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IN THE SUPREME COURT OF THE UNITED STATES

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CHRISTINE ARMOUR, ET AL., :

Petitioners : No. 11-161

v. :

CITY OF INDIANAPOLIS, :

INDIANA, ET AL. :

- - - - - x

Washington, D.C.

Wednesday, February 29, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

MARK T. STANCIL, ESQ., Washington, D.C.; on behalf of
Petitioners.

PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of
Respondents.

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in case 11-161, Armour v. City of Indianapolis.

Mr. Stancil.

ORAL ARGUMENT OF MARK T. STANCIL

ON BEHALF OF THE PETITIONERS

MR. STANCIL: Mr. Chief Justice, and may it please the Court:

The city chose a method for abandoning its sewer funding mechanism that left Petitioners paying 30 times more than their next door neighbors to connect to their neighborhood sewer project simply because Petitioners had paid their tax bills in full.

Mere timing of payment does not render similarly situated taxpayers into similar groups. And that is particularly true here where the taxpayers are a discreetly defined group of homeowners sharing equally in a common specific benefit and State law specifically defines them as similarly situated.

The city's principal contention is that jettisoning the Barrett Law, they waived a fundity of initial taxation, was itself an end for this justification and itself justified the gross disparity

1 imposed on Petitioner -- on Petitioners. That does not.
2 The fact that an arbitrary classification may yield a
3 desirable result does not render it any less arbitrary.
4 The city must have a reason for drawing the distinction;
5 but paying ones taxes in good faith does not equal
6 treatment.

7 Indeed State law here makes clear that
8 delaying payment by choosing an installment plan does
9 not put a taxpayer on special footing. For example, the
10 Barrett Law declares that installment payments "shall be
11 collected in the same manner as other taxes" and
12 installment payments are automatically secured by a lien
13 against the property.

14 Taxpayers who select the installment plan,
15 which they may do for any reason or no reason
16 whatsoever; and in fact, if they make no choice, they
17 default into the installment plan. They are required,
18 if the city asks as it did here, to sign an agreement,
19 agreeing to pay the installments in full with interest
20 and not to contest the validity of the underlying
21 assessment.

22 JUSTICE SOTOMAYOR: Counsel, I understand
23 your arguments. Your adversary raises a point that
24 concerns me, which is what happens to all other amnesty
25 programs like parking ticket amnesties? And if you take

1 your logic to an extreme, how about something that
2 doesn't involve money but immigration status amnesty,
3 illegal aliens who can apply for citizenship and be
4 forgiven their illegal entry?

5 Doesn't the logic of your theory basically
6 mean that there are no circumstances in which the
7 government could treat people differently?

8 MR. STANCIL: No, Your Honor, for several
9 reasons. For starters, this Court's equal protection
10 and rational bases cases in particular make clear
11 context is key. So forgiving a penalty imposed on a
12 speeder, for example, who has an overdue ticket or
13 parking ticket is qualitatively different judgment than
14 forgiving the underlying tax liability broad --

15 JUSTICE SOTOMAYOR: Every time a police
16 officer stops me for a traffic violation, I get angry
17 when he lets somebody else go. So you are suggesting
18 that there is a difference between that and this case
19 where the government is basically saying, you owe me
20 something and I'm going to forgive you what you owe me?

21 MR. STANCIL: Yes, Your Honor. The Chief
22 Justice's opinion in Engquist took that specific example
23 on, not with you in mind presumably, but took that
24 example on specifically and it said: This is the kind
25 of action itself that is inherently a subjective

1 individualized determination. It's not irrational to
2 pull over one traffic violator and not another because
3 that's the nature of the enforcement action. That is
4 qualitatively different from a tax imposed on 181
5 homeowners who live next door to each other, and then
6 12 months later saying, you know, 31 of you are going to
7 pay 30 times as much in reality as the other 150, even
8 though --

9 JUSTICE BREYER: I thought there were a lot
10 more than 20 different lots. 20 different -- I mean,
11 what's your view of how the cutoff should work? Do they
12 have to refund all the money, everybody who, in fact,
13 ever paid a Barrett Law assessment?

14 MR. STANCIL: No, Your Honor, and State law
15 on this is quite clear.

16 JUSTICE BREYER: I don't care what the State
17 says; I'm saying a matter as a constitutional law.

18 MR. STANCIL: Well, constitutional law looks
19 to State law. That's what we took out of Allegheny
20 Pittsburgh v. Nordlinger.

21 JUSTICE BREYER: Okay.

22 MR. STANCIL: But I will back up. I'll do
23 it both ways, Your Honor. State law says the following
24 taxpayers are similarly situated, your project specific
25 to your neighborhood because those are the people to

1 whom you are guaranteed -- with whom you are guaranteed
2 equal treatment. It is not that you are entitled to a
3 certain price for a sewer connection under this law.

4 It's --

5 JUSTICE BREYER: Well, why in the State,
6 when they have let's say, 10,000 people who have already
7 paid their assessments -- well, why doesn't it have to
8 give them back their money, on your theory? That's my
9 simple question.

10 MR. STANCIL: Because they are not similarly
11 situated. Because --

12 JUSTICE BREYER: Why aren't they?

13 MR. STANCIL: Because your -- the States
14 have flexibility to define at the outset who is
15 similarly situated.

16 JUSTICE BREYER: Okay. Fine. They define
17 here who is similarly situated, and the people who
18 aren't are the ones who are on the installment plan.

19 MR. STANCIL: No, Your Honor, but they have
20 a basis for stating that. They don't just --

21 JUSTICE BREYER: They do. They do. The
22 reason is because they think it's unfair to give the
23 people -- they think it's unfair -- they don't want to
24 bother collecting it from those people who haven't paid
25 yet. Okay? That's why. And they don't see a way, if

1 you -- so if we are going to free them, we don't want to
2 go back into history and then suddenly give back all the
3 people whoever paid their assessment. I mean, so we
4 draw the line somewhere.

5 MR. STANCIL: Your Honor --

6 JUSTICE BREYER: This is where are we
7 drawing it. That's the State law. What's wrong with
8 that?

9 MR. STANCIL: That's not what this Court's
10 cases say. It's not the fact that you need to draw a
11 line somewhere. I will take the case that Respondents
12 rely on heavily FCC v. Beach --

13 JUSTICE BREYER: I mean -- My point, I'm not
14 making it clear. My point is that what is less rational
15 about saying, if you paid, too bad. We are having an
16 amnesty for the future. What's less rational about that
17 than saying some of the people who paid in full will get
18 their money back and some will not. Which is the line
19 you want to draw.

20 MR. STANCIL: No, Your Honor. I'll back up
21 again. So, we do have a specific definition of who is
22 and who is not entitled to equal treatment or roughly
23 equal treatment. So that's under State law. So they
24 already committed to who is and who is not similarly
25 situated. All you need to decide in this case and this

1 is broad as in homeowners on these people who are
2 promised you will pay the very same as your next
3 neighbor that you will pay the same amount for the this
4 pipe that you will flush your toilet into. Are they
5 going to change their mind and say you are going to pay
6 30 times as much?

7 JUSTICE GINSBURG: Mr. Stancil, who are
8 these people? We have plaintiffs in this suit and there
9 was a judgment in the court of first instance in the
10 appellate court, for a dollar amount, but we're told
11 there are many more of these Barrett Law projects, and
12 that they all operate the same way.

13 So the result is a lot more money than these
14 plaintiffs are claiming, is that not so? If your
15 position under the law is right?

16 MR. STANCIL: If we are correct, the city
17 will end up paying a little more than in our specific
18 case but I would like to explain why and how much
19 because it's an important distinction.

20 There are about 21 Barrett Law projects that
21 still have balances outstanding many of them are almost
22 paid off. So there are only three that have the 30-year
23 option. The rest have of the 10-year option. Anything
24 from 2001 prior. So in fact I can give you specific
25 numbers.

1 There are 7 projects that are less than --
2 that are half paid off or less than half paid off.
3 Because of the equal protection violation is only
4 triggered by gross disparity between similarly situated
5 taxpayers the city may or may not have to refund in each
6 project down the line. If you are nine out of ten.

7 JUSTICE KAGAN: That counts as a gross
8 disparity?

9 MR. STANCIL: I don't think that counts as a
10 gross disparity.

11 JUSTICE KAGAN: Well, what does is my
12 question. How -- how do you separate a gross disparity
13 from a non-gross disparity.

14 MR. STANCIL: Well, start with this case,
15 which is easy. It's 10 to 1 and 30 to 1. It's the same
16 numbers in Allegheny Pittsburgh. But even if you drew 4
17 to 1 or 5 to 1 as a line, as the Court has done, say, in
18 punitive damages cases where it suggested outer limits,
19 that -- I think those are easy lines to draw, and
20 certainly lines that the lower courts could draw.

21 JUSTICE SCALIA: If -- if you win, does --
22 does the city just have to give you enough to bring it
23 down to 5 to 1 so it's no longer a gross disparity?

24 MR. STANCIL: I don't think so, Your Honor.
25 I think triggering -- the gross disparity triggers the

1 violation. And the question is, well, what's the remedy
2 for a violation? I think they'd have to have a reason
3 for saying we're going to with -- it would be the very
4 definition of arbitrary to say well, even though you are
5 entitled to equal treatment as a matter of law, you
6 know, and even though we're not -- it's not -- liability
7 isn't triggered except for gross disparities, I think
8 they would have to give us that -- that figure.

9 And, Your Honor, if I could, I'd like to get
10 back, Justice Ginsburg, to your question about how these
11 other projects -- there's a suggestion by Respondents
12 that there's a terrible line drawing problem in how do
13 we calculate these benefits. It's simply not the case.
14 We have this Federal class action in the Cox case, which
15 is every other Barrett Law project that's active except
16 ours. We opted out.

17 The damages question was before that Court,
18 because -- because the Court ruled in favor of the
19 position that this is an equal protection violation.
20 The city put together a damages pleading, and it -- and
21 it produced to the dollar a calculation of every
22 overpayment in every Barrett Law project.

23 JUSTICE BREYER: But that isn't the
24 administrative -- the administrative -- well, maybe
25 that's one. The administrative problem is, I thought,

1 the following: Imagine that you are the city mayor.
2 All right? And suppose the mayor does what you want.
3 The mayor says I'll give all these people in their
4 project back their money.

5 The next day in my office, there show up 15
6 people who say, last month, we happened to be in project
7 2, and we paid all our money. Why don't you give us
8 back our money? You just gave it to the people in
9 project 1. Give it to us. And the next day after that,
10 there are 14 people from project 3 and from project 4.

11 What is your answer to those angry taxpayers
12 who have said: We don't understand why you refunded the
13 money from project 1 but not for us.

14 What's your answer?

15 MR. STANCIL: Two reasons. One, you are not
16 promised equal treatment under State law to those other
17 projects; you were promised equal treatment with the
18 people you live next door. Two, you use a different
19 pipe. These pipes cost different amounts of money to
20 put in different places, and they're done over time.

21 Your Honor's hypothetical -- actually, if I
22 could tweak it a little bit -- it -- the question is not
23 who comes in for somebody -- who comes in from a project
24 last month. The burning question is who comes in from a
25 project 11 or more years ago, because those are the only

1 ones that'll still be in repayment.

2 The Cox -- if we win -- well, there's a
3 repayment plan. That's the only thing that creates
4 this -- this asymmetry. The only people who are going
5 to come in and say well, you refunded some people on my
6 project but not me are people in repayment, so it's only
7 going to be from a project '95 and forward.

8 JUSTICE SOTOMAYOR: You see, the problem
9 that I have is that you're trying to lop off half of the
10 project, which is was what was the Barrett project --
11 without looking at what the new project is. And that
12 goes to what Justice Breyer's point was. Moving
13 forward, every old project and every new project is
14 going to pay more money than they did under the Barrett
15 Law, because I think, if I understand correctly, the
16 city is raising a -- essentially not a flat fee, but a
17 fee -- assessing a flat fee across all taxpayers so that
18 these sewer lines can be built.

19 Am I correct about that?

20 MR. STANCIL: No, Your Honor. For future
21 sewer projects that they start, each person who connects
22 to that new pipe pays a \$2,500 flat fee. Every resident
23 citywide who uses the municipal sewer -- new, old, or
24 whatever -- pays an extra about \$10 a month under the
25 new system. So what they did is they decided this

1 program, the Barrett Law, is politically very unpopular;
2 we would like to get rid of it. Fair enough. But they
3 chose a way to do it. They said well, we're going to be
4 completely ignorant of --

5 JUSTICE SOTOMAYOR: But it -- but it says
6 that new people are going to pay a flat fee. Old people
7 are going to pay \$10 more a month that they didn't have
8 to pay.

9 MR. STANCIL: Right.

10 JUSTICE SOTOMAYOR: And so why can't they
11 come in, and why don't they come in and say exactly what
12 Justice Breyer said: You forgave the payments of taxes
13 for hooking up to the sewer system of these new people
14 coming in. You're treating me differently.

15 MR. STANCIL: They should -- there's nobody
16 who will pay more under the new system than my clients,
17 because the new people pay \$2,500 and the same monthly
18 fees that now every Indiana resident pays.

19 JUSTICE SOTOMAYOR: Well, so everybody else
20 says I want to pay \$2,500. You're still not dealing
21 with the fact that this was one decision tied to others.
22 It was a package deal. And so that the rationality of
23 this package deal has to be seen in context. You want
24 to lop it off and say, all I'm looking at is how much
25 these taxpayers paid for this old system, not what the

1 new system is creating.

2 MR. STANCIL: But that's because under this
3 Court's equal protection cases, they have to have a
4 reason for this particular line. They can't say we have
5 a general objective and it doesn't matter if we pursue
6 it --

7 JUSTICE BREYER: I might have missed a fact
8 which -- which I'd like to know. Let's call your
9 project, project 1, all right? And all the others are 2
10 through 20. Are there any people in projects 2 through
11 20 who still have money outstanding, or are they all
12 paid off?

13 MR. STANCIL: Yes. They have -- they're in
14 various states of repayment.

15 JUSTICE BREYER: They're in various states.
16 Okay. What happened to the taxpayers who still owe
17 money in projects 2 through 20?

18 MR. STANCIL: They all got refunds -- or
19 their balances were completely forgiven.

20 JUSTICE BREYER: Okay. So it's the same.
21 So now, the people for the angry taxpayers in projects 2
22 through 20 show up at the mayor and say, mayor, you're
23 not only -- you only -- you're not only -- under your
24 system, you not only gave the all-paid-up people back,
25 if you win, but you also forgave the future people in 2

1 through 20, and you're not giving us our money back.

2 MR. STANCIL: Look -- let me make clear, 2
3 through 20 are --

4 JUSTICE BREYER: Am I arguing the facts?

5 MR. STANCIL: I'm not sure. I want to make
6 sure I understand that -- that fact. 2 through 20 are
7 actually older projects --

8 JUSTICE BREYER: Yes. Older projects.

9 MR. STANCIL: So they owe less money.
10 And -- and they come into the mayor and they say:
11 Where's my money? I paid in full. I paid my --

12 JUSTICE BREYER: Right.

13 MR. STANCIL: -- 9,000, but Joe over here
14 got his last \$1,000 forgiven. Here's what the mayor
15 says.

16 JUSTICE BREYER: Yes.

17 MR. STANCIL: The mayor says, I talked to my
18 lawyers. If it's a grossly disproportionate burden.
19 So, if you end up paying grossly disproportionately to
20 your next-door neighbor, because that's what Allegheny
21 Pittsburgh and Nordlinger and all the Court's cases say,
22 then I'm entitled -- I have to give you a refund. But,
23 if you end up paying 10 percent more than the other
24 person to connect to this pipe, that's just not an --

25 JUSTICE SCALIA: I think -- I think that

1 Justice Breyer is suggesting that if you treat
2 unconstitutionally a whole lot of people, you can get
3 away with it.

4 (Laughter.)

5 JUSTICE BREYER: Oddly enough, I was not
6 suggesting that.

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: Counsel, some --
9 some time ago, I thought you were just about to tell us
10 how much money the city says will be at stake if you
11 prevail.

12 MR. STANCIL: In my case, there's
13 \$273,391.63. In the Cox case, \$2,783,702.59, on the
14 assumption that all of those people are grossly
15 disproportionately burdened.

16 CHIEF JUSTICE ROBERTS: And -- the city says
17 that's the total amount that's at issue if you prevail,
18 if the taxpayers prevail on this claim.

19 MR. STANCIL: That's -- that's what it said
20 in Cox. Yes, Your Honor.

21 JUSTICE ALITO: Could the city cure the
22 problem by rescinding the forgiveness for those who paid
23 under the installment plan?

24 MR. STANCIL: No, Your Honor.

25 JUSTICE ALITO: Why not?

1 MR. STANCIL: This was specifically
2 addressed in Allegheny Pittsburgh. That's exactly what
3 the West Virginia Supreme Court said. They said, well,
4 if you have any remedies -- only to raise the taxes on
5 other people. And this Court specifically rejected
6 that.

7 JUSTICE SCALIA: You wouldn't have any
8 incentive to bring a lawsuit if that were the remedy,
9 would you?

10 MR. STANCIL: Right. I'm already
11 unpopular --

12 JUSTICE SCALIA: So effectively --

13 MR. STANCIL: -- I'm unpopular in
14 Indianapolis as it is. If I went back and just raised
15 everybody's taxes, I'll -- I'll never get to go home.

16 (Laughter.)

17 MR. STANCIL: But, again, this -- and that's
18 just the practical reality.

19 JUSTICE GINSBURG: Why isn't that a choice
20 for the legislature? Because everybody could be treated
21 equally by getting their money back, or nobody gets out
22 from under the old system. So why shouldn't that be --
23 the decision is you can't treat these two groups of
24 people differently, so I think the Court has said in a
25 number of cases you can equalize up or down as a

1 legislative choice.

2 MR. STANCIL: It was a legislative choice,
3 Justice Ginsburg. But having now made a choice that
4 inflicts a constitutional violation, this Court's cases
5 are clear. The correct and the default rule is refunds,
6 because -- for exactly the reason Justice Scalia raised.
7 Even if it's possible to go back and do that, which --
8 it isn't always the case -- but even if it's possible,
9 that just means the equal protection cases and tax cases
10 don't get brought, because the most you can hope to get
11 is --

12 JUSTICE KAGAN: Mr. Stancil, if that's
13 right, and let's take a case which is different from the
14 one that -- that you're saying. Let's take a case where
15 there are many, many, many more open projects, involving
16 much, much more costs than you are saying is true here.
17 And the mayor looks at this and says, you know what,
18 unless I can just draw the line here, I'm not going to
19 be able to change this financing system. Either --
20 unless I can draw the line here, or unless I can say
21 nobody gets any money.

22 What's a mayor to do?

23 MR. STANCIL: Well, again, I agree with
24 Justice Scalia that making a big mess isn't a
25 justification for arbitrarily ending it.

1 JUSTICE KAGAN: Well, but I -- I guess what
2 I'm asking is, we have this terrible program; everybody
3 hates it; it's not fulfilling its intended purposes; the
4 mayor and everybody else wants to change it. How is the
5 mayor going to change this program now.

6 MR. STANCIL: There are two ways he could
7 have changed this program. One, he could have offered
8 us refunds. Two --

9 JUSTICE KAGAN: I'm suggesting --

10 MR. STANCIL: I know --

11 JUSTICE KAGAN: -- that that is financially
12 prohibitive.

13 MR. STANCIL: I will pay for it then,
14 because he can go and he could -- he could have done two
15 things here. They could have -- and I'm using the mayor
16 loosely; it's actually the board of public works and the
17 city-county council. But he could have increased that
18 monthly fee under the new program. There actually --
19 these sewer projects still cost the same.

20 JUSTICE SCALIA: Have we ever decided an
21 equal protection case on the basis that the -- the State
22 who had violated the -- the Constitution can't afford to
23 pay for it? Is there any case that supports that?

24 MR. STANCIL: No, Your Honor.

25 JUSTICE SCALIA: It's just too expensive?

1 MR. STANCIL: No.

2 JUSTICE SCALIA: And, therefore, we have to
3 deny equal protection?

4 MR. STANCIL: No, Your Honor. And I --

5 JUSTICE KAGAN: Well, isn't that what you
6 are saying, Mr. Stancil? Is what you are saying that
7 when cities create tax policy, they can't think about
8 the budget implications of that tax policy?

9 MR. STANCIL: No. Your Honor. What I'm
10 saying is when they want to change tax policy, having
11 already said these taxpayers are the same and entitled
12 under law to equal treatment, they can't just say it
13 would be too expensive on us to treat them equally when
14 unwinding that program. This Court in Plyler has said
15 resources are not sufficient.

16 And any tax case could be justified. If
17 the -- if the city says, well, you know, we want to
18 have -- we want to refund X dollars to our taxpayers,
19 but we only have enough to refund to -- to the blonde
20 people and not to brunettes, that's arbitrary, even if
21 they couldn't afford to do it other ways -- another way.

22 So they can't just pick a method that sort
23 of where the math works out or is convenient, and just
24 say well, that's the way we could have done it.

25 I would, if I could, just return to the

1 practical ways they could have done this. And I think
2 that highlights just how arbitrary this line was. They
3 could have increased those monthly fees under STEP, the
4 new program. I mean, that's how they paid for the rest
5 of these projects. They are paying off the bonds of the
6 old projects by charging everybody in Indianapolis \$10
7 more a month.

8 They could have just collected -- in our
9 project, they could have collected for 2 more years.
10 They could have said you will be forgiven -- I think
11 it's about 27 months. We are going to forgive your
12 balances as of, you know, whatever that would be -- June
13 of 2010, whatever it would be. Or 2007 -- collected
14 that money, and then they would have had the cash to
15 refund to the people who had paid an inequal amount that
16 they were forgiving to the others. So I think -- I
17 think that's sort of, it's a red herring to say gosh, we
18 had no other way, or we only had these options A, B, and
19 C.

20 I'd like to -- I really want just to drill
21 down on an illustration of just how crazy I think this
22 is. Suppose if the United States decides tomorrow to go
23 to a national sales tax instead of the Federal income
24 tax. It's February 29th; millions of people have paid
25 their taxes for 2011; many, many -- most of us have not

1 yet paid. Could the IRS come in and say, well if you
2 have already filed and paid your taxes for 2011, too
3 bad. But lucky you, if you are a late filer, you are
4 going to get your entire tax bill forgiven?

5 I don't think that is remotely close. I
6 think that is arbitrary, and I will give you a couple of
7 reasons. One, absolutely no notice. So the timing of
8 payment, the method of payment that was selected, gives
9 those taxpayers absolutely no notice as to some
10 constitutional significance that attaches to it.

11 And I don't think -- and I can tell you from
12 talking to my clients, they don't -- they didn't think
13 that by paying upfront in full that they had -- they
14 were somehow sacrificing their chance to equal
15 treatment. Or that the city might some day wipe out 97
16 percent of their neighbors' tax obligations.

17 JUSTICE SOTOMAYOR: That is the park --
18 parking amnesty example that you have said wasn't the
19 same. Because if an individual taxpayer has filed late,
20 it's like the parking guy who didn't file his ticket,
21 either.

22 MR. STANCIL: Well --

23 JUSTICE SOTOMAYOR: So you really are saying
24 that amnesty programs are out of the question if the
25 risk is imposed equally on everyone.

1 MR. STANCIL: No, Your Honor. In the
2 parking ticket example, forgiving a penalty for late
3 payment is a qualitatively different -- to borrow from
4 Engquist again, "a subjectively individualized
5 determination" designed to achieve another goal, a
6 legitimate goal in itself. Pay your parking ticket, and
7 we will let the penalty go. That is different.

8 So if my clients were here saying, well,
9 you're not charging me --

10 JUSTICE SOTOMAYOR: No, but you are saying
11 if you forgive the parking ticket, that's an equal
12 protection violation.

13 MR. STANCIL: No, Your -- I mean, I would
14 not, Your Honor. Again, it's context-driven. The
15 parking --

16 JUSTICE BREYER: The goal here is very
17 simple. They say we have hundreds or dozens or 20
18 different programs anyway, and once we start getting
19 into the business of distinguishing among people who are
20 already paid up, it's going to be a nightmare. And so
21 the only clear line we draw is between the people who
22 are already paid up and the people who haven't paid.
23 And we don't want those people who haven't paid to have
24 to pay, because that's going to be another 20 years of
25 administrating \$33 a month.

1 Okay. That's their rationale. Now that may
2 not be perfect, but it sounds reasonable, doesn't it?
3 What's wrong with it?

4 MR. STANCIL: It's not, Your Honor. And I
5 will say --

6 JUSTICE BREYER: It's not their rationale,
7 or it's not perfect?

8 MR. STANCIL: It's not reasonable, Your
9 Honor. It rests on the faulty premise that this is some
10 administratively --

11 JUSTICE BREYER: It's not impossible. They
12 don't say it's impossible. Say, try looking through the
13 U.S. tax code. It has thousands of pages. There is not
14 one human being alive who understands every provision.
15 All we have to do is start comparing the provision on
16 page 1 with page 3 with page 7 and page 9, and we will
17 discover irrationality forever.

18 So I don't -- I mean, you may have this
19 fairly simple case but I foresee, if you win, the --
20 don't ask me what will happen, but I have a suspicion
21 it's not going to be too good.

22 MR. STANCIL: Your Honor, I mean -- there's
23 one -- there's somebody not here in this case that I
24 think belies this notion --

25 JUSTICE BREYER: Right.

1 MR. STANCIL: That this is going against the
2 tax code broadly or amnesty forgiveness decisions
3 generally. If -- if -- I think if people really thought
4 that this case was going to foul up the tax code of
5 forgiveness, I think the IRS would be here or the United
6 States would be here saying, this is very similar to
7 what we do on a daily basis in compromising debt --

8 CHIEF JUSTICE ROBERTS: Is there an easier
9 thing to administer than the system that was struck down
10 in Allegheny Pittsburgh?

11 MR. STANCIL: No, Your Honor.

12 CHIEF JUSTICE ROBERTS: When you paid,
13 that's what your assessment was. And they argued well,
14 this is easy; that's enough. And this Court said no;
15 it's an equal protection violation.

16 MR. STANCIL: Correct, Your Honor, and
17 again, the administrative burden there was actually
18 quite significant.

19 JUSTICE SCALIA: You don't believe in the
20 administrative nightmare exception to the Equal
21 Protection Clause?

22 (Laughter.)

23 MR. STANCIL: Not when it takes only three
24 pages.

25 JUSTICE KENNEDY: Can you tell me -- I'm

1 curious to know, if other States have provisions like
2 the Barrett Law and they are concerned about this, can
3 they provide in the initial documents a -- a promise
4 that there will be no forgiveness, so that there would
5 be a contract clause sort of argument against what
6 happened here? In other words -- and if we could
7 explore that for just a minute, I'm going to ask what it
8 is that you thought constituted a promise in this case?

9 MR. STANCIL: Well, there are four --

10 JUSTICE KENNEDY: And maybe not a promise in
11 the contract sense.

12 MR. STANCIL: Yes. Four separate provisions
13 of the Barrett Law -- just -- I will rattle them off for
14 you. First, it says installment payments shall be
15 collected in the same manner as other taxes. It
16 actually says "shall collect" two other times. Requires
17 a lien. It says that municipal officials who don't
18 collect installment payments can actually be held
19 personally liable and removed from office for failing to
20 discharge their duties.

21 That's on pages 2a to 3a of the appendix to
22 the blue brief. So I don't think there is any sensible
23 way to read the Barrett Law as saying it doesn't require
24 payment, and none of the State court judges who have
25 looked at this have suggested that. And --

1 JUSTICE KENNEDY: On the other aspect of my
2 case, do you think other States could provide protection
3 against this, in the event that you do not prevail here,
4 and -- and put in the documents that-- that it is
5 understood that a condition for your approving of
6 this -- these sewers, will be that there will be no
7 forgiveness?

8 MR. STANCIL: I suppose they could, Your
9 Honor. I, again I'd argue that --

10 JUSTICE KENNEDY: Would that then be
11 enforceable under the Contract Clause, do you think?

12 MR. STANCIL: I'm not sure it would be
13 under -- under the Contract Clause. But could I flip it
14 and suggest that if a State wanted to preserve its right
15 to forgive willy-nilly, they could include a provision
16 in their law that says by the way, if you choose an
17 installment plan and we change our policy, there shall
18 be -- you are not entitled to equal treatment with
19 people who pay upfront.

20 JUSTICE KENNEDY: Give you a warning?

21 MR. STANCIL: Right. And let's -- we will
22 see who pays upfront under that system.

23 (Laughter.)

24 MR. STANCIL: If I can, Your Honor, again, I
25 would like to reserve the remainder of my time.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Stancil.

3 Mr. Clement.

4 ORAL ARGUMENT OF PAUL D. CLEMENT
5 ON BEHALF OF THE RESPONDENTS

6 MR. CLEMENT: Thank you, Mr. Chief Justice,
7 and may it please the Court:

8 In 2005, the City of -- the City of
9 Indianapolis decided that it wanted to abandon its
10 reliance on the Barrett Law, a program that had proved
11 unpopular for financing public improvements. In doing,
12 so they decided to make a clean break and forgive the
13 outstanding balances that were due under the Barrett Law
14 program. The alternative of maintaining those accounts
15 and maintaining the tax liens associated with those
16 accounts for nearly 3 decades was particularly
17 unattractive. Now the Petitioners --

18 JUSTICE ALITO: I think you've put your
19 finger on the reason for this, which is that the city
20 calculated that what it did would be more politically
21 acceptable than treating the people who paid upfront
22 equally on an economic basis with the people who paid in
23 installment plans. Now if that's the reason for this,
24 is that rational?

25 MR. CLEMENT: Well, Justice Alito, it -- it

1 might well be rational. I mean, sometimes things that
2 make policy sense that the public likes also make good
3 government sense; and in this context, what they wanted
4 to do is they wanted to get out of the Barrett Law
5 business. That's the exact words --

6 JUSTICE ALITO: But what does that mean,
7 they wanted to get out of the Barrett Law business?

8 MR. CLEMENT: That -- can I put it very
9 concretely? I mean, before this -- you know, when they
10 used to have the Barrett Law and used it on an ongoing
11 basis, within the controller's office, they had a
12 Barrett Law office. They wanted to get rid of the
13 Barrett Law office.

14 How do you get rid of the Barrett Law
15 office? You get of the obligation to continue to
16 collect these payments for 30 years; you get rid of the
17 obligations to keep all these files together and see
18 whether you are in a position to enforce a tax lien.

19 JUSTICE ALITO: That really doesn't seem
20 very complicated to collect payments that people have
21 agreed to pay. And if they didn't want to do it
22 anymore, I bet they could have contracted that out for a
23 very modest fee to any number of private entities that
24 would have done it for them.

25 MR. CLEMENT: Well, Justice Alito, of course

1 they could have continued to collect. I think that's
2 common ground here, which I think ultimately shows why
3 this is a very curious equal protection theory, because
4 if the city would have continued to collect these,
5 added, you know, for 30 years then they agree, there is
6 no equal protection clause problem at all.

7 Now, I think it's Justice Kagan was
8 suggesting, if you now create a rule that says when they
9 do forgive, they actually have to provide refunds and
10 face equal protection clause violations, then in the
11 future nobody is going to ever forgive. What they are
12 going to do in the future is, even though they are
13 trying to move away from this policy, even though they
14 are trying to get out of the Barrett Law business, they
15 are going to be stuck.

16 JUSTICE KENNEDY: And so, I think maybe if
17 you prevail in this opinion, we should say the principle
18 we are adopting in this case is: Don't trust the
19 government.

20 MR. CLEMENT: No, Justice Kennedy, I don't
21 think that that's right. But the fact that that's your
22 reaction I think shows that this is not really an equal
23 protection claim, and it's not really like Allegheny
24 Pittsburgh. Because as your colloquy with Mr. Stancil
25 suggested, they would admit that if the government said,

1 as part of the Barrett Law, look, we reserve the right
2 to abandon the Barrett Law, and if we do so, we, you
3 know, we may forgive installment payments. If they said
4 that, the equal protection claim would go away in their
5 view.

6 CHIEF JUSTICE ROBERTS: Well, that's simply
7 because, as we said in Allegheny Pittsburgh, the basis
8 for considering the equal protection claim is the rights
9 that you're given under State law. In Allegheny
10 Pittsburgh it says you have the right to be treated
11 equally with respect to assessments. And you weren't.

12 Here the law says you have the right to be
13 treated equally, or whatever it is, the apportionment,
14 and they weren't. All that you're saying there is that
15 State law gets to set the base. And if the State law
16 says, we don't treat people the same in extending sewer
17 hook-ups, then that takes away your equal protection
18 clause. But it just sets the base.

19 MR. CLEMENT: Two differences,
20 Mr. Chief Justice. First of all, you know, there is
21 no -- there is no real analog to Allegheny Pittsburgh,
22 because Allegheny Pittsburgh is a one time in time case.
23 There the problem was that statute was very different.
24 It was facially neutral. And it was being applied in an
25 unequal way.

1 Nothing, not one word in Allegheny
2 Pittsburgh suggests that if the State of West Virginia
3 wanted to change its policy and adopt proposition 13 as
4 the law of West Virginia, that it couldn't do so. And
5 that's the anomaly here. This equal -- this equal
6 treatment requirement they get, they get it from the
7 Barrett Law. That's the exact law that --

8 CHIEF JUSTICE ROBERTS: The change in
9 policy -- the change in policy is from treating people
10 equally to treating people unequally. I don't see how
11 the fact that they are changing that policy addresses
12 the issue at all. They're going from a system where
13 everybody was subject to the same assessment to a system
14 where some paid something and other people paid 30 times
15 that. Yes, it's a change, but it's the change that
16 presents the problem.

17 MR. CLEMENT: No, I -- with respect, I think
18 it's the change that makes this case different from
19 Allegheny Pittsburgh. It's the change that makes this
20 government action rational. This would be a different
21 case if they didn't change the Barrett Law program.

22 They just stuck by it and said, you know, we
23 are going to forgive some people. But here they decide
24 they are going to -- they're going to abandon the very
25 law that imposes, supposedly -- I'm going to talk about

1 what State law really does. It supposedly imposes this
2 equal protection requirement. That's the very law they
3 want to move away from. And this idea that --

4 JUSTICE ALITO: Other than political
5 expediency and administrative convenience, I still don't
6 understand what rational basis you claim there was for
7 the distinction that was drawn. Now maybe one of those
8 is sufficient, but other than those two possible bases,
9 I don't see another one.

10 MR. CLEMENT: Well, you know, I count five,
11 Justice Alito. If you want to hear -- I mean, I'll go
12 through them. One is what I call making a clean break,
13 having not to deal with the vestiges of the old program.
14 You may call it political expedience. I don't think it
15 is. I think that's, you know, a good government
16 concern.

17 The second is avoiding the administrative
18 burdens of particularly the refund process. And I think
19 it's worth recognizing that -- you know, they say look,
20 well, what could be simpler; just cut a check. But to
21 whom and for what amount? I mean, if you are going to
22 go back to close accounts, the first thing you are going
23 to have to confront is what do we do with the people
24 that have sold their house.

25 Well, I mean, you know, we have to figure

1 out where they are now. We have to figure out, I mean,
2 do we --

3 JUSTICE ALITO: There is lots of reasons for
4 not giving refunds, but what are the reasons for
5 forgiving the debt that people agreed to?

6 MR. CLEMENT: Well, okay. But, if I could,
7 they don't challenge the forgiveness. So the reason
8 that I'm trying to explain that there are rational bases
9 for not giving refunds is because the challenge that is
10 really brought here is to Resolution 101 and it's --
11 it's forgiveness without refunds.

12 JUSTICE KENNEDY: You don't dispute that the
13 city would have that option if we rule against you.

14 MR. CLEMENT: Have the option what, Mr.
15 Justice Kennedy?

16 JUSTICE KENNEDY: Not to forgive the unpaid
17 balances. The city has the option, I assume.

18 MR. CLEMENT: They certainly have the option
19 in the future. I think it's a dispute between the
20 parties whether they have the option as a part of the
21 remedy. I would say, not to get ahead of myself, but to
22 address the remedy, this is very different from
23 Allegheny Pittsburgh. And it has to be that one option
24 is to simply invalidate Resolution 101.

25 I am not aware of any other area of the law

1 where you can have a statute or an ordinance that draws
2 an invalid distinction, and one remedial option is not
3 to invalid -- invalidate the statute or the ordinance.

4 And that's the position. Their position is,
5 you know, if you would have put something in there that
6 said we are not going to do anything, you'd be fine.
7 But having given forgiveness, and said we are not going
8 to give refunds, you're stuck not only with the
9 forgiveness but also with giving refunds.

10 JUSTICE KENNEDY: That's a big difference.
11 In one case there is an expectation and in the other
12 case there isn't.

13 MR. CLEMENT: No, Mr. Justice Kennedy,
14 because the expectation here is at the time of
15 Resolution 101. At the time of Resolution 101, I think
16 it's common ground. The city was under no obligation to
17 provide forgiveness.

18 So if in 101, by providing forgiveness
19 without refunds, they violated the Equal Protection
20 Clause, why isn't the logical remedy for that to simply
21 invalidate Resolution 101? You receive forgiveness and
22 everybody gets equal treatment.

23 JUSTICE SCALIA: Because you would eliminate
24 all litigation on equal protection clause grounds if all
25 that the Plaintiff is going to achieve is not any

1 benefit to him but harming somebody else. That's -- the
2 classic case is the sex discrimination case, where a
3 State had a drinking law which said that men could drink
4 at the age of 18 but women at the age of 21.

5 And what happened in the lawsuit? Did the
6 court say, well, I guess -- I guess men won't be able to
7 drink at 18. No, that's --

8 MR. CLEMENT: No, I think what they said --

9 JUSTICE SCALIA: They said that men would
10 have to drink at 18, not that women will have to wait
11 until 21.

12 MR. CLEMENT: No, I think they said that was
13 with respect --

14 JUSTICE GINSBURG: It could go either way.

15 MR. CLEMENT: Exactly.

16 JUSTICE GINSBURG: It was up to the Oklahoma
17 legislature. They could make it 21 for everyone and 18
18 for everyone.

19 CHIEF JUSTICE ROBERTS: And the city retains
20 that option in this case going forward. The problem
21 with your reality is you are dealing with a situation,
22 you are saying well, here's a violation and the law can
23 -- and what does the law do? The truth is this is
24 exactly 180 degrees away. There is no violation and the
25 law creates the violation.

1 MR. CLEMENT: Right. The thing is --

2 CHIEF JUSTICE ROBERTS: I think you are
3 dealing with an entirely different case.

4 MR. CLEMENT: If the law that created the
5 violation is Resolution 101, than the remedy in every
6 other area of constitutional law, including sex
7 discrimination, is clearly that the State has the
8 option. They can level up or they can level down. The
9 only case that's different is Allegheny Pittsburgh and
10 the assessment cases it relies on. But there is an
11 important difference.

12 JUSTICE BREYER: Then you are saying that
13 the difference between the two classes is that if you
14 continue to have the tax apply to the people who haven't
15 paid it yet, there is a large administrative expense.
16 And if you -- an expense that does not exist in respect
17 to the class that has already paid.

18 So the question, I would have thought in,
19 our Court is whether that's a rational distinction. And
20 I think contrary to what was suggested, administrative
21 expenses, of course, make a difference where the Equal
22 Protection Clause is concerned, because they
23 differentiate between the two classes, and trying to
24 avoid an administrative expense is a rational reason,
25 normally, for making the distinction.

1 Now, I mention that because I know --
2 what can -- does that bring to mind any authority which
3 would be helpful, because there was a question that
4 there is no such authority. It makes sense to me, but
5 is there some authority for that?

6 MR. CLEMENT: Sure, there is, Your Honor. I
7 mean, if you look to a number of places. I would look
8 to Carmichael v. Southern Coal where, you know, this
9 Court is confronting a case where the State says, you
10 know, we are not going to tax employers -- employers who
11 are smaller than 8, because, you know, the game is not
12 worth the candle. And in a similar way here, they say
13 we want to get out of the Barrett Law business. We want
14 to make a clean break, and they say, you know, we don't
15 want to keep this office in the comptroller's office.

16 JUSTICE SCALIA: But here the State has
17 defined the class. That's the difference. I mean, to
18 say employers with less than 8 is a separate class,
19 that's fine. But -- but here, the State said, we're
20 creating this class of -- of people who have to pay for
21 sewer assessments. And we're going to treat them
22 equally. That's what the law required.

23 MR. CLEMENT: I would have thought, Justice
24 Scalia, that this was an equal protection case, not a
25 contracts case, not a Winstar case, not an estoppel

1 case. If this was an equal protection case, the
2 relevant time period would be the time period of the
3 ordinance that's challenged, Resolution 101. At that
4 time, there is a difference already in real world fact
5 between those who have paid in full and those who have
6 outstanding balance and they are going to keep the city
7 in the Barrett Law business for three decades.

8 JUSTICE SCALIA: So you are saying that any
9 future law which -- which disregards an equal
10 classification that a prior law established is okay? So
11 long as it's a future law that does it.

12 MR. CLEMENT: It --

13 JUSTICE SCALIA: There will always be a
14 future law that does it.

15 MR. CLEMENT: No, it -- it could be. There
16 still has to be a rational basis for it.

17 JUSTICE SCALIA: Yes. That's what we are
18 questioning.

19 MR. CLEMENT: Right. But a rational basis
20 is void. You know, we have two sets of accounts. Half
21 of these accounts are going to be a nightmare to
22 maintain. We have an estimate from our comptroller,
23 this is in the Cox litigation, but it's cited in one of
24 the amicus briefs, we have an estimate from a
25 comptroller that is going to cost \$200,000 to upgrade

1 and maintain this system. We really don't want to spend
2 that.

3 Now, if that \$200,000 associated --

4 CHIEF JUSTICE ROBERTS: Excuse me. I don't
5 see the answer to Justice Scalia's question. You are
6 saying this would be a rational system going forward,
7 but you also promised the people that they would be
8 treated equally over a certain period.

9 When you start out it's not equal, because
10 somebody pays \$400 and somebody else pays 10,000, and --
11 but over the 30-year period, it's the same. That's why
12 it's equal in the beginning, even though somebody pays
13 400 and somebody pays 10,000, because they are going to
14 pay the same over the period. Then you lop off the
15 period.

16 So you are not treating them equally, when
17 you started. You can no longer say, don't worry about
18 the inequality, it will sort out in 30 years. Now you
19 can't -- you have no way of telling them why it's not
20 unequal.

21 MR. CLEMENT: With all due respect,
22 Mr. Chief Justice, you are making this sound like it's
23 an estoppel case, like it's a Winstar case. It's not a
24 broken promise case. This is an equal protection case.

25 And the reason there is a rational

1 difference at the time Resolution 101 is, is because
2 that point time has passed and they are in an different
3 position.

4 But I also do want to make clear that you
5 will look in vain in the Barrett Law for this stern
6 promise that no matter what happens, we will eventually
7 collect the same amount from everybody. What there is,
8 is there is a requirement for equal assessment in the
9 first instance -- nobody says that was violated -- and
10 then, if you elected four installments, there is a
11 provision that says you shall collect.

12 The irony of their position is they say it's
13 perfectly okay for the city to break that promise. It's
14 perfectly okay to give forgiveness. They don't have a
15 quorum -- a quarrel with forgiveness. They want
16 forgiveness. They just want to get some refunds, too,
17 as a result.

18 JUSTICE ALITO: Well, they want forgiveness,
19 but you outline correctly in your brief the fact that
20 the city had three options. One of the options was to
21 hold everybody to what they understood when they signed
22 up under the Barrett Law.

23 And I -- I do not understand how your
24 administrative convenience argument fits in with the
25 decision to forgive the debt of the people who agreed to

1 pay on the installment plan. When the city was
2 collecting those payments was that a net loss, were the
3 administrative costs of making those collections more
4 than the amount of money that was brought in?

5 If not, then I don't see how administrative
6 convenience justifies a rejection of that option.

7 MR. CLEMENT: Justice Alito, as I hear you,
8 you have switched from rational basis to, it has to be,
9 you know, a net -- unless we can show a net loss, we
10 lose. Why can't we make a rational judgment that
11 there's a unique \$200,000 cost associated with
12 maintaining this program? We don't want to maintain the
13 program. It's tremendously politically unpopular. We
14 have moved away from it. We don't want to -- I mean,
15 can you imagine the city --

16 JUSTICE ALITO: It's rational for a city to
17 say that it costs us \$100,000 to collect this money, and
18 if we do collect it, we are going to bring in \$500,000,
19 so we don't want to pay the \$100,000, so we are going to
20 get rid of the program? That's rational?

21 MR. CLEMENT: It is rational, Justice Alito,
22 because they have to maintain an office to do it. That
23 -- you know, think about the city, do you really
24 think --

25 JUSTICE ALITO: If the net -- if the net

1 cost -- if it's a net gain, what is the rationality of
2 abandoning it?

3 MR. CLEMENT: Because they want to get rid
4 of the office; they want to get out of the business;
5 they want to make a clean break.

6 Can you imagine the city 27 years from now
7 trying to take somebody's home by imposing and then
8 trying to enforce a tax lien based on a program that
9 they walked away from 27 years earlier? They would get
10 laughed at. They couldn't do that.

11 And if they can make that judgment in --
12 another way of thinking about it 10 years from now.
13 Okay? They collected everything from the 10-year
14 payers. All they have got left are the 20-year payers,
15 the 30-year payers. They say, you know, this is
16 ridiculous, it's still -- we are still taking in more
17 money than it would cost, but it's ridiculous. We want
18 to get out of this business. We have told the people --

19 JUSTICE ALITO: You put your finger on it.
20 They want to get out of the business. What they have
21 done is shift the cost of the sewers from a -- from a
22 small group, a small interest group that is able to
23 presumably exert some political power to -- to
24 everybody. They spread the cost around to everybody.
25 And everybody -- the ordinary person who has to pay a

1 little bit more every month doesn't get all fired up
2 about it.

3 That's what this -- that's what this is
4 about, isn't it?

5 MR. CLEMENT: No, it's not what it's about,
6 the way you're describing it. Maybe there's a takings
7 claim for somebody to bring, but it's not an equal
8 protection claim. What you articulated would be exactly
9 the same if there were a provision in the Barrett Law
10 that said, by the way, if we ever get rid of the Barrett
11 Law all bets are off, we might not collect --

12 CHIEF JUSTICE ROBERTS: There is a
13 provision -- you said I would search in vein for this
14 provision in the Barrett Law.

15 MR. CLEMENT: Yes.

16 CHIEF JUSTICE ROBERTS: Well, I went and
17 searched and 15 --

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: -- 15(b)(3)says:
20 The costs shall be primarily apportioned equally among
21 all abutting lands or lots.

22 MR. CLEMENT: Yes, that's the -- I -- I --
23 that's the provision I already mentioned about
24 appraisals. That's talking about the costs --

25 CHIEF JUSTICE ROBERTS: It says costs.

1 MR. CLEMENT: The cost of the project when
2 they are doing the appraisal. When they are coming up
3 with the cost for how much it's going to cost to stick
4 the pipes in the ground, they have a law that it has to
5 be divided equally among the lots. That's an
6 assessment, there is a specific provision. You had can
7 challenge the assessment if you don't like it. Once you
8 don't challenge it it's final.

9 There is two provisions in the Barrett Law
10 that you won't search in vein for that talk about the
11 interest of finality, which is yet another reason that
12 justifies the differential treatment here between people
13 who paid have in full, their accounts are closed and
14 people who have ongoing outstanding balances.

15 CHIEF JUSTICE ROBERTS: Where -- where do I
16 look to find that when they say the costs shall be
17 apportioned equally, they are not referring to the
18 costs, but they were referring to the assessments?

19 MR. CLEMENT: They are referring to the
20 costs of the project, the improvement. That will then
21 be reflected --

22 CHIEF JUSTICE ROBERTS: The costs of the
23 project are funded by the -- the sewer hook-ups, and
24 some people pay 400 and some people paid 10,000.

25 MR. CLEMENT: But it's the costs that are

1 then reflected in the assessment on each lot. And
2 there's then a process for challenging that assessment
3 on the assumption that the costs are allocated equally
4 to each lot, and then when that's done, the finality
5 provisions kick in. And nobody says there was anything
6 wrong.

7 JUSTICE KENNEDY: That just -- that just
8 underscores the promise of the State or the city that
9 all owners will be treated equally. That just
10 underscores the point that that was the understanding
11 and the commitment.

12 MR. CLEMENT: With respect, that's not.
13 The -- the original idea is -- sure, you know, we are
14 going to assess the costs of the project equally among
15 everybody whose benefiting from the project. And then
16 we're going to have an assessment, and if the Barrett
17 Law doesn't change, the assumption is everybody's going
18 to pay the same amount.

19 I'm not here to tell you otherwise, but the
20 point is, the Barrett Law, like most laws, doesn't have
21 a clause that plans for its own demise. It doesn't say,
22 well, you know, if -- if we get rid of this law, we
23 either will or will not enforce the installments.

24 And I think the question here is at a
25 different point in time when they have made a different

1 judgment. We don't like the Barrett Law. It's proven
2 unpopular. It's proven unwieldy. It's not just
3 popularity or political, it's that, you know, they were
4 facing lots of low-income subdivisions with septic
5 tanks, and, you know, they are forcing the prospect of
6 trying to get people to pay \$10,000 to improve a -- the
7 sewer on a house that is worth \$50,000. They realize
8 that's a non-starter. We have got to get out of this
9 business.

10 CHIEF JUSTICE ROBERTS: You just said it's
11 not popularity. In page 1 of your brief you say the
12 Barrett Law method eventually proved to be politically
13 unpopular. Sounds like it's popularity to me.

14 MR. CLEMENT: It's just popularity. You
15 know, every once in a while the people have a point.
16 And it's not just they don't like something, it's the
17 right to not like it. And they are very much right to
18 not like the law that says you have a \$50,000 house and
19 we are going to make you pay for a \$10,000 sewer
20 hook-up.

21 They were right to get out of the business.
22 Having done that I don't understand why they are saddled
23 with a provision of law that exists in the old law that
24 they are trying to get away from.

25 And just to be clear -- I mean, if you want

1 to look at a case that I think shows you why the State
2 law is not as equality ueber alles, as they are
3 presenting. Take a look at the old Indiana case called
4 Allendorf, 176 N.E. 240. That's a case where somebody
5 in the project challenged the -- the assessment, said
6 that's unfair, it's too much. Other people paid in
7 full.

8 The people who challenged it went to court.
9 They eventually settled with the city for a reduced
10 amount. Then later on the people who had paid in full
11 went into court and said we are entitled to pay no more
12 than those guys. You know what the Indiana appellate
13 court said? No dice. That doesn't work. You
14 basically -- you either waived your right and express
15 waiver or if you paid in full, it's -- you know, too
16 late, it's too late.

17 So the -- and this is -- with respect I
18 think part of the problem with the Allegheny Pittsburgh,
19 in particularly this extension of it, you are putting so
20 much weight on the State law, and it gets you in this
21 business of flyspecking the Barrett Law.

22 I mean -- you know, this -- I mean, Justice
23 Thomas made this point very well in the Nordlinger case
24 that there is an anomaly here, which is you looking --
25 supposed to be looking at Federal law and the violation

1 seems to be tied to potentially a violation of State
2 law.

3 If I could focus on that for a minute,
4 because this is another really important difference
5 between Allegheny Pittsburgh and this case, which speaks
6 right to the remedy. In Allegheny Pittsburgh, it's a
7 facially neutral statute.

8 And so it would be an anomaly there to say
9 that when there's a facially neutral statute, you're
10 going to invalidate the -- the statute. The statute's
11 fine. The problem is, you've been assessed at
12 100 percent, everybody else has been assessed at 50
13 percent. The Court in that unique context says, you
14 know, there's no obligation to go and sort of mandamus
15 the assessor, to bring everybody else up. You get to
16 sort of go back to that level.

17 This is very different. The challenge here,
18 like in Nordlinger, is a challenge to a distinction
19 drawn in a law. Resolution 101, unlike the law in
20 Allegheny Pittsburgh, is not facially neutral. It draws
21 a distinction. So the relevant question is the
22 rationality of that distinction. Is it rational?

23 We submit there are multiple reasons why it
24 is rational. But if you disagree with me, the obvious
25 remedy is to strike down the statute, or at least remand

1 to the State court with express instructions that they
2 have the option, which is exactly what happened in the
3 sex discrimination cases.

4 And Justice Scalia, if you're worried about
5 incentives and standing, look at Heckler v. Mathews.
6 Another sex discrimination case. This exact issue came
7 up. And what the Court said is standing is based on
8 your right to guarantee equal treatment. Whether or not
9 it's a pocketbook injury, you have standing if you're
10 denied equal treatment.

11 Now, these guys may have been denied equal
12 treatment on the assumption they're right. But they can
13 get equal treatment restored just as easily by
14 Resolution 101 being invalidated in full as they can by
15 getting an additional windfall by getting a refund. And
16 as Justice Alito --

17 JUSTICE KENNEDY: Well, why -- why is
18 that -- why is that a big deal for us? That's the law,
19 you get your -- your choice.

20 MR. CLEMENT: Okay. But, I mean, that's a
21 big difference, because that's different from what
22 they're saying. They're saying there's no remedial
23 option. They're saying we are stuck now. We -- we have
24 to give refunds. That's the only permissible
25 constitutional remedy. And obviously, the city would

1 prefer to get out of the Barrett Law business and to
2 provide these forgiveness, but it would certainly be a
3 lot better for the city if they would at least -- as the
4 Court made clear, they had the option of levelling up or
5 levelling down. I do think, though, that gets to
6 Justice Kagan's --

7 CHIEF JUSTICE ROBERTS: You -- you mentioned
8 Heckler v. Mathews. In Heckler v. Mathews, the Court
9 said, quote: "Ordinarily, extension of the withheld
10 benefit rather than nullification is the proper course."

11 MR. CLEMENT: Yes.

12 CHIEF JUSTICE ROBERTS: So while it is true
13 that you can cure a violation by levelling up or
14 levelling down, ordinarily, extension of the benefit is
15 the proper course. And that's for the reason
16 Justice Scalia gave, because otherwise, there would be
17 no equal protection case brought.

18 MR. CLEMENT: If that were the rule, Heckler
19 v. Mathews would have come out the other way. The Court
20 was -- you know, the Court --

21 CHIEF JUSTICE ROBERTS: Well, what wrong --
22 what did the Court mean when they said "ordinarily,
23 extension is the proper course"?

24 MR. CLEMENT: Well, they were talking about
25 a specific situation and a Federal law. So I don't know

1 why the rule would be the same. And the sex
2 discrimination cases are much more on point for purposes
3 of this. But they're also talking about a very specific
4 context where you have a limitation on a benefit. And
5 the idea is, if you strike down the limitation, the
6 default option is everybody gets the benefit.

7 This is different. I mean, you know, really
8 what Heckler is talking about is severability concerns.
9 There's no severability that works here. Resolution
10 101, if you look at it, it doesn't say anything about
11 refunds.

12 It simply says we're going to forgive the
13 balances on the outstanding accounts. If that's somehow
14 impermissible, then the law goes. There's nothing to
15 sever. There's nothing -- there's not one word in the
16 statute about refunds, and that's different from the
17 context where you have a general extension of benefits
18 and you have similar limitations than a bank would have
19 --

20 JUSTICE BREYER: What -- what do you think
21 would happen if the city says -- if it came out that
22 way -- we really want to give refunds. Or cut the loss.
23 We want to stop collecting the money, period. Then to
24 make it fair on this hypothesis, the city would have to
25 go back and refund money. To whom? And how many?

1 MR. CLEMENT: And -- and in what amount?

2 JUSTICE BREYER: And you heard your -- your
3 -- your friend try to -- make a distinction between this
4 project, and you wouldn't have to give the money, he
5 said, to every other person -- whoever back in 1850 or
6 1890 or whenever it was -- began to make Barrett Law
7 payments. But you would with this one.

8 Now, what -- I'd like a little comment on
9 that.

10 MR. CLEMENT: Well, you're absolutely right.
11 I talked about the --

12 JUSTICE BREYER: Right, because it's a
13 question.

14 MR. CLEMENT: Okay. Then the answer is, it
15 would be an administrative nightmare. If I understand
16 the question --

17 JUSTICE SCALIA: I don't understand that
18 why. I mean, people paid the lump sum.

19 MR. CLEMENT: With respect to --

20 JUSTICE SCALIA: -- if people come forward
21 and say I'm one of the ones who paid the lump sum, I
22 want a refund; and if somebody doesn't come and present
23 such a claim, the city doesn't pay. If someone does --

24 JUSTICE BREYER: That's right.

25 JUSTICE SCALIA: Surely the city has

1 records.

2 JUSTICE BREYER: Let me try to get my
3 question, which is, I'm not -- I'm thinking this is
4 project 1. So certainly on the hypothesis, you have to
5 pay back the people who already paid up for project 1.

6 But in your brief, you say there's project 2
7 through 20. And is there in your opinion a basis for
8 distinguishing all those people who have paid up in
9 those projects, or would you have to give them their
10 money back, too? Now, you heard your friend's statement
11 -- explanation of why you wouldn't have to give them the
12 money back, and I want to get your response to that.

13 MR. CLEMENT: Well, with respect, what I
14 heard him say is we probably would. And I think we
15 certainly would as to most of the projects. There might
16 be a couple of the projects where the differences are so
17 small that he would say there's no gross inequality
18 there. But as to most of the other projects, there's
19 still substantial differences --

20 JUSTICE BREYER: How many people does that
21 involve, about?

22 MR. CLEMENT: It involves -- I don't know --
23 I know the number of projects. It's like 20 projects.
24 So I'm guessing it's at least 1,000 people. And then of
25 course, somebody's going to come in if we do that, as

1 you suggested, and say wait a second --

2 JUSTICE SOTOMAYOR: Was his figure of
3 \$2 million accurate? The stakes in the other case.

4 MR. CLEMENT: The -- the stakes in the other
5 case without interest I think are \$2.7 million. So, you
6 know, I think the -- the ballpark figures are right.

7 CHIEF JUSTICE ROBERTS: When -- when you say
8 "the other case," do you mean every other project?
9 Because that's what, a class action; right?

10 MR. CLEMENT: It -- it's a class action that
11 tops the Federal litigation. But still, that's not a --
12 that's not an insubstantial amount. Of course, the
13 relevant question is not, you know, are the damages a
14 set figure after you've had litigation in Federal court.

15 The question is: what is the city
16 administrator, at the time he has to decide whether he
17 has a refund obligation, to do?

18 And, Justice Scalia, you said well, it's
19 clear as mud. I mean, did you listen to the answer
20 about gross inequality? What, are they supposed to run
21 it through the gross inequality calculator that tells
22 them well, you know, it's close, but it's not really --
23 there's not a discrete obligation? I don't know -- I
24 would not know how to advise them, as to which of the
25 other 212 projects they owed a refund to, and which they

1 didn't. I would be at a complete loss.

2 And the reason --

3 CHIEF JUSTICE ROBERTS: Well, if
4 everybody -- if everybody entitled to a refund came
5 forward, it would cost you \$2.7 million.

6 MR. CLEMENT: No, actually it would -- plus
7 this one. So it would be a little over 3.

8 CHIEF JUSTICE ROBERTS: Okay. 3,
9 \$3 million. And you say the real problem is the huge
10 administrative costs in trying to figure out who you owe
11 it to. If it's that huge, all they do is -- who
12 somebody comes forward, asks for a refund, verify that
13 they are a -- you know, were a homeowner on the project,
14 give them the refund.

15 MR. CLEMENT: Well, I mean --

16 CHIEF JUSTICE ROBERTS: The most it's going
17 to cost is \$3 million.

18 MR. CLEMENT: Yes, in this case. And the --
19 and the law you develop is not going to be limited to
20 this case; it's going to apply in other contexts as
21 well. Heaven knows where it stops. As I said,
22 Allegheny Pittsburgh, it was at least limited to a
23 particular context. Now, I mean, I don't know why any
24 city ever -- I mean, maybe this is the limiting
25 principle -- that no city ever again will provide

1 amnesty or forgiveness under any circumstances.

2 CHIEF JUSTICE ROBERTS: Amnesty -- I don't
3 get -- amnesty is entirely different. Amnesty is for
4 people who did something wrong. Nobody did something
5 wrong here; it wasn't wrong to pay with installments.
6 So the amnesty -- don't apply.

7 MR. CLEMENT: But Mr. Chief Justice, it's --
8 it's the same principle. I mean, I could certainly see
9 some -- you know, suppose the city elects a laissez
10 faire mayor, and says you know what, parking tickets,
11 it's not worth the hassle; we are going to getting out
12 of the parking ticket enforcement business, and we are
13 going to forgive everybody their parking tickets. If I
14 had just paid my parking tickets I would be hacked off.
15 But I wouldn't feel like I had a Federal constitutional
16 right to get my money back. And that's the difference
17 --

18 JUSTICE KENNEDY: What can you do with the
19 hypothetical about the income tax and the sales tax? So
20 you don't pay any income tax if the sales tax had gone
21 into effect.

22 MR. CLEMENT: I think if they really got rid
23 of the -- the Federal tax forever, I don't think there
24 wouldn't be an equal protection violation. I think
25 there might be a different constitutional violation. If

1 you listen to him, the first thing he ticked off about
2 why that would be so horrible, is there was no notice.
3 Well, that sounds like a due process concern to me, not
4 an equal protection concern.

5 And that's really what's happening here.
6 When they transport Allegheny Pittsburgh from the
7 context it arose in to this very different context, they
8 are converting it from an equal protection case to
9 something more like a Contract Clause case, or to a
10 Winstar case, or something like that. And not one word
11 in that opinion suggests that once a State adopts a
12 certain policy, that it's trapped. It can't make a
13 reasonable and rational transition away from that policy
14 to a policy that better serves the citizenry. And if it
15 doesn't --

16 JUSTICE ALITO: Is there some identified or
17 identifiable demographic difference between the two
18 groups that either justifies or could on -- on a remand
19 justify the different treatment?

20 MR. CLEMENT: Well, I think the one -- I
21 don't think there is a demographic difference. I think
22 the one concrete difference that really is a difference
23 is from the city's perspective, they are looking at two
24 groups all of whom are going to have to pay a new higher
25 monthly fee; and I think they can a rational decision

1 that says look, you know, one of these groups has to
2 make two monthly payments to the city for sewer and
3 water. That seems a little crazy.

4 So why are we -- what we will do is we will
5 just make everybody in the city in terms of or their
6 ongoing payments to the city for sewer and water, we
7 will treat them all exactly the same. One fee.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Stancil, you have 4 minutes remaining.

11 REBUTTAL ARGUMENT OF MARK T. STANCIL

12 ON BEHALF OF THE PETITIONERS

13 MR. STANCIL: Justice Alito, I want to just
14 pick up right there. What they are actually saying on
15 these two monthly payments idea is that it's rational
16 for somebody who's just who just paid \$300, and now
17 everybody pays an extra \$10 a month, we don't want them
18 to have to make their \$30 a month Barrett Law payment
19 having paid \$300, and the extra 10.

20 My clients still have to pay the extra \$10 a
21 month, but we are out of pocket \$9,300. I think that is
22 -- I think that is patently irrational, to say that --
23 that we are trying to help people who are out 300 bucks
24 from having to pay an extra 30 bucks going forward.

25 JUSTICE KAGAN: Mr. Stancil, here is what

1 worries me about this case. To me, this is a case about
2 transition rules. All legislation creates classes of
3 citizens and some are -- and puts them all in a group,
4 and says you are going to be treated in the same way as
5 long as this legislation exists. And then a legislature
6 comes along and changes that piece of legislation, and
7 different people are affected differently by it.

8 And to me what you are suggesting is that
9 when that break is made and when that transition occurs,
10 the -- I don't know how you would apply the rule that
11 you were suggesting, which is that everybody in the
12 former class has to be treated the same as a matter of
13 transition policy.

14 MR. STANCIL: If you've promised equal
15 treatment -- and we're talking about a -- this is a -- a
16 specific case. A specific commonly shared benefit among
17 people who are indistinguishable on any rational basis.
18 They live next to door to each other; they flush into
19 the same pipes; and they paid and were promised equal
20 payments. In that instance you -- then there has to be
21 a rational method. You have to treat them equally when
22 you transition.

23 So there may be times where the city has
24 promised and committed and there is no independent
25 rational basis for distinguishing.

1 It's not that if we want to go forward and
2 we want to tax blondes instead of brunettes, well, the
3 fact that we are going to start doing that prospectively
4 doesn't make that okay. And moreover, this isn't
5 prospective. We are talking about an assessment
6 historically imposed on the very same -- for the very
7 same.

8 JUSTICE ALITO: Well, time is usually a
9 rational reason for doing it. If -- suppose everybody
10 paid on the installment plan. The city could say as of
11 a certain date we're -- no more installment payments.
12 Then the people who paid up previously, would -- would
13 they be -- would they have an equal protection claim?

14 MR. STANCIL: If we -- I'm sorry. I thought
15 --

16 JUSTICE ALITO: Suppose that there had never
17 been the option of making the lump sum payment.
18 Everybody paid on installment plans over a 10-year
19 period, and then the city decided January 1, 2012, no
20 more installment plans; everything that is still due is
21 forgiven. That would be rational, wouldn't it?

22 MR. STANCIL: Right. Because we would all
23 be treated equally. Could I quickly get to the
24 administrative nightmare? In -- if you go to the Cox
25 litigation and go on Pacer, and you pull up

1 document number 98, you will find the city's filing in
2 the Cox case, in which they give the name and address
3 and amount of owed to every taxpayer under any of these
4 20 other Barrett Law projects. This is -- I think it's
5 -- I think it's ludicrous to say there is some Gordian
6 knot that would have to be cut to issue refunds.

7 But more generally, I think this is part of
8 the city's argument. They say well, perfection may be
9 difficult to achieve. Well, so be it. It always is;
10 but that does not justify gross disparities and
11 "anything goes." You may want to make a clean break and
12 go to a new system, fine. But you have to do it in a
13 way that treats the -- the same.

14 JUSTICE BREYER: The argument isn't that
15 it's expensive to administer as much as it is, there are
16 1,000 people in all these projects who are already paid
17 up. We don't have enough money to pay them all back.
18 That's why we don't want to pay them back. At the same
19 time, we don't want to collect the money for 30 years
20 from these other people who aren't fully paid yet.

21 MR. STANCIL: Well, if that's the case --

22 JUSTICE BREYER: The question is, I guess,
23 is, is that rational.

24 MR. STANCIL: No, Your Honor. Simply
25 sending in your tax bill -- again, if you sent in your

1 taxes yesterday, are you "too bad, so sad"? I don't
2 think that is rational.

3 And I want to get back to reliance interest
4 because -- I can't.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 The case is submitted.

7 (Whereupon at 11:09 a.m., the case in the
8 above-entitled matter was submitted.)

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