties." *Id.* § 36-9-39-25.

Homeowners have several options for paying off the amount assessed through the elaborate Barrett Law process. They may pay off the entire amount in a single lump sum, or they may choose to pay in installments over ten, twenty, or thirty years, with interest. *See* Ind. Code §§ 36-9-37-6, -8.5, -11. If a property owner elects to pay in installments, the assessment "shall be collected in the same manner as other taxes." *Id.* § 36-9-37-6. Until fully paid, the assessment constitutes a lien against the property,

and the municipality may initiate foreclosure proceedings if even one installment is in default. *Id.* §§ 36-9-37-9(b), -22. Proceeds from assessments for a particular Barrett Law project "constitute a special fund" that may be used only for specific purposes, including payment of contractors or security and payment of bonds issued in relation to a project. *Id.* § 36-9-37-13.

B. The Brisbane/Manning Sewer Project

For decades, the City of Indianapolis used the Barrett Law to finance sewer improvements for residents. *See, e.g.*, *Indiano v. City of Indianapolis*, 269 N.E.2d 552, 553 (Ind. Ct. App. 1971); *Conley v. Brummit*, 176 N.E. 880, 881 (Ind. Ct. App. 1931). Between 1992 and 2005 alone, the City connected some 4,200 properties to sewers using the Barrett Law. Brendan O'Shaughnessy, *City's Sewer Policy Upsets Some Residents*, Indianapolis Star, Nov. 8, 2005, at B2. One of the literally hundreds if not thousands of projects over the years was the Brisbane/Manning Sewer Project, the project giving rise to this litigation.

In every respect, the Brisbane/Manning project was unremarkable and no different from countless Barrett Law projects that had preceded it. The project was intended to bring sewers to approximately 180 properties in Indianapolis' Northern Estates neighborhood. Pet. App. 3a–4a. In April 2001, the City informed affected homeowners of the intended project. Homeowners received notice of an upcoming informal meeting where Department of Public Works (DPW) staff would discuss the costs of the project and the

recommended assessment range. Homeowners were told that if the Public Works Board approved the assessment range, then "the per benefited lot assessments for this project will not exceed that range." J.A. 55–56.

On August 8, 2001, the Board adopted a resolution formally commencing the project. J.A. 66. At a public hearing on February 27, 2002, the Board estimated the total costs for the project as $2,393,802 and set a targeted assessment of $10,500 to $11,500 per property. *Ibid.* In a May 31, 2002, letter, the City informed homeowners of these developments, noting that "actual assessment[s]" would be determined at a final public hearing "after the completion of construction." J.A. 59–60.

Construction was completed in October 2003, at which time homeowners could connect to the new sewer line. J.A. 63–64, 70. In May 2004, the Board informed homeowners of a final public hearing to "close out" the Brisbane/Manning project. J.A. 69. At that hearing, homeowners were told, they would have an opportunity to be heard, following which the Board would set the final assessment amounts, *ibid.*; subsequently, homeowners would receive notices regarding their assessment and their options for payment, J.A. 70.

At the final public hearing on June 9, 2004, the Board heard from interested persons and set a final Barrett Law assessment of $9,278 per property, more than a thousand dollars below the lower end of

the initial assessment range.[1] The Board also set an interest rate of 3.5 percent for homeowners who elected to pay in installments. The Board confirmed the final assessment roll and transmitted it to the City's financial officer. J.A. 65–67. There is no indication that any homeowner appealed his assessment; accordingly, the Board's determination that each homeowner had been "specially benefited" from the sewer in the amount of $9,278 was final and conclusive.

Shortly thereafter, in July 2004, homeowners received formal notice of their assessment and their payment options. J.A. 45–46. Of the approximately 180 properties covered by the project, 142 homeowners elected to pay in installments: 47 chose the ten-year plan ($77.27 per month); 27 chose the twenty-year plan ($38.66 per month); and 68 chose the thirty-year plan ($25.77 per month). Those installment payments reflected a 3.5 percent interest rate, and were accompanied by a statutory lien on the properties. Owners of the remaining 38 properties made a single lump-sum payment. Pet. App. 4a & n.4.

C. The City's Discontinuance of Barrett Law Funding

Despite its long history of use by the City and other municipalities to fund sewer projects, the Barrett Law became unpopular in Indianapolis. Critics claimed that it permitted the City to "force[] homeowners with septic systems to pay the cost of

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[1] Several properties were subject to assessments below $9,278 based on unique features. J.A. 66–67.

hooking up to sewers or risk losing their property for not paying taxes," Brendan O'Shaughnessy, *Sewer Rate Proposal Is Mixed*, Indianapolis Star, Oct. 4, 2005, at B1, and that the assessments "create[d] considerable hardship" for some homeowners, David Rohn, *Mandated Sewer Hookups Can Carry Financial Drain*, Indianapolis Star, Mar. 13, 2001, at A1. *See also* Editorial, *Time to Hold Nose and Pay Pipe Fitters*, Indianapolis Star, Oct. 5, 2005, at A14 (referring to "the hated Barrett Law"). Coinciding with the increasing disdain for Barrett Law financing was a growing realization by elected officials that, for environmental and public health reasons, the City desperately needed to upgrade its sewer infrastructure—in particular, reducing the number of residential septic systems. *See, e.g.*, Matthew Tully & John Fritze, *Septic System Issue Bubbles to the Surface*, Indianapolis Star, Dec. 8, 2003, at A1.

Consequently, on October 31, 2005, the City-County council passed Ordinance No. 107, 2005, Proposal 535. Pet. App. 4a, 44a. The ordinance enacted a "sweeping plan" to "overhaul" the city's sewer financing system. Brendan O'Shaughnessy, *Sewer Plan is Expected to Get OK*, Indianapolis Star, Oct. 31, 2005, at B1. The plan, referred to as the Septic Tank Elimination Program (STEP), received "unanimous support from both parties." It eliminated reliance on the "much-reviled Barrett Law" and instituted a $2,500 flat fee for homeowners to connect to a sewer line. To fund these changes, the City increased monthly sewer rates and stormwater fees for all residents. In conjunction with its abandonment of reliance on the unpopular

Barrett Law, the City also agreed to "cover any outstanding Barrett Law debts." *Ibid.*; Pet. App. 5a & n.5, 15a n.10.

As such, on December 7, 2005, the Board of Public Works unanimously enacted Resolution No. 101, pursuant to which the Board "forg[a]ve all assessment amounts it established pursuant to the Barrett Law Funding for Municipal Sewer program due and owing from the date of November 1, 2005 forward." J.A. 71–72. In enacting the forgiveness program, the Board specifically noted that the discontinued Barrett Law program had "present[ed] financial hardships on many middle to lower income participants who most need sanitary sewer service in lieu of failing septic systems," as well as the fact that the new funding approach included a "rate and fee increase package" applicable to all City residents. J.A. 71. At the time Resolution 101 was enacted, there were more than forty Barrett Law projects of various vintages for which outstanding balances remained for those electing to pay in installments. Pet. App. 5a. Resolution 101 neither refunded any payments previously made—whether in installments or lump-sum payments—nor reopened any closed transactions.

D. Proceedings Below

1. Petitioners are owners of 31 of the approximately 38 properties included in the Brisbane/Manning sewer project who paid their Barrett Law assessments in a lump sum. Pet. App. 4a. In February 2006—over two years after construction of the Brisbane/Manning sewer was completed, and over a year and a half after the

project was formally "close[d] out," J.A. 69—petitioners, citing Resolution 101, requested a refund from the City for $9,278, *i.e.*, the full amount of the Barrett Law assessment each had paid. J.A. 49.

The City denied the request. In a letter to petitioners, James Garrard, the DPW Director, explained that Resolution 101, which forgave all outstanding Barrett Law balances as of November 1, 2005, was enacted "in response to" the sewer overhaul legislation, which "phas[ed] out" the City's use of the Barrett Law. J.A. 49–50. Garrard acknowledged that because the Brisbane/Manning project was closer in time to the effective date of the transition, petitioners might feel entitled to a refund of their payments. Nevertheless, he explained, "the fact that this was a recent use of [the] Barrett Law does not distinguish it from previous projects constructed using the same funding mechanism." J.A. 51. To reopen earlier transactions and refund petitioners' payments made before the effective date of the transition/forgiveness, as opposed to forgiving outstanding balances, "would establish a precedent of unfair and inequitable treatment to all other property owners" who had paid Barrett Law assessments in the past. *Ibid.*

Petitioners' letter invoked Ind. Code § 36-9-39-15, which requires that Barrett Law assessments be apportioned equally among the affected lots. Garrard explained that the Brisbane/Manning project fully complied with this provision, which governs only the assessment process, because each property "was assessed the same amount to finance th[e] project under a legally established process that the City utilized at the time." J.A. 50. Garrard

closed by noting that while the Board's choice of November 1, 2005, as the date to forgive outstanding balances might seem "arbitrary to [petitioners]," the City had to establish a date that would permit it to "move forward" with the new approach. J.A. 51.

2. Petitioners filed suit against the City and various agencies and officials (respondents here) in Marion Superior Court, alleging, *inter alia*, a violation of the Equal Protection Clause. J.A. 10–24.[2] Petitioners asserted that because of Resolution 101, their neighbors who had chosen an installment plan had effectively paid "a maximum of $1,215.22" for a new sewer, while they had paid $9,278 for the same sewer. J.A. 15. Petitioners alleged that the "application of Resolution 101" by the City therefore "denied the equal protection of the laws to the class of taxpayers who had already fully paid" their Barrett Law assessments, by "arbitrarily wiping out the liability" of those who had elected to pay by installments. J.A. 16. Petitioners contended that this "arbitrary classification of taxpayers" violated the Equal Protection Clause. J.A. 17. With two exceptions not relevant here, petitioners each sought a refund of $8,062.78—not the full amount of their initial assessment, but the difference between their lump-sum payment and the maximum amount paid by their neighbors whose had chosen installments (presumably, those who had opted for the ten-year installment plan). J.A. 15.

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[2] Petitioners also alleged violations of the Due Process Clause and provisions of the Indiana Constitution and Indiana statutes, claims no longer at issue. Pet. App. 7a.

Both parties moved for summary judgment. The trial court granted summary judgment for petitioners and entered judgment against the City for $380,914.16. Pet. App. 7a, 80a–84a.

3. The Court of Appeals of Indiana affirmed. Pet. App. 41a–78a.

As an initial matter, the court of appeals noted that petitioners were not challenging the 2004 assessments on their properties, the constitutionality of the ordinance overhauling the City's sewer system, or the "facial validity" of the forgiveness provision, Resolution 101. Pet. App. 53a. Instead, the "dispositive question" was whether the City's refusal to issue refunds to petitioners violated the Equal Protection Clause. *Id.* at 53a–54a. Acknowledging that rational basis review governed that question, *id.* at 54a–56a, the court concluded that the "most relevant" authority was this Court's decision in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989)—a case upon which petitioners had not even relied in their briefs. Pet. App. 24a n.14, 57a. The court of appeals also found "instructive" three state supreme court decisions purportedly holding that a municipality violates the Equal Protection Clause "when it forgives an outstanding assessment owed by some property owners while, at the same time, it refuses to refund an equivalent amount to similarly situated property owners who have already paid the same assessment in full." *Id.* at 58a–60a (citing *Armco Steel Corp. v. Dep't of Treasury*, 358 N.W.2d 839 (Mich. 1984), *State ex rel. Stephan v. Parrish*, 891 P.2d 445 (Kan. 1995), and *Richey v. Wells*, 166 So. 817 (Fla. 1936)).

Guided by those decisions, the court then purported to apply rational basis review to the City's decision not to issue refunds to petitioners, committing multiple legal errors along the way. Notwithstanding Resolution 101's broad application to multiple projects of various ages (as long as outstanding balances existed), it narrowly confined the "relevant classification in this case" to "all the Northern Estates property owners subject to the same July 2004 Barrett Law assessment." Pet. App. 61a. It repeatedly observed that it was "the City's burden to provide a rational basis" for its decision, rather than petitioners' burden to negate the existence of a rational basis. *See id.* at 63a & n.9, 70a. It believed that because the City had set forth findings in Resolution 101, it was "foreclosed from offering other subsequent explanations" supporting its decision. *Id.* at 67a. And it concluded that the City could not remedy the alleged equal protection violation by rescinding the forgiveness provision; instead, the City was "required by the Constitution" to provide refunds. *Id.* at 76a–77a.

The court of appeals denied the City's petition for rehearing. J.A. 6.

4. The Indiana Supreme Court granted transfer and reversed. Pet. App. 1a–40a.

The court agreed with the parties that rational basis review applied. Pet. App. 9a. Unlike the court of appeals, the Indiana Supreme Court thoroughly reviewed this Court's rational basis jurisprudence and concluded that, for a number of reasons, the City's actions did "not run afoul of the Equal Protection Clause." *Id.* at 9a–15a. The court noted

that the forgiveness program was designed to relieve middle- and low-income property owners from Barrett Law assessments, and "[p]roviding relief or support for citizens facing financial hardship is clearly a legitimate interest." *Id.* at 15a–16a. The City, moreover, could have reasonably believed that owners who had paid their assessments "were in better financial positions than those who chose installment plans," and, in any event, "eliminating tax burdens is clearly a rational way of eliminating financial hardship caused by the tax burden." *Id.* at 16a.

Furthermore, the court held, the City could have reasonably believed that "the benefits of simplifying sanitary sewer funding outweighed the effort of continuing a collection system for thousands of taxpayers, some of whom owed all, some a lot, and some only a little of their respective assessments." Pet. App. 18a. That was particularly true because preserving all outstanding assessments would have meant "not only maintaining such a collection system but sitting on the tax liens for up to 30 years." *Ibid.* And the fact that the City "chose to draw the line at November 1, 2005," was "a matter of discretion appropriately exercised by the City and the Board." *Ibid.*

The court also concluded that the City had a legitimate interest in "not emptying its coffers to provide refunds to those who had already paid their assessments." Pet. App. 19a. As the court explained, petitioners' assessments "were used to fund the Brisbane/Manning Project and had already been spent in constructing those sewers." *Ibid.* Petitioners "each paid for a sewer and received a

sewer, along with all the attendant public health benefits associated with sanitary sewers." *Ibid.* "This was *not* a case," the court observed, "in which [petitioners] were assessed for a local benefit and did not receive that local benefit." *Ibid.*

The court then rejected the arguments advanced by petitioners and the court of appeals. Rebuffing petitioners' reliance on "so-called 'class-of-one' * * * equal protection cases," the court observed that Resolution 101 "makes a broad classification on the basis of a common characteristic—outstanding Barrett Law balances." Pet. App. 20a, 24a. The court noted that Resolution 101 simply "distinguishes between property owners who had outstanding Barrett Law assessments on November 1, 2005, and property owners who did not." Furthermore, the resolution "does not limit the Barrett Law projects to which it applies but forgives *all* outstanding Barrett Law assessments, regardless of the particular project under which the assessments were levied." *Id.* at 23a. In addition, the court stressed, "it was not just Brisbane/Manning taxpayers who had paid their assessments in full who did not receive refunds; *no* taxpayers in any of the 40-plus Barrett Law projects received any refunds of the amounts they had paid." *Ibid.* (emphasis added). That was the case for "thousands of taxpayers, some of whom had paid all, some a lot, and some only a little of their respective assessments." *Ibid.* The court also noted that, unlike many traditional class-of-one cases, there was "no evidence that the City's action was motivated by animus or ill-will toward [petitioners]" or any other

homeowners without outstanding balances. *Id.* at 24a.

The court also criticized the court of appeals' reliance on *Allegheny Pittsburgh* and its disregard of "other cases applying traditional rational-basis analysis." Pet. App. 29a. The court noted that in *Nordlinger v. Hahn*, 505 U.S. 1 (1992), this Court deemed *Allegheny Pittsburgh* a "rare case," Pet. App. 27a (quoting 505 U.S. at 16), and that later decisions characterized it as a class-of-one case, *id.* at 28a (citing *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602–03 (2008), and *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

The court rejected petitioners' reliance on out-of-state decisions holding that purportedly similar actions violated equal protection. It concluded that petitioners' leading case, *Armco Steel*, *supra*, was "incorrect in its articulation of equal protection law and distinguishable on its facts." Pet. App. 30a. It found the others "unpersuasive," observing that "[a]ll but one of th[o]se cases considered challenges under state constitutions," rather than the federal Equal Protection Clause. *Id.* at 31a–32a. The remaining case, *Richey*, *supra*, cited "no authority" in finding an Equal Protection violation. *Id.* at 32a. The court also dismissed petitioners' reliance on *Cox v. City of Indianapolis*, No. 1:09-cv-435-WTL-DML, 2010 WL 2484620 (S.D. Ind. June 14, 2010), where the district court had ruled in favor of a class of City residents who, like petitioners, had fully paid their Barrett Law assessments and asserted an Equal Protection violation. *Id.* at *2. The Indiana Supreme Court noted that the *Cox* decision "relied almost entirely" on the court of appeals' opinion, which "did not apply

the appropriate equal protection standard." Pet. App. 34a n.22.

The court further corrected other flaws in the court of appeals' decision. It observed, for example, that the court of appeals erred in requiring the City to "come forth with proof" that its decision was rational. Pet. App. 16a. And it criticized the court of appeals' conclusion that the legislative findings in Resolution 101 precluded the City from providing other rational bases for its actions. *Id.* at 17a n.11. Because the court held that the City had not violated the Equal Protection Clause, it did not address whether, as a remedy, the City could rescind Resolution 101 rather than provide refunds.

Justice Rucker, joined by Justice Dickson, dissented. He agreed that rational basis review governed, but like the court of appeals, he believed that "when a legislature * * * state[s] a reason for a statutory classification, * * * it is inappropriate to consider other conceivable or even expressed rationales for the purpose of 'saving' an inadequately justified classification." Pet. App. 35a–36a (Rucker, J., dissenting). Accordingly, he confined his analysis to "the reasoning set forth in [Resolution 101's] text," which in his view "does nothing to explain why the City treated differently residents who elected to pay their assessments in a lump sum versus those who elected to pay in installments." *Id.* at 38a–39a.

SUMMARY OF ARGUMENT

Resolution 101 reflects an eminently rational approach for a government transitioning away from an unpopular program. The City recognized that the use of the Barrett Law to finance sewer projects had

become unpopular. In its place, the City adopted the STEP initiative, which it believed would provide a better mechanism for financing sewers, but which would also impose higher monthly fees on residents. The question then naturally arose concerning what to do about the vestiges of the Barrett Law program, in particular the outstanding balances and associated tax liens of residents in some forty Barrett Law projects. The City had three basic options. It could continue to collect the outstanding balances and maintain the associated tax liens for the nearly thirty years that it would take for payments under the discontinued regime to run their course. Alternatively, the City could refund every payment ever made under the program (or perhaps going back some arbitrary period like five or ten years) at enormous cost and administrative difficulty. Or the City could steer a middle course, forgiving the outstanding balances and eliminating the vestiges of the program going forward, while declining to reopen closed transactions or refund past payments.

The City's decision to choose the third of these options was perfectly rational. It draws on one of the basic divisions employed by every branch of government—the divide between prospective action and retroactively revisiting past transactions. That basic division is particularly appropriate in the context of a government transition away from an abandoned policy. The interests in making a clean break from the *ancien regime* and eliminating the vestiges of an unpopular program are more than sufficient to sustain the City's actions against constitutional attack under rational basis review.

But here the decision to forgive outstanding balances without reopening past transactions or issuing refunds made particular sense. STEP imposed higher monthly fees. The City could rationally decide that forcing citizens to make continuing Barrett Law payments on top of these additional monthly fees could cause financial hardship. The City could also rationally decide that reopening past transactions and issuing refunds would be an administrative nightmare. The City chose the one date for forgiveness that made eminent sense: the effective date of the transition to STEP. If it went back in time and refunded past payments, it would open up a host of questions about how far back in time to go, and which payments to refund. Those decisions in turn could run into serious logistical difficulties given the limits of recordkeeping and administrative capacity. The clean, simple alternative of only forgiving all outstanding balances made eminent sense.

The decision here is no different from countless government programs that announce forgiveness or amnesty for those who owe some obligation to the government. Those programs generally do not offer a refund to those who paid a penalty in full just before a program is announced or just before an effective date. While someone who, for example, pays a late parking ticket in full, with penalty, may feel some sense of unfairness if, due to an amnesty program, an even tardier fellow-parker has the penalty forgiven, there is no inequality of constitutional dimension. The impulse that produces tax forgiveness and parking ticket amnesty

is to be encouraged, not rendered unconstitutional if unaccompanied by refunds.

Petitioners would put a constitutional obligation on jurisdictions forgiving outstanding balances to provide refunds as well. They derive that principle from this Court's decision in *Allegheny Pittsburgh*. But that decision, which this Court severely circumscribed just three years later, is readily distinguishable. *Allegheny Pittsburgh* involved the aberrational application of an assessment system in which the local assessor deviated from the state's announced policy. There is no analog here. Petitioners suggest that the failure to provide refunds is unfaithful to the Barrett Law's requirement that initial assessments be equal. But that mixes apples and oranges. The initial assessments were equal here. The later decision to forgive outstanding balances without issuing refunds for past payments does not violate that inapposite state-law requirement. To the contrary, Resolution 101 addresses a situation not expressly contemplated by the Barrett Law and its requirement of equal assessments—namely, how to make a rational transition away from the Barrett Law after it had proven inadequate and unpopular. Resolution 101 provides for a perfectly rational transition, and nothing in *Allegheny Pittsburgh* is remotely to the contrary.

Petitioners' remaining arguments do not call into question the constitutionality of the City's decision to forgive outstanding balances without reopening past transactions or refunding past payments. They wisely abandon their previous reliance on inapposite class-of-one and state

supreme court cases. They ignore the myriad cases that emphasize that rational basis review is neither demanding nor limited to contemporaneous statements of legislative purpose. And there is no merit to their implicit premise that the only possible remedy for their claim is to provide refunds to all, rather than eliminate the prospective forgiveness. That argument only highlights the tenuous nature of petitioners' claim. They do not claim injury from having to pay a Barrett Law assessment; they claim injury from the relative good fortune of their neighbors whose outstanding balances were forgiven. Properly understood, that is no constitutional injury at all, but if government forgiveness of some is the source of the injury, then eliminating that forgiveness must surely remedy the injury. And that is what petitioners' argument invites: if the price of government forgiveness of outstanding balances is a requirement to reopen past transactions and refund past payments, then government forgiveness will become an endangered species.

ARGUMENT

I. THE CITY'S DECISION TO TRANSITION AWAY FROM RELIANCE ON BARRETT LAW FINANCING BY FORGIVING OUTSTANDING BALANCES BUT NOT REOPENING CLOSED TRANSACTIONS OR REFUNDING PAST PAYMENTS WAS EMINENTLY RATIONAL

Under well-established principles of rational basis review, the City's decision to forgive all existing Barrett Law balances as of November 1,

2005, but not to refund Barrett Law payments made before that date does not violate the Equal Protection Clause. Indeed, the City's decision is eminently rational and relies on one of the most basic dividing lines employed by all branches of government—the basic divide between prospective change and retroactively revisiting past transactions. The City certainly could have decided to maintain the vestiges of the abandoned financing plan for the next three decades while outstanding balances eventually were reduced to zero. But it was perfectly rational—indeed commendable—for the City to make a clean break and forgive the outstanding balances. In doing so, the City was not constitutionally obligated to go back and refund amounts previously paid under the program, whether recent lump-sum payments, payments by those choosing the ten-year option instead of the thirty-year approach, or otherwise. It certainly could have done so, but rational basis means having options. The option the City chose here—to draw a line between prospective forgiveness and retroactive refunds; between outstanding obligations and payments already made—was eminently rational and offends no principle of federal constitutional law.

A. Rational Basis Review Indisputably Governs the City's Actions

Petitioners have never disputed that rational basis review governs whether the City's actions violate the Equal Protection Clause. *See* Pet. App. 9a. Their opening brief, however, is tellingly devoid of even the most general discussion of this Court's considerable jurisprudence on what rational basis entails. That jurisprudence makes crystal clear that

the City's choice to forgive outstanding balances while not granting retroactive refunds offends no principle of constitutional law.

The Equal Protection Clause "does not forbid classifications" but "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger*, 505 U.S. at 10. Governments are generally "presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *Ibid.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961)) (internal quotation marks omitted). Accordingly, "unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic"—which petitioners have never claimed—"the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Ibid.*; *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–41 (1985); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*). This is not a high bar. A classification not subject to heightened scrutiny "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). So long as the question of rationality "is at least debatable," the challenging party "cannot prevail." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (internal quotation marks omitted).

The deferential nature of this review is no accident. Government is essentially an exercise in

continuous line-drawing. For courts to maintain their proper and properly-limited role, equal protection review in areas that do not implicate fundamental rights or a suspect class must be deferential. "'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'" *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973) (quoting *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 510 (1937)) (internal quotation marks omitted). Rational basis review is thus "a paradigm of judicial restraint." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993).

One aspect of that deferential review is that the classification is "accorded a strong presumption of validity." *Heller*, 509 U.S. at 319. The burden is on "the one attacking the legislation" to "negative every conceivable basis which might support it." *Id.* at 320 (quoting *Lehnhausen*, 410 U.S. at 364) (internal quotation marks omitted). That is true "whether or not the basis has a foundation in the record." *Id.* at 320–21. Indeed, a government need not "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger*, 505 U.S. at 15. Instead, a governmental choice "may be based on rational speculation unsupported by evidence or empirical data," and a classification "'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Heller*, 509 U.S. at 320 (quoting *Beach Commc'ns*, 508 U.S. at 313). And because the government is "never require[d] * * * to articulate its reasons for

enacting" a law, it is "entirely irrelevant for constitutional purposes" whether "the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315.

Nowhere is the deferential nature of rational basis review more evident or critical than where the government "engage[s] in a process of line-drawing." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). "[C]lassifying governmental beneficiaries" will "'inevitably require[] that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line.'" *Beach Commc'ns*, 508 U.S. at 315–16 (quoting *Fritz*, 449 U.S. at 179). But the "fact that the line might have been drawn differently * * * is a matter for legislative, rather than judicial, consideration." *Id.* at 316 (quoting *Fritz*, 449 U.S. at 179) (brackets and internal quotation marks omitted). Indeed, even if a classification is "both underinclusive and overinclusive," and the line drawn thus "imperfect," there is no violation of equal protection, since "'perfection is by no means required.'" *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (quoting *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 385 (1960)). That is because "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations." *Heller*, 509 U.S. at 321 (quoting *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69–70 (1913)) (internal quotation marks omitted). Accordingly, a challenged classification survives rational basis review "even when there is an imperfect fit between means and ends." *Ibid.* The "precise coordinates of the

resulting legislative judgment" are "virtually unreviewable." *Beach Commc'ns*, 508 U.S. at 316.

Rational basis review is "especially deferential" when classifications concerning taxation are at issue. *Nordlinger*, 505 U.S. at 11. The Court has emphasized that "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983). Thus, within the bounds of rationality, "the Constitution grants legislators, not courts, broad authority * * * to decide whom they wish to help with their tax laws and how much help those laws ought to provide." *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108 (2003).

B. The City Had a Rational Basis For Forgiving All Outstanding Barrett Law Balances Under Resolution 101

Throughout this litigation, petitioners have repeatedly insisted that they are not challenging their initial Barrett Law assessments, the City's transition from Barrett Law funding to STEP, or, most importantly, the facial validity of Resolution 101. *See, e.g.*, Pet. App. 53a; Br. 37, 44; Appellees' C.A. Br. 22–23. They claim only that the decision to forgive outstanding balances triggered a constitutional obligation to issue refunds.

Petitioners' concessions are well-taken. While the City certainly could have maintained the vestiges of the Barrett Law for the nearly thirty years it would have taken for all outstanding balances to be paid down, it was plainly rational to make a clean break and forgive all outstanding

balances. By any measure, the Barrett Law was deeply unpopular. As the City noted in the *Cox* litigation, "'[n]o one liked [the] Barrett Law—not the City officials, not the neighborhood organizations, not the general public.'" 2010 WL 2484620, at *1. Having decided to transition away from the reviled Barrett Law and toward STEP, the City could rationally decide to eliminate the remnants of the *ancien regime*. Doing so sends constituents an unequivocal message that reliance on the Barrett Law has ceased. It also avoids confusion and financial hardship on the part of residents asked to continue installment payments while simultaneously paying higher monthly rates under STEP. In short, there is a rational basis in making a clean break. The City's DPW director, James Garrard, made precisely this point in his deposition in *Cox*, stating that "the whole sort of approach to ending Barrett Law was to clearly end Barrett Law":

> We wanted a finite date to say: Look, we are now done with all aspects of Barrett Law. It was such a wildly unpopular program[.] * * * So our primary focus was: let's simplify this program, make it very clear that folks will pay one fee going forward, it's a constant fee across the City, and we're done. * * * So ending Barrett Law for us had to mean not just we're not going to use it going forward, but we would end all aspects of it, including collecting old Barrett Law fees. So we can clearly say to folks: We are out of the Barrett Law business.

Ex. C to Pls.' Supp. Mot. For Summ. J., at 45:7–46:2, *Cox*, No. 1:09-cv-435-WTL-DML (filed Jan. 4, 2010) [Dkt. 53-3] (deposition transcript of James Garrard).

The City's decision to forgive all outstanding Barrett Law balances also makes sense from the standpoint of administrative convenience. At the time the City transitioned to STEP, the City was collecting outstanding balances for at least forty Barrett Law projects, some of them relatively recent. Pet. App. 18a. As the Indiana Supreme Court recognized, absent forgiveness, the City would have had to "continu[e] a collection system for thousands of taxpayers" and maintain thousands of tax liens on affected properties. *Ibid.* Declining to forgive outstanding balances and liens would have kept the City in "the Barrett Law business" for nearly thirty years. By contrast, eliminating them, while not without fiscal impact, undoubtedly advanced the City's legitimate interest in a smooth regulatory and administrative transition from the discontinued framework to the new scheme. Indeed, DPW director Garrard stated in an affidavit that "[t]he administrative costs to service and process remaining balances on Barrett Law accounts long past the transition to the STEP program" were one of the reasons for the passage of Resolution 101. J.A. 76. Maintaining those accounts, he continued, would "not benefit the taxpayers" and would "defeat the purpose of" the new program—"namely simplifying things." *Ibid.*

Finally, the prospective elimination of outstanding balances also rationally furthered the City's interest in minimizing the impact of the transition on middle- to lower-income residents. It

was certainly rational to conclude that the obligation to continue Barrett Law payments on top of the higher monthly sewer rates and stormwater fees associated with STEP would have a particularly harsh impact on lower-income residents. Again, that is borne out by Resolution 101 itself and Garrard's affidavit, which both refer to the "financial hardships" incurred by many middle- to lower-income residents subject to the Barrett Law. J.A. 71, 75. By eliminating the need to make continued installment payments, the City eliminated the possibility of a double burden on cash-strapped residents.

To be sure, not all residents with outstanding Barrett Law balances may qualify as middle- to lower-income, and the City could have means-tested its forgiveness program. But it was certainly under no federal constitutional obligation to do so. Rational basis review does not require a perfect means-end fit, and means-testing the forgiveness program would have been fatal to some of the City's other objectives, such as making a clean break from the "bad old days" of Barrett Law financing. In the real world, legislation is rarely the product of a single motivation, *see Fitzgerald*, 539 U.S. at 108–09, and for that reason, among others, the absence of a perfect fit between Resolution 101's particular concern with middle- to lower-income residents and its forgiveness of all outstanding balances is not fatal under rational basis review. *See, e.g.*, *Heller*, 509 U.S. at 321.

C. The City's Decision Not to Reopen Closed Transactions or Refund Barrett Law Payments Already Made Was Entirely Rational

Petitioners' concession that Resolution 101's forgiveness of outstanding Barrett Law balances is permissible is far more damaging than they acknowledge. Indeed, it is ultimately fatal to their claim. The Equal Protection Clause requires treating similarly situated individuals the same. But petitioners are not similarly situated to the residents who received relief under Resolution 101 for the simple and critical reason that petitioners had no outstanding balances. As anyone with an outstanding credit card balance can confirm, the difference between having an outstanding balance and being paid-in-full is a meaningful one. Petitioners were treated no differently from anyone else without an outstanding Barrett Plan balance, whether that balance had been paid in a lump sum or over installments.

What petitioners seek, then, is not equal treatment, but a constitutional rule that requires a jurisdiction that intends to forgive outstanding balances to reopen past transactions and provide refunds for payments already made. They propose a rule where the price of prospective forgiveness is retroactive refunds. The Equal Protection Clause does not work that way. The difference between outstanding balances and past payments is simply an application of the fundamental difference between prospective change and retroactivity. That line is not only rational, but one of the basic building blocks of government action. Petitioners would

replace that eminently sensible line with a constitutional refund obligation of uncertain scope that would deter governments at every level from prospective tax forgiveness—an impulse that should be encouraged, not constitutionally proscribed.

1. The City's decision to make Resolution 101 apply to outstanding balances and not to reopen past transactions and issue refunds for payments already made was eminently rational. It is simply an application of the basic divide between legislation that is prospective only and legislation that retroactively revisits past transactions. That basic divide is so rational that it gives rise to the presumption that legislation that is silent as to its temporal effect applies prospectively only. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 236–37 (1995). To be sure, when legislation imposes new burdens on past conduct, constitutional provisions like the Ex Post Facto clauses can affirmatively limit the government to prospective action. But what is sometimes constitutionally compelled does not become affirmatively irrational when the new law confers a benefit rather than imposes a burden. To the contrary, a law that, for example, confers tax forgiveness or parking ticket amnesty can rationally apply only prospectively and honor the finality interest in taxes already paid and transactions already closed. Indeed, when it comes to judicial decisions, this Court has recognized that the interest in finality is of constitutional dimension. *Id.* at 218–19, 240. The legislature's interest in not reopening past transactions is surely at least rational.

The Court has long acknowledged finality as a legitimate justification for line-drawing,

notwithstanding the potential for perceived unfairness. Thus, for example, if the Court announces a new constitutional rule, a criminal defendant whose case is still on direct review may enjoy its benefits, *see Griffith v. Kentucky*, 479 U.S. 314 (1987), but another criminal defendant whose conviction was already final may only do so under the very limited circumstances of *Teague v. Lane*, 489 U.S. 288 (1989). *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007). That is so even if the two defendants were indicted on the same day and for the same crime; even if the rule would aid the second defendant more; and even if the first defendant's case is nonfinal only because of frivolous appeals the second defendant elected to forgo. Similarly, this Court's decision in *Plaut* meant that a securities plaintiff who pursued a frivolous appeal in the wake of *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), would benefit from Congress' constitutionally valid extension of the statute of limitations in pending cases, while a comparable litigant who dropped the case in light of *Lampf* could not constitutionally have his finally adjudicated claim revived. *See* 514 U.S. at 214, 240.

This is not the unconstitutional treatment of similarly situated individuals, because whatever their other similarities, they are not similarly situated in the one way that counts: timing. That result may seem unfair on the surface, but a line has to be drawn somewhere, and the line between final judgments and pending cases, like the line between past payments and outstanding balances, is a perfectly rational place to draw the line. Governments need particular flexibility in

transitioning from one policy to another. For that reason, this Court and lower courts have rejected equal-protection-based challenges to "grandfather clauses" or other policies that treat two parties differently based on timing considerations related to a change in government policy. *See, e.g.*, *Dukes*, 427 U.S. at 305 (holding that "gradual approach" to imposing ban on pushcarts was not "constitutionally impermissible"); *Bell v. Dupperault*, 367 F.3d 703, 707 (7th Cir. 2004) (holding that changed policy rendered two otherwise identical applications submitted at different times "not similarly situated"). *Cf.* U.S. Const. art. II, § 1, cl. 4 (limiting presidential eligibility to natural born citizens and citizens "at the time of the Adoption of this Constitution"); U.S. Const. amend. 22, § 1 (exempting current officeholder from new presidential term limit).

The basic rationality of a line differentiating between outstanding balances and payments already made is only underscored by the difficulty of fixing any other line. Indeed, had the City decided to provide refunds to *some* homeowners who made payments before the transition, like petitioners, but not *all* such homeowners, it would presumably have a more difficult time justifying its decision. For example, the City could have allowed a refund for all payments made in the last five years; but that limit would have been far more arbitrary than its decision to provide no retroactive refunds at all and only forgive outstanding balances. To be sure, even a five-year retroactivity period could be defended as rational (as the line has to be drawn somewhere),

but that only confirms the rationality of the City's decision.

The logic of petitioners' position would seem to extend at least so far as to require a refund for any homeowner who paid in full while others in the same project continue to have an outstanding balance. Just as those who made a lump-sum payment may envy those who stretched their payments out over ten years, those who paid in full after ten years may envy those who stretched payments out over twenty years, and so on. Indeed, the phenomenon is not limited to those who paid in full. A Brisbane/Manning homeowner who elected to pay over ten years paid $50 more per month than a neighbor choosing the thirty-year option and may feel disadvantaged by the relatively greater forgiveness extended to the latter. And, of course, even someone who fully paid Barrett Law assessments decades earlier may still feel disadvantaged relative to those who receive any degree of forgiveness.

This concern was not lost on this City. DPW Director Garrard informed petitioners that granting a refund to them but not others would be "unfair and inequitable" to "all other property owners who ha[d] also paid Barrett Law assessments." J.A. 51. In other words, once the line between past payments and outstanding balances is abandoned, there is no logical stopping point for the refunds. Petitioners' trial counsel even conceded as much during the summary judgment hearing: when asked by the court whether petitioners' theory would "open[] the floodgates for other litigation of the same kind" by "people who have paid in the past," counsel

answered that the court was "correct." C.A. App. 416–17. The *Cox* litigation further bears this out; one of the plaintiffs seeking a refund there fully paid off his Barrett Law assessment in December 2000—five years before Resolution 101 was passed. *See* Ex. B to Pls.' Supp. Mot., *supra* [Dkt. 53-2] (affidavit of Harvey Shannon, Jr.).[3]

Particularly absent any meaningful limit on the number and scope of potential Barrett Law refunds, the City's decision to forgive all outstanding balances while granting no refunds for payments already made avoids two equally vexing and inescapable problems. First, it would have been fiscally challenging to issue refunds since, under the Barrett Law, homeowners' payments had been committed to special funds designed to pay the costs of the very improvements from which those homeowners had benefited, including contractor and debt service costs. Ind. Code § 36-9-37-13. The Deputy City Controller confirmed as much in an affidavit in *Cox*. *See* Ex. C to Defs.' Supp. Cross-Mot. For Summ. J. at 2 ¶ 9, No. 1:09-cv-435-WTL-DML (filed Feb. 4, 2010) [Dkt. 57-3] (affidavit of Charles White) (stating that

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[3] At the summary judgment hearing, when pressed to identify any limiting factor that would prevent the anticipated torrent of claims, petitioners' counsel could only suggest "statute of limitations problems." C.A. App. 417. But that cannot be correct. Resolution 101—and its failure to grant retroactive refunds while forgiving outstanding balances—is the source of petitioners' constitutional claim. The statute of limitations could not possibly begin to run before Resolution 101's enactment and might not run until a requested refund was denied. *See, e.g.*, *Wallace v. Kato*, 549 U.S. 384, 391 (2007); *Cooper Indus., LLC v. City of South Bend*, 899 N.E.2d 1274, 1280 (Ind. 2009).

"Barrett Law funds collected prior to the forgiveness [resolution] were retained in a special fund and were used to pay the bond debt on the sanitary sewer construction projects"). Thus in contrast to a situation where certain outstanding general tax obligations are forgiven (which itself would be wholly rational), here the payments were attributed to specific projects and, by law, could only be spent—if they had not already been spent—on costs related to those projects.

Second, it would have been immensely difficult from an administrative standpoint for the City to have issued Barrett Law refunds to homeowners who had previously made payments. At the time Resolution 101 was enacted, there were over forty Barrett Law projects where homeowners had outstanding balances. Pet. App. 5a. The City had utilized the Barrett Law for decades; between 1992 and 2005 alone, the City connected some 4,200 properties to sewers using Barrett Law financing, and between 1996 and 2005, the City "received approximately $17,000,000 in Barrett Law payments," Ex. C to Defs.' Supp. Cross-Mot., *supra*, at 1 ¶ 6. The City no longer even had records of Barrett Law assessments and payments from before the early 1990s. *Id.* at 3 ¶ 14. To provide refunds (or even accurately assess the fiscal impact of the refunds), therefore, the City would have had to review records for thousands of homeowners across hundreds of different projects—if those records even existed anymore. It would have had to arrange for payments from non-Barrett Law sources, since funds were committed to and spent on Barrett Law projects as they were undertaken. And it would

have had to address innumerable other difficult issues—for example, whether homeowners were entitled to interest from the time they had made their payments, and if so, at what rate. These concerns are flatly contrary to the City's intended goal of being "done with all aspects of [the] Barrett Law" and "out of the Barrett Law business" upon passage of Resolution 101. The City accordingly acted well within the bounds of rationality in declining to provide refunds to petitioners and instead drawing a clear line between outstanding balances and past payments.

2. In an apparent attempt to sidestep the well-established principles of rational basis review that support the City's decision not to refund any Barrett Law payments made before Resolution 101's effective date, petitioners repeatedly accuse the City of a variety of impermissible classifications. At times, they accuse the City of "discriminat[ing] between taxpayers who delayed full payment of their assessments and those who paid in full." Br. 38; *see also id.* at 7, 32, 39, 49, 52. At other times, they contend that the City discriminated between "early vs. late payers." *Id.* at 40. At still other times, they claim that the City discriminated between "petitioners and their similarly situated neighbors." *Id.* at 33; *see also id.* at 9, 11, 22, 32. These various formulations miss the critical point: petitioners are not similarly situated to neighbors with outstanding balances. The very fact that petitioners affirmatively needed to seek a refund, while their neighbors simply had their outstanding balances forgiven without any further action on their parts,

underscores this fundamental division, which gives rise to a perfectly rational distinction.

Resolution 101 draws no distinction, other than a temporal one that looks to whether there were outstanding balances on Resolution 101's effective date. Resolution 101 forgave *all* outstanding Barrett Law balances due on November 1, 2005—regardless of the specific project to which they related, the particular neighborhood involved, how large or small a balance was, or how many installments were left to be paid. Likewise, the City has never refunded *any* Barrett Law payments made before that date—again, regardless of the specific project to which they related, the particular neighborhood involved, how large or small the payments were, or whether the payments were made by installment or lump-sum amounts. As the Indiana Supreme Court observed, "it was not just the Brisbane/Manning taxpayers who had paid their assessments in full"—*i.e.*, not just petitioners—"who did not receive refunds." Pet. App. 23a. Rather, "*no* taxpayers in any of the 40-plus Barrett Law projects received any refunds of the amounts they had paid, including those who had paid some but not all of their installments." *Ibid.* (emphasis added). In every material respect, both in forgiving *all* outstanding balances and in refusing to issue *any* refunds of prior payments, the City has treated all similarly-situated parties the same at all times. "Generally speaking, laws that apply evenhandedly to all 'unquestionably comply' with the Equal Protection Clause." *Vacco v. Quill*, 521 U.S. 793, 800 (1997) (quoting *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979)). That is plainly the case here.

The only distinction the City *has* drawn is to declare an effective date of the forgiveness program of November 1, 2005, waiving all outstanding balances as of that date and refusing to refund any payments made before that date. While that effective date, like virtually any effective date, may have a disproportionate effect on someone who submitted a payment right before the deadline, that is not an unfairness of constitutional dimension. Any time the government forgives any payment or grants amnesty for anyone, there will be someone who has just paid a tax or penalty in full. But far from producing a constitutional violation, such an exercise of governmental line-drawing is perhaps the paradigmatic example of state action warranting deference under rational basis review. *See*, *e.g.*, *Beach Commc'ns*, 508 U.S. at 315–16. Indeed, notwithstanding the wide latitude afforded to the City in selecting an effective date, it chose arguably the *least* arbitrary date possible—one day after passage of the legislative overhaul to which Barrett Law forgiveness was indisputably tied.

At its core, petitioners' claim reduces to the contention that the Equal Protection Clause forbids a forgiveness program that operates only prospectively. But that cannot possibly be the law. Otherwise, countless such programs operating at the local, state, and federal levels would be called into constitutional doubt. For example, the District of Columbia recently offered an amnesty program under which, beginning August 1, 2011, drivers could pay overdue parking and moving violation tickets without incurring the usual penalty for late payment (a doubling or more of the fine). *See* Nikita

Stewart, *DMV Offers Amnesty For Overdue Tickets*, Wash. Post, July 28, 2011, at B5. Without doubt, countless motorists had sent in their double payments in the days and weeks before the announcement; nevertheless, the District offered "no refunds" for such drivers. *Ibid.* Scores of other municipalities have instituted similar programs. *See, e.g.*, Melanie D. Scott, *Pay Parking Tickets Now and Save Big*, Detroit Free Press, June 19, 2011, at A11; Fran Spielman, *Amnesty Raises $7 Mil., Now Boots Are Coming*, Chi. Sun-Times, Mar. 4, 2009, at 6.

Likewise, California has enacted tax amnesty programs that "allow[] individuals and corporations owing income or sales taxes to pay up without facing financial penalties," without any indication that those who paid such penalties before the start date are entitled to refunds. Evan Halper & Dan Morain, *State Reaps $3 Billion in Overdue Taxes*, L.A. Times, Apr. 8, 2005, at B3. And the federal Internal Revenue Service has established programs allowing taxpayers with "undisclosed foreign accounts" voluntarily to disclose such accounts, thereby "avoid[ing] substantial civil penalties and generally eliminat[ing] the risk of criminal prosecution." Internal Revenue Service, Voluntary Disclosure: Questions and Answers (May 6, 2009), *available at* tinyurl.com/VDfaq. If the IRS has already "initiated a civil examination," however, the taxpayer is not eligible for the program. *Ibid.*

To be sure, each of the foregoing programs results in some unfairness to those whose relevant conduct preceded the program's announcement or effective date. The relatively-scrupulous and

modestly-tardy District parker may chafe at seeing his less scrupulous and tardier neighbor avoid a fine. But none of this amounts to a constitutional violation or a constitutional obligation for the District to provide refunds to all if it chooses to grant amnesty to some. As long as the government is even-handed about applying the effective date, there is simply no constitutional issue implicated. It is perfectly rational for a government to apply a forgiveness program prospectively, and the Court should resist petitioners' invitation to transform unlucky timing into a constitutional violation.

Relative to most individuals who fall on the wrong side of an effective date or amnesty deadline, moreover, petitioners are poorly positioned to claim unfairness. Under the Barrett Law, each petitioner's $9,278 assessment was based on the actual costs of the sewer project and constituted a conclusive determination that each petitioner was specially benefited in that amount. Ind. Code §§ 36-9-39-23(a)–(b), -25. In exchange for paying that assessment—which they never challenged as excessive or improper—petitioners received precisely the benefit they were promised: a new sewer system. Petitioners are no different from thousands of City residents who, for decades, paid a Barrett Law assessment in exchange for a sewer valued at that amount.

Petitioners' claim is thus not a product of petitioners' own injury, but wholly a product of petitioners' dissatisfaction with the fact that some of their neighbors benefited from the government's forgiveness. Absent that act of government generosity, petitioners would suffer no injury

whatsoever, since they got exactly what they paid for. By dint of timing and the City's decision to make a clean break from the Barrett Law, some of petitioners' neighbors got something of a windfall. To be sure, those homeowners were fortunate—just as a criminal defendant on direct review is fortunate when this Court announces a new rule that benefits him but not his co-defendant whose conviction is final, and just as a parking scofflaw is fortunate when a city enacts an amnesty program relieving him of hundreds of dollars in penalties his neighbor paid for the same offenses. But envy does not a constitutional violation make.

3. Neither this Court nor any other federal court has ever suggested, much less held, that a government violates the Equal Protection Clause when, as here, it forgives outstanding balances but does not reopen past transactions by refunding payments already made. Such a ruling would serve as a powerful deterrent to a wide range of government initiatives involving forgiveness of penalties, amnesty programs, and other acts of grace. It would be surprising if the same document that establishes the pardon power prevents such acts when they are prospective only. It would be unfortunate as well. Such government impulses should be encouraged—not deemed unconstitutional because the forgiveness extends only to "outstanding balances" and not to payments already made.

As noted, governments at the local, state, and federal level routinely engage in forgiveness or amnesty programs involving everything from parking tickets to tax deficiencies to other violations of the law. *See* Jane Prendergast, *Ticket Skippers*

Get Amnesty—Until June, Cincinnati Enquirer, May 10, 2011 (describing municipal amnesty program covering past-due bills for "emergency medical runs, summer day camps, barricading unsafe buildings and other fees"). These programs are mutually beneficial to both governments and constituents. In some circumstances, governments are able to raise much-needed funds. One recent IRS amnesty program involving offshore bank accounts, for example, "allow[ed] the United States Treasury to collect at least half a billion dollars in unpaid taxes." David Kocieniewski, *Amnesty Program Yields Millions More in Back Taxes*, N.Y. Times, Sept. 15, 2011, at B9. That justification does not always apply when, as here, a government transitions from one policy to another, but in those circumstances the revenue-raising justification is supplanted by the virtues of making a clean break from the past program and avoiding payments that may be viewed as duplicative. *See* pp. 26–29, *supra*. Constituents, in turn, avoid the very burden that the forgiveness program was designed to eradicate—be it a payment, a penalty, or even a criminal prosecution. Here, the benefit was quite clear as the City not only forgave outstanding Barrett Law balances but removed liens on affected properties.

Those benefits to both governments and constituents are put at risk by the rule petitioners advocate. Few governments would ever launch such programs if they face the possibility of compelled refunds or other benefits to a potentially limitless class of individuals who would claim to be "similarly situated" to the benefited individuals, but for an accident of timing. No municipality would ever

forgive penalties for late parking tickets if it were required to refund all penalties previously paid. And, here, all five members of the DPW Board attested that they would not have voted for Resolution 101 had the City been required, as a result, to refund all Barrett Law payments made before the effective date. *See* Ex. D–H to Defs.' Supp. Cross-Mot., *supra* [Dkts. 57-4 to 57-8].

If the price of government forgiveness is forced refunds for payments previously made, then government forgiveness programs will become an endangered species. That outcome is neither prudent nor compelled by law. The Equal Protection Clause is not offended by a wholly rational distinction between, on the one hand, forgiving outstanding balances and, on the other hand, reopening past transactions and refunding payments already made.

II. PETITIONERS' ARGUMENTS THAT THE CITY LACKED A RATIONAL BASIS FOR REFUSING TO REFUND THEIR BARRETT LAW PAYMENTS ARE UNAVAILING

A. Petitioners' Reliance On *Allegheny Pittsburgh* Is Misplaced

Petitioners principally rely (Br. 22–36) on *Allegheny Pittsburgh*, in which this Court held unconstitutional the peculiar assessment practices of the Webster County, West Virginia tax assessor. 488 U.S. at 338. According to petitioners, their case is "on all fours" with *Allegheny Pittsburgh*. That is a bold claim considering that petitioners did not even rely on that case in the lower courts, *see* Pet. App. 24a n.14; C.A. App. 18–43, 377–93; Appellees' C.A.

Br. 7–25, and this Court has essentially limited it to its highly aberrational facts. It is also incorrect. Not only is *Allegheny Pittsburgh* readily distinguishable, but petitioners' reliance on it reflects the precise mistake they repeatedly charge (erroneously) the City with making—namely, it confuses the initial assessment process and the later decision to forgive outstanding balances. *Allegheny Pittsburgh* involved the assessment process, an aspect of the Barrett Law process petitioners do not challenge, and it has nothing to do with the obligation to issue refunds for past payments.

The facts and holding of *Allegheny Pittsburgh* are unusual but uncomplicated. For over ten years, the Webster County assessor, "apparently on her own initiative," had assessed the petitioners' properties at levels dramatically higher than comparable surrounding properties. 488 U.S. at 339, 344–45. The resulting disparities were stark, with one property assessed at 35 times the value of a comparable property, and an estimate that it would take 500 years for valuations to equalize. *Id.* at 341–42. None of this was pursuant to a conscious policy choice by the state; instead, the assessor "fashion[ed] [her] own substantive assessment policies independently of state statute"—namely, by deciding that recently conveyed properties would be assessed on the basis of purchase price, a practice inconsistent with the State tax authority's guidance. *Id.* at 338, 345. The result of that "aberrational enforcement policy," *id.* at 344 n.4, was that petitioners suffered from the "intentional systematic undervaluation by state officials of comparable property in [the] County," constituting an equal

protection violation, *id.* at 346 (internal quotation marks omitted). The "aberrational" deviation underscored the Court's holding, as it expressly reserved judgment about the validity of a state's conscious decision to adopt a differential valuation scheme. *Id.* at 344 n.4.

From that modest case and its modest holding, petitioners seek to draw a broadly applicable principle of equal protection law. *Allegheny Pittsburgh*, petitioners contend, stands for the proposition that there must be "a plausible basis, judged in relation to the background policy choice the State had made, for the taxing authority to impose significant inequality among otherwise similarly situated property owners." Br. 26. In this case, they claim, the "background policy choice" was "equality among neighbors," *id.* at 26, 30, from which the City "wildly departed" when it forgave all outstanding Barrett Law balances but refused to refund any prior Barrett Law payments, *id.* at 32. (quoting *Engquist*, 553 U.S. at 603) (internal quotation marks omitted).

Petitioners' effort to recast *Allegheny Pittsburgh* suffers from multiple defects. As an initial matter, *Allegheny Pittsburgh* addressed discriminatory action in the context of property assessments. Petitioners concede, however, that they are not challenging their assessments. Br. 37. Rather, as they repeatedly take pains to point out—while chiding the City and the Indiana Supreme Court for purportedly failing to grasp the difference—they are challenging the City's subsequent decision not to refund their Barrett Law payments. *See, e.g.*, *id.* at 38, 39, 44. That is an entirely different state action

from the assessment determinations at issue in *Allegheny Pittsburgh*.

What is more, petitioners are attempting to mix and match the state's policy in the assessment process (equality) with the results of the separate forgiveness resolution (forgiveness for outstanding payments only) to generate the kind of inconsistency in *Allegheny Pittsburgh*. That will not work. It was critical to this Court's decision in *Allegheny Pittsburgh* that the assessor's valuation process deviated from the avowed state policy for the valuation process itself. Nothing in *Allegheny Pittsburgh* remotely suggests that governmental action fully compliant with a state law addressing assessments constrains subsequent, distinct governmental action regarding whether to forgive outstanding payments as part of a transition away from an old system. Here, to the extent Indiana state law required equal assessments, it was fully complied with.[4] But nothing in state law, let alone the federal Constitution, requires transplanting the equal assessment requirement to the separate context of deciding whether a forgiveness policy for outstanding balances should extend to refunds for prior payments. To use the parking analogy, an amnesty program that did not refund past payments

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[4] The Barrett Law does *not* require that homeowners, even those in the same project, be "treated equally." It merely provides that the "costs" of a sewer "shall be primarily apportioned equally among" affected properties. Ind. Code § 36-9-39-15(b)(2)–(3). The statute thus speaks only of requiring equal assessments among homeowners in the same project—nothing more. That is precisely what occurred in this case, as petitioners do not dispute. Br. 31, 48.

would not violate a statutory requirement that all tickets and penalties be assessed at an equal $50 amount, nor would it violate the Equal Protection Clause.

To the extent petitioners attempt to read *Allegheny Pittsburgh* as announcing some form of "rational basis-plus," that reading is completely inconsistent with a host of this Court's decisions suggesting that, if anything, governments have particular latitude in drawing classifications in the tax process. *See* pp. 25–26, *supra*. It is also completely inconsistent with this Court's decision three years later in *Nordlinger v. Hahn* confirming that *Allegheny Pittsburgh* was a narrow, factbound decision, not a revolution in Equal Protection jurisprudence. In *Nordlinger*, the Court addressed the issue it had reserved in footnote 4 of *Allegheny Pittsburgh—viz.,* the validity of a state initiative expressly adopting a policy of acquisition-value assessment. *See Nordlinger*, 505 U.S. at 5. The result was "staggering" differences in tax burdens for comparable properties. *Id.* at 6–7. The Court upheld the scheme against an equal protection challenge after confirming the applicability of the ordinary principles of rational basis review and concluding that the law rationally furthered multiple legitimate interests. *See id.* at 11–14.

In so doing, the Court rejected the petitioner's appeal to *Allegheny Pittsburgh*. It acknowledged that the assessment practices in both cases "resulted in dramatic disparities in taxation of" comparable properties. *Nordlinger*, 505 U.S. at 14. But the Court distinguished *Allegheny Pittsburgh* by emphasizing the aberrant practices of the county

assessor in that case: there was not "any indication" there that the assessor's "unequal assessment scheme" was driven by any reasonable policy, unlike the initiative at issue in *Nordlinger*. *Id.* 14–15. *Allegheny Pittsburgh*, the Court concluded, was "the rare case" under rational basis review "where the facts precluded any plausible inference" that the state action was driven by a legitimate interest. *Id.* at 16.

Nordlinger is instructive in several respects. First, it repeatedly refers to the "assessment scheme" at issue in *Allegheny Pittsburgh*, *see* 505 U.S. at 14–15, further confirming the disconnect between the state action there (assessment) and here (denial of refunds) and the impropriety of mixing and matching policies from one context to the other. Second, it establishes that "dramatic disparities in taxation" on comparable properties are not sufficient to make out an equal protection claim. *Id.* at 14. Third, and most significantly, it emphasizes the peculiar facts and extremely narrow holding of *Allegheny Pittsburgh*, describing it as a highly unusual case turning on the rogue assessor's systematic, intentional undervaluation. The disjunction between the stated assessment policy and the assessor's practices was both highly aberrational and critical; it was as if a state had adopted a flat tax and some local authorities had, for years, collected a graduated tax.[5] That is precisely

[5] Of course, even in that case, it is not obvious why the aberrational efforts of the local tax authorities would violate the federal Constitution, as opposed to merely violating state law. *Cf. Nordlinger v. Hahn*, 505 U.S. 1, 18 (1992) (Thomas, J., concurring in part and concurring in the judgment). While

how *Allegheny Pittsburgh* has been understood by lower courts and commentators, including the Indiana Supreme Court here. *See, e.g.*, Pet. App. 28a; *Jicarilla Apache Nation v. Rio Arriba Cnty.*, 440 F.3d 1202, 1211 (10th Cir. 2006) (stating that "*Allegheny Pittsburgh* speaks to long-standing policies that produce systematic inequality"); Robert C. Farrell, *The Equal Protection Class Of One Claim:* Olech*,* Engquist*, and the Supreme Court's Misadventure*, 61 S.C. L. Rev. 107, 120-21 (2009) (observing that in *Nordlinger*, the Court "effectively limited the holding of *Allegheny Pittsburgh* to its facts").[6]

Finally, as even petitioners admit, their test is satisfied so long as there was a "plausible basis" for the government's purportedly differential treatment. Br. 26. For *Allegheny Pittsburgh* to be reconciled with the rest of the Court's equal protection

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there is no need to overrule *Allegheny Pittsburgh* here because it is so readily distinguishable, petitioners' creative efforts and the confusion sowed in the lower courts have proven Justice Thomas prescient in predicting that *Allegheny Pittsburgh* was a problematic and unworkable precedent even on its narrow facts. *Ibid.*

[6] Notably, criticism of *Allegheny Pittsburgh* is not in short supply. *See, e.g.*, *Nordlinger*, 505 U.S. at 18 (Thomas, J., concurring in part and concurring in the judgment); *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1197 (9th Cir. 2002) (describing *Allegheny Pittsburgh* as "without substantial analysis"); William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 Fla. State U.L. Rev. 451, 496–97 (2010) (describing *Allegheny Pittsburgh* as a "muddled opinion" and an "outlier case"); John H. Ely, *Another Spin On* Allegheny Pittsburgh, 38 UCLA L. Rev. 107*,* 108–11.

jurisprudence, a "plausible basis" is simply a rational one. And as explained, there are manifold plausible and eminently rational justifications for the City's actions here. *See* pp. 26–37, *supra*.

B. Petitioners Do Not Otherwise Defend The Reasoning Of The Court Of Appeals Or The Dissent Below

Curiously, apart from following the court of appeals' suggestion that *Allegheny Pittsburgh* is highly relevant, petitioners do not employ or defend any of the reasoning found in the decisions below that support them. And they barely acknowledge the arguments they actually made before the lower courts. There is good reason for petitioners' reticence: all of the arguments they previously made are inconsistent with settled precedent, and the decisions below supporting them are riddled with errors.

For example, both the court of appeals and Justice Rucker's dissent cited *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), for the proposition that, as the court of appeals put it, "when the text of a law specifically declares its purpose, the law leaves no room to conceive of any other purpose for its existence." Pet. App. 65a (brackets and internal quotation marks omitted). Because the City had "made findings and declared its purpose in" Resolution 101, the court of appeals believed the City was "foreclosed from offering other subsequent explanations" for its conduct in the context of rational basis review. *Id.* at 67a; *see also id.* at 72a. Justice Rucker likewise remarked that "when a legislature does state a reason for a

statutory classification, * * * it is inappropriate to consider other conceivable or even expressed rationales." *Id.* at 35a–36a (Rucker, J., dissenting).

But it is hornbook law that rational basis review does not work this way. Any conceivable rational basis, whether expressed contemporaneously or not, suffices. An enacting authority is "never require[d] * * * to articulate its reasons for enacting" a law, *Beach Commc'ns*, 508 U.S. at 315 (citing *Fritz*, 449 U.S. at 179), and this Court has never suggested, much less held, that the mere fact that legislation sets forth findings or purposes automatically precludes consideration of other justifications or rationales. *Cf. Fitzgerald*, 539 U.S. at 108–09. If the law were otherwise, governments would have every incentive to remain mum concerning their findings and motivations, which would hardly facilitate either good government or judicial review. Nor does *Allied Stores* suggest otherwise; as the Indiana Supreme Court properly observed, in that case the Court merely noted that when legislation expressly declares a *suspect purpose*, a government cannot later attempt to disclaim that rationale by advancing a different one. 358 U.S. at 529–30 (citing *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949)); Pet. App. 17a n.11. That is assuredly not the case here, and petitioners do not seriously contend otherwise.

The court of appeals also pointed to out-of-state decisions. *See* Pet. App. 29a–33a, 59a–60a. Petitioners likewise begin their argument with the bold assertion that, other than the Indiana Supreme Court, "every state supreme court to address the issue" has held that the Equal Protection Clause "prohibits tax-forgiveness measures that favor

taxpayers who delayed full payment over those who promptly paid their tax assessments in full." Br. 21. But the four decisions they cite are neither explained nor ever mentioned again. The reason is obvious: they are utterly inapplicable to this case. In *State ex rel. Stephan v. Parrish*, the "sole issue" was whether a state law violated the state constitution; the court cited no federal law. 891 P.2d at 448. So too in *Perk v. City of Euclid*, 244 N.E.2d 475 (Ohio 1969). In *Richey v. Wells*, decided well before the Court's modern rational basis review jurisprudence, the court simply declared, absent citation to authority, that the challenged provision "transcend[ed] the limits of both state and federal provisions of organic law on the subject of equal protection." 166 So. at 819. And as the Indiana Supreme Court properly explained, *Armco Steel Corp. v. Department of Treasury* was "incorrect in its articulation of equal protection law and distinguishable on its facts." Pet. App. 30a–31a.

Finally, before the lower courts, petitioners "primarily rel[ied] on * * * so-called 'class-of-one' cases." Pet. App. 20a. Before this Court, petitioners have largely abandoned that approach in favor of misplaced (albeit creative) reliance on *Allegheny Pittsburgh*. The closest petitioners come is to fault the Indiana Supreme Court for supposedly "suggest[ing] * * * that *Allegheny Pittsburgh* is irrelevant because that case was supposedly a 'class-of-one' case, whereas this case is not." Br. 35. But that just underscores that petitioners view their current *Allegheny Pittsburgh*-based claim as distinct from a class-of-one case. In any event, whether *Allegheny Pittsburgh* is viewed as a precursor to a

class-of-one claim or as simply a one-off case in light of *Nordlinger*, *see* Pet. App. 28a–29a, the result is the same. Petitioners have abandoned the arguments they made below and focused on *Allegheny Pittsburgh*, a readily distinguishable decision that cannot possibly carry the weight petitioners place on it.

C. Petitioners' Remaining Contentions Are Unfounded

Petitioners' remaining arguments attempt to pick away at various statements by the Indiana Supreme Court and various rationales for the City's conduct, hoping to induce death by a thousand cuts. Br. 36–56. But that scattershot approach does not undermine the rationality of the City's actions.

Petitioners repeatedly attempt to preempt the City's rational justifications for refusing to refund their Barrett Law payments by contending in various formulations that "the City has admitted that the only interest advanced by its decision to withhold refunds was its interest in keeping petitioners' money." Br. 40–41; *see also id.* at 37, 40, 46, 50, 56. They base these assertions on two passing statements in the City's Brief in Opposition: the first that "all of the City's other reasons for forgiveness without refunds would have been accomplished if refunds were also extended," Br. in Opp. 6, and the second that "[petitioners'] solution of additional refunds would accomplish the same goals, but would have cost the city millions of additional dollars as a result," *id.* at 11.

These isolated remarks are entirely accurate, but do not carry anywhere near the significance

petitioners ascribe to them. The first simply reflects the reality that in transitioning away from the Barrett Law, the City could have made a clean break by not only forgiving outstanding balances, but refunding past payments as well. The second simply captures the reality that going beyond the forgiveness of outstanding balances to refunding past payments, potentially going back to the City's first use of Barrett Law financing, would have been considerably more expensive and prohibitively so. *See* pp. 34–37, *supra.* None of this is remarkable, let alone fatal to the City's position. This Court has often remarked that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987). There are always competing concerns and constraints, and one of the most obvious is limited financial resources. That does not mean that when a legislature recognizes that it cannot pursue its objectives at all costs and draws a line, the only justification for drawing the line in that place is financial savings. To the contrary, legislatures operating with limited financial resources routinely draw lines that do not fully achieve their objectives, but draw the line in a place that otherwise makes sense. In the context of transitioning away from an abandoned policy, a decision to eliminate the vestiges of the program without reopening every transaction under the old regime is a perfectly sensible place to draw the line in a world of limited resources.

Nor is it correct for petitioners to insist that the City's interest was "in keeping petitioners' money." Br. 41. It bears repeating that upon payment, "petitioners' money" was allocated to a special fund

statutorily restricted to paying certain costs associated with the very sewer that the City had provided to petitioners in exchange for those payments. The City was not sitting on an enormous pot of petitioners' money; it was legislating in the face of severe fiscal restraints and drew the line at the most sensible place—forgiving outstanding balances without refunding previous payments. *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 50 (1990) (observing that governments "have a legitimate interest in sound fiscal planning"); *Lyng v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am.*, 485 U.S. 360, 373 (1988).

Petitioners also contend that "administrative convenience" does not provide a legitimate basis for the City's refusal to deny them refunds. Br. 44–45. That is wrong both factually and legally. Petitioners claim that "it is difficult to imagine a case in which the administrative burden could be lighter." *Id.* at 44. But that ignores that petitioners are not the only parties entitled to refunds under their theory. The obligation would extend at least to similarly situated homeowners in other projects and could extend well beyond. The exact administrative burdens are difficult to pinpoint because the metes and bounds of petitioners' novel theory are imprecise, but the burdens are real. And, as a matter of law, petitioners are simply wrong to contend that avoiding administrative burdens is not a valid basis for legislation under rational basis review; the Court has long held otherwise. *See, e.g.*, *Bowen v. Roy*, 476 U.S. 693, 711–12 (1986); *Mathews v. Lucas*, 427 U.S. 495, 509–10 (1976).

Petitioners spend ten pages (Br. 46–56) responding to the Indiana Supreme Court's single statement 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." Pet. App. 16a. Petitioners attack this sentence on the ground that having made a lump-sum payment is a poor proxy for someone's overall "financial position[]." Whatever the truth of that proposition, having paid in full is a fair, if inexact, proxy for the aspect of a resident's "financial position" that was most relevant to the City in passing Resolution 101—namely, the ability of someone to pay both ongoing Barrett Law obligations and higher monthly fees under STEP. Obviously, those with no outstanding Barrett Law balances were in a better "financial position" in terms of liquidity to pay the higher monthly fees than those facing the new fees and the prospect of paying off outstanding balances. In all events, the constitutionality of Resolution 101 does not turn on this lone remark; ample independent rational bases support Resolution 101.

Finally, petitioners are incorrect to suggest, as the court of appeals concluded, that if the City's failure to provide refunds following Barrett Law forgiveness constitutes a violation of the Equal Protection Clause, the City must provide refunds rather than rescind forgiveness. *See* Pet. App. 75a–77a. This remedial question obviously does not arise unless petitioners' constitutional claim succeeds. But if the federal Constitution really does put a jurisdiction to the choice of either forgiving outstanding balances and refunding past payments

or forgiving nothing at all, there is no reason that the only constitutionally permissible remedy is the former.

In erroneously holding otherwise, the court of appeals again relied on *Allegheny Pittsburgh*. But there the Court merely rejected the proposition that an equal protection violation is alleviated if the government "imposes on him against whom the discrimination has been directed the burden of" establishing equalization. 448 U.S. at 346. That is a far cry from holding that a government cannot remedy an equal protection violation by *itself* rescinding the discriminatory conduct or eliminating the improper classification. In fact, this Court has "never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 738 (1984). To the contrary, "when the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of equal treatment." *Id.* at 740 (quoting *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931)). That result "can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Id.*; *see also Wiesmueller v. Kosobucki*, 571 F.3d 699, 702 (7th Cir. 2009) (Posner, C.J.) (stating that "[l]eveling down is a permissible form of compliance with a command to end unequal treatment").

In this case, petitioners claim that they were treated unequally when the City forgave the outstanding Barrett Law balances of their neighbors (and many others) but did not refund the past

Barrett Law payments they (or anyone else) had already made. If that is an inequality of constitutional dimension, eliminating the forgiveness program rectifies that purportedly unequal treatment no less than refunding petitioners' payments, and the City should be afforded the former option to equalize the allegedly disparate treatment. Indeed, when remedying equal protection violations, "a remedial outcome consonant with the [government's] overall purpose is preferable." *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 153 (1980). Here, every member of the DPW Board has indicated that he or she would have preferred not to pass Resolution 101 at all rather than pass it but refund prior payments to homeowners, *see* p. 44, *supra*—an intent that should be honored should a violation be found.

Of course, the foregoing only highlights the anomaly of petitioners' constitutional claim. Petitioners' injury does not flow from being cheated out of some promised government benefit. They received the sewer they paid for. Their entire injury stems from the relative good fortune of their neighbors who were the beneficiaries of the government's understandable—indeed, admirable—desire to make a clean break from an abandoned policy and not saddle residents with continuing obligations under the old law. Such a "constitutional injury" could be "remedied" by eliminating the neighbors' good fortune, but there is simply no constitutional injury here in the first place. The City could have refunded every payment ever made under the old program, but doing so would have been infeasible. Instead, the City drew an eminently

sensible line using a principle underlying the actions of every branch of government. The vestiges of the discarded program were eliminated prospectively, but past payments and closed transactions were left undisturbed. There is simply nothing improper, let alone unconstitutional, about that commonsense decision.

CONCLUSION

The judgment of the Indiana Supreme Court should be affirmed.

Respectfully submitted,

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