

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   CHRISTINE ARMOUR, ET AL.,                   :

4                           Petitioners                   :   No. 11-161

5                   v.   :

6   CITY OF INDIANAPOLIS,                   :

7   INDIANA, ET AL.   :

8   - - - - - x

9   Washington, D.C.

10    Wednesday, February 29, 2012

11

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

15 APPEARANCES:

16 MARK T. STANCIL, ESQ., Washington, D.C.; for  
17           Petitioners.

18 PAUL D. CLEMENT, ESQ., Washington, D.C.; for  
19           Respondents.

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll 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 separate groups. And that is particularly true here where the taxpayers are a discretely defined group of homeowners sharing equally in a common specific benefit and State law explicitly defines them as similarly situated.

The city's principal contention is that jettisoning the Barrett Law, the way they funded the 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 one's taxes in good faith does not eliminate  
6 a taxpayer's right to equal 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, quote,  
11 "shall be collected in the same manner as other taxes."  
12 And installment payments are automatically secured by a  
13 lien 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 basis cases in particular make clear that  
11 context is key. So, forgiving a penalty imposed on a  
12 speeder, for example, who has an overdue ticket or a  
13 parking ticket is a qualitatively different judgment  
14 than forgiving the underlying tax liability of a broad  
15 swath of --

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

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

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

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

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

18 JUSTICE BREYER: I don't care what the State  
19 is; I'm saying a matter of constitutional law.

20 MR. STANCIL: Well, constitutional law looks  
21 to State law. That's what we took out of Allegheny  
22 Pittsburgh and Nordlinger.

23 JUSTICE BREYER: Okay. All right. So what?

24 MR. STANCIL: But -- but I will back up.  
25 I'll do it both ways, Your Honor. State law itself says

1 the following taxpayers are similarly situated, your  
2 project specific to your neighborhood, because those are  
3 the people to whom you're guaranteed -- with whom you're  
4 guaranteed equal treatment. It isn't that you're  
5 entitled to a certain price for a sewer connection under  
6 this law. It's --

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

12 MR. STANCIL: Because they're not similarly  
13 situated. Because --

14 JUSTICE BREYER: Why aren't they?

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

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

21 MR. STANCIL: No, Your Honor, but they still  
22 have to have a basis for saying that. They don't --

23 JUSTICE BREYER: They do. They do. The  
24 reason is because they think it's unfair to give the  
25 people -- they think it's -- they don't want to bother

1 collecting it from these people who haven't paid yet.  
2 Okay? That's why. And they don't see a way, if you --  
3 so, if we're going to free them, we don't want to go  
4 back into history and then suddenly give back all the  
5 people who've ever paid their assessment. I mean -- so,  
6 we draw the line somewhere.

7 MR. STANCIL: Your Honor --

8 JUSTICE BREYER: This is where we're drawing  
9 it. That's the State law.

10 MR. STANCIL: Well, that --

11 JUSTICE BREYER: What's wrong with that?

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

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

23 MR. STANCIL: No, Your Honor. Let me --  
24 I'll back up again. So, we do have a specific  
25 definition of who is and who is not entitled to equal



1 treatment or roughly equal treatment. So -- that's  
2 under State law. So, they've already committed to who  
3 is and who is not similarly situated. So, all you need  
4 to decide in this case -- and this is brought as an  
5 as-applied challenge by -- by these homeowners -- is:  
6 Are these people who are promised you will pay the very  
7 same as your next-door neighbor for this pipe that  
8 you're going to flush your toilet into -- are they  
9 allowed to then change their mind and say actually  
10 you're going to pay 30 times as much?

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

18 So, the result is a lot more money than  
19 these plaintiffs are claiming; is that not so? If your  
20 position on the law is right.

21 MR. STANCIL: If we're -- if we are correct,  
22 the city will end up paying a little more than in our  
23 specific case, but I'd like to explain why and how much  
24 because it's an important distinction.

25 There are about 21 Barrett Law projects that

1 still have balances outstanding. Many of them are  
2 almost paid off. So, it -- in -- there are only three  
3 that have the 30-year option. The rest have the 10-year  
4 option. Anything from 2001 prior. So, in fact, I think  
5 I can give you specific numbers.

6           There are seven projects that are less  
7 than -- that are half paid off or about less than -- or  
8 less than half paid off. Because the equal protection  
9 violation is only triggered by gross disparity between  
10 equally -- similarly situated taxpayers, the city may or  
11 may not have to refund in each project down the line.  
12 If you're in year 9 of 10 of repayment, that's not a --

13           JUSTICE KAGAN: That counts as a gross  
14 disparity?

15           MR. STANCIL: If you're in year 9 of 10, I  
16 don't think that counts as a gross disparity.

17           JUSTICE KAGAN: What does, is my question.  
18 How -- how do you separate a gross disparity from a  
19 non-gross disparity?

20           MR. STANCIL: Well, start with this case,  
21 which is easy. It's 10 to 1 and 30 to 1. It's the same  
22 number as in Allegheny Pittsburgh. But even if you drew  
23 4 to 1 or 5 to 1 as a line, as the Court has done, say,  
24 in punitive damages cases where it suggested outer  
25 limits, that -- I think those are easy lines to draw and

1 certainly lines that the lower courts could draw.

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

5 MR. STANCIL: I don't think so, Your Honor.  
6 I think triggering -- the gross disparity triggers the  
7 violation. And the question is, well, what's the remedy  
8 for a violation? I think they'd have to have a reason  
9 for saying we're going to -- it would be the very  
10 definition of arbitrary to say, well, even though you're  
11 entitled to equal treatment as a matter of law, you  
12 know, and even though we're not -- it's not -- liability  
13 isn't triggered except for gross disparities, I think  
14 they would have to give us that -- that figure.

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

23 The damages question was before that court,  
24 because -- because the court ruled in favor of the  
25 position that this is an equal protection violation.

1 The city put together a damages pleading, and it -- and  
2 it produced to the dollar a calculation of every  
3 overpayment in every Barrett Law project.

4 JUSTICE BREYER: But that isn't the  
5 administrative -- the administrative -- well, maybe  
6 that's one of them. The administrative problem is, I  
7 thought, the following: Imagine that you are the city  
8 mayor. All right? And suppose the mayor does what you  
9 want. The mayor says I'll give all these people in  
10 their project back their money.

11 The next day in my office, there show up 15  
12 people who say: Last month, we happened to be in  
13 project 2, and we paid all our money. Why don't you  
14 give us back our money? You just gave it to the people  
15 in project 1. Give it to us.

16 And the next day after that, there are 14  
17 people from project 3 and from project 4. What is your  
18 answer to those angry taxpayers who have said we don't  
19 understand why you refunded the money from project 1 but  
20 not for us?

21 What's your answer?

22 MR. STANCIL: Two reasons. One, you were  
23 not promised equal treatment under State law to those  
24 other projects; you were promised equal treatment with  
25 the people you live next door. Two, you use a different

1 pipe. These pipes cost different amounts of money to  
2 put in different places, and they're done over time.

3 Your Honor's hypothetical -- actually, if I  
4 could tweak it a little bit, it -- the question is not  
5 who comes in for somebody -- who comes in from a project  
6 last month. The only question is who comes in from a  
7 project 11 or more years ago, because those are the only  
8 ones that'll still be in repayment.

9 The Cox -- if we win -- well, there's a  
10 repayment plan. That's the only thing that creates  
11 this -- this asymmetry. The only people who are going  
12 to come in and say, well, you refunded some people on my  
13 project but not me are people in repayment. So, it's  
14 only going to be from a project '95 --

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

1 Am I correct about that?

2 MR. STANCIL: No, Your Honor. For future  
3 sewer projects that they start, each person who connects  
4 to that new pipe pays a \$2,500 flat fee. Every resident  
5 citywide who uses the municipal sewer -- new, old, or  
6 whatever -- pays an extra about \$10 a month under the  
7 new system. So, what they did is they decided this  
8 program, the Barrett Law, is politically very unpopular;  
9 we would like to get rid of it. Fair enough. But they  
10 chose a way to do it. They said well, we're going to be  
11 completely ignorant of -- of the effects.

12 JUSTICE SOTOMAYOR: But it -- but it says  
13 that new people are going to pay a flat fee. Old people  
14 are going to pay \$10 more a month that they didn't have  
15 to pay.

16 MR. STANCIL: Right.

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

22 MR. STANCIL: There's -- there's nobody who  
23 will pay more under the new system than my clients  
24 because the new people pay \$2,500 and the same monthly  
25 fees that now every Indiana resident pays.

1 JUSTICE SOTOMAYOR: Well, so, everybody else  
2 says I want to pay \$2,500. You're still not dealing  
3 with the fact that this was one decision tied to others.  
4 It was a package deal and -- so that the rationality of  
5 this package deal has to be seen in context. You want  
6 to lop it off and say all I'm looking at is how much  
7 these taxpayers paid for this old system, not what the  
8 new system is creating.

9 MR. STANCIL: But that's because, under this  
10 Court's equal protection cases, they have to have a  
11 reason for this particular line. They can't say we have  
12 a general objective, and it doesn't matter if we pursue  
13 it --

14 JUSTICE BREYER: I might have missed a fact,  
15 which -- which I'd like to know. Let's call your  
16 project, project 1, all right? And all the others are 2  
17 through 20. Are there any people in projects 2 through  
18 20 who still have money outstanding, or are they all  
19 paid off?

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

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

25 MR. STANCIL: They all got refund -- or

1 their balances were completely forgiven.

2 JUSTICE BREYER: Okay. So, it's the same.

3 So, now the people for the angry taxpayers in projects 2  
4 through 20 show up at the mayor and say, Mayor, you're  
5 not only -- you only -- you're not only -- under your  
6 system, you not only gave the all-paid-up people back,  
7 if you win, but you also forgave the future people in 2  
8 through 20, and you're not giving us our money back.

9 MR. STANCIL: Let me make clear, 2 through  
10 20 are --

11 JUSTICE BREYER: Am I right on the facts?

12 MR. STANCIL: I'm not sure. I want to make  
13 sure I understand that -- that fact. Two through 20 are  
14 actually older projects --

15 JUSTICE BREYER: Yes. Older projects.

16 MR. STANCIL: Okay. So, they owe less  
17 money, and they come into the mayor and they say:  
18 Where's my money? I paid in full. I paid my --

19 JUSTICE BREYER: Yes. Right.

20 MR. STANCIL: -- 9,000, but Joe over here  
21 got his last \$1,000 forgiven.

22 Here's what the mayor says --

23 JUSTICE BREYER: Yes.

24 MR. STANCIL: The mayor says: I talked to  
25 my lawyers. If it's a grossly disproportionate



1 burden -- so, if you end up paying grossly  
2 disproportionately to your next-door neighbor, because  
3 that's what Allegheny Pittsburgh and Nordlinger and all  
4 the Court's cases say, then I'm entitled -- I have to  
5 give you a refund. But, if you end up paying 10 percent  
6 more than the other person to connect to this pipe,  
7 that's just not an equal protection problem.

8 JUSTICE BREYER: Oh, I see the --

9 JUSTICE KAGAN: Mr. Stancil --

10 JUSTICE SCALIA: I think -- I think that  
11 Justice Breyer is suggesting that if you treat  
12 unconstitutionally a whole lot of people, you can get  
13 away with it.

14 (Laughter.)

15 MR. STANCIL: Well --

16 JUSTICE BREYER: Oddly enough, I was not  
17 suggesting that.

18 (Laughter.)

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

23 MR. STANCIL: In my case, there's  
24 \$273,391.63. In the Cox case, \$2,783,702.59, on the  
25 assumption that all of those people are grossly

1 disproportionately burdened.

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

5 MR. STANCIL: That's -- that's what they  
6 said in Cox. Yes, Your Honor.

7 JUSTICE ALITO: Could the city cure the  
8 problem by rescinding the forgiveness for those who paid  
9 under the installment plan --

10 MR. STANCIL: No, Your Honor.

11 JUSTICE ALITO: Why not?

12 MR. STANCIL: This was specifically  
13 addressed in Allegheny Pittsburgh. That's exactly what  
14 the West Virginia Supreme Court said. They said, well,  
15 if you have any remedy, it's only to raise the taxes on  
16 other people. And this Court specifically rejected  
17 that.

18 JUSTICE SCALIA: You wouldn't have any  
19 incentive to bring a lawsuit if that were the remedy,  
20 would you?

21 MR. STANCIL: Right. I'm already unpopular.

22 JUSTICE SCALIA: So, effectively --

23 MR. STANCIL: I'm unpopular in Indianapolis  
24 as it is.

25 (Laughter.)

1                   MR. STANCIL:  If I went back and just raised  
2 everybody's taxes, I'll -- I'll never get to go.

3                   (Laughter.)

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

6                   JUSTICE GINSBURG:  Why isn't that a choice  
7 for the legislature?  Because everybody could be treated  
8 equally by getting their money back, or nobody gets out  
9 from under the old system.  So, why shouldn't that be --  
10 the decision is you can't treat these two groups of  
11 people differently.  So, I think the Court has said in a  
12 number of cases you can equalize up or down.  That is a  
13 legislative choice.

14                   MR. STANCIL:  It was a legislative choice,  
15 Justice Ginsburg, but having now made a choice that  
16 inflicts a constitutional violation, this Court's cases  
17 are clear, that the correct and the default rule is  
18 refunds, because -- for exactly the reason  
19 Justice Scalia raised.  Even if it's possible to go back  
20 and do that, which -- it isn't always the case, but even  
21 if it's possible, that just means the equal protection  
22 cases and tax cases don't get brought because the most  
23 you can hope to get is --

24                   JUSTICE KAGAN:  Mr. Stancil, if that's  
25 right, and let's take a case which is different from the

1 one that -- that you're saying. Let's take a case where  
2 there are many, many, many more open projects, involving  
3 much, much more cost than you're saying is true here.  
4 And the mayor looks at this and says: You know what?  
5 Unless I can just draw the line here, I'm not going to  
6 be able to change this financing system, either unless I  
7 can draw the line here or unless I can say, you know,  
8 nobody gets any money.

9 What's a mayor to do?

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

13 JUSTICE KAGAN: Well, but I -- I guess what  
14 I'm asking is we have this terrible program; everybody  
15 hates it; it's not fulfilling its intended purposes; the  
16 mayor and everybody else wants to change it: How is the  
17 mayor going to change this program now?

18 MR. STANCIL: There are two ways he could  
19 have changed this program. One, he could have offered  
20 us refunds. Two --

21 JUSTICE KAGAN: I'm suggesting --

22 MR. STANCIL: I know --

23 JUSTICE KAGAN: -- that that is financially  
24 prohibitive.

25 MR. STANCIL: I will pay for it then because

1 he can go and he could -- he could have done two things  
2 here. They could have -- and I'm using "the mayor"  
3 loosely; it's actually the board of public works and the  
4 city-county council. But he could have increased that  
5 monthly fee under the new program. There actually --  
6 these sewer projects still cost the same.

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

11 MR. STANCIL: No, Your Honor.

12 JUSTICE SCALIA: It's just too expensive?

13 MR. STANCIL: No.

14 JUSTICE SCALIA: And, therefore, we have to  
15 deny equal protection?

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

17 JUSTICE KAGAN: Well, isn't that what you're  
18 saying, Mr. Stancil? Is what you're saying that when  
19 cities create tax policy, they can't think about the  
20 budget implications of that tax policy?

21 MR. STANCIL: No, Your Honor. What I'm  
22 saying is when they want to change tax policy, having  
23 already said these taxpayers are the same and entitled  
24 under law to equal treatment, they can't just say, well,  
25 it would be too expensive on us to treat them equally

1 when unwinding that program. This Court in Plyler has  
2 said resources are not sufficient.

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

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

12 I would, if I could, just return to the  
13 practical ways they could have done this, And I think  
14 that highlights just how arbitrary this line was. They  
15 could have increased those monthly fees under STEP, the  
16 new program. I mean, that's how they paid for the rest  
17 of these projects. They're paying off the bonds of the  
18 old projects by charging everybody in Indianapolis \$10  
19 more a month.

20 They could have just collected -- in our  
21 project, they could have collected for 2 more years.  
22 They could have said you'll be forgiven -- I think it's  
23 about 27 months. You will -- we're going to forgive  
24 your balances as of, you know, whatever that would be --  
25 June of 2010, whatever it would be, 2007 -- collected

1 that money, and then they would have had the cash to  
2 refund to the people who had paid in an equal amount  
3 that they were forgiving to the others. So, I think --  
4 I think that's sort of -- it's a red herring to say,  
5 gosh, we had no other way, or we only had these options  
6 A, B, and C.

7 I'd like to -- I really want just to drill  
8 down on the illustration of just how crazy I think this  
9 is. Suppose that the United States decides tomorrow to  
10 go to a national sales tax instead of the Federal income  
11 tax. It's February 29th; millions of people have paid  
12 their taxes for 2011; many, many -- most of us have not  
13 yet paid. Could the IRS come in and say: Well, if  
14 you've already filed and paid your taxes for 2011, too  
15 bad. But lucky you, if you're a late filer; you're  
16 going to get your entire tax bill forgiven.

17 I don't think that's remotely close. I  
18 think that is arbitrary, and I'll give you a couple of  
19 reasons. One, absolutely no notice. So, the timing of  
20 payment, the method of payment that was selected, gives  
21 those taxpayers absolutely no notice as to some  
22 constitutional significance that attaches to it.

23 And I don't think -- and I can tell you from  
24 talking to my clients, they don't -- they didn't think  
25 that by paying up front in full that they had -- they

1 were somehow sacrificing their chance to equal treatment  
2 or that the city might some day wipe out 97 percent of  
3 their neighbors' tax obligations.

4 JUSTICE SOTOMAYOR: That is the parking  
5 amnesty example that you have said wasn't the same.  
6 Because if an individual taxpayer has filed late, it's  
7 like the parking guy who didn't file his ticket, either.

8 MR. STANCIL: Well --

9 JUSTICE SOTOMAYOR: So, you really are  
10 saying that amnesty programs are out of the question if  
11 the risk is imposed equally on everyone.

12 MR. STANCIL: No, Your Honor. In the  
13 parking ticket example, forgiving a penalty for late  
14 payment is a qualitatively different -- to borrow from  
15 Engquist again, a subjectively individualized  
16 determination designed to achieve another goal, a  
17 legitimate goal in itself. Pay your parking ticket, and  
18 we'll let the penalty go. That is different.

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

21 JUSTICE SOTOMAYOR: No, but you're saying if  
22 you forgive the parking ticket, that's an equal  
23 protection violation.

24 MR. STANCIL: No, Your -- I mean, I would  
25 not, Your Honor. Again, it's context-driven. The



1 parking --

2 JUSTICE BREYER: The goal here is very  
3 simple. They say we have hundreds or dozens or 20  
4 different programs anyway, and once we start getting  
5 into the business of distinguishing among people who are  
6 already paid up, it's going to be a nightmare. And so,  
7 the only clear line we draw is between the people who  
8 are already paid up and the people who haven't paid.  
9 And we don't want those people who haven't paid to have  
10 to pay because that's going to be another 20 years of  
11 administrating \$33 a month.

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

15 MR. STANCIL: It's not, Your Honor. And  
16 I'll say it rests on the faulty --

17 JUSTICE BREYER: It's not their rationale,  
18 or it's not perfect?

19 MR. STANCIL: It's not reasonable, Your  
20 Honor. It rests on the faulty premise that this is some  
21 administratively --

22 JUSTICE BREYER: It's not impossible. They  
23 don't say it's impossible. Say, try looking through the  
24 U.S. tax code. It has thousands of pages. There is not  
25 one human being alive who understands every provision.

1 All we have to do is start comparing the provision on  
2 page 1 with page 3 with page 7 and page 9, and we will  
3 discover irrationality forever.

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

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

11 JUSTICE BREYER: What?

12 MR. STANCIL: -- that this is going against  
13 the tax code broadly or amnesty programs or forgiveness  
14 decisions generally. If -- if -- I think if people  
15 really thought that this case was going to foul up the  
16 tax code or forgiveness, I think the IRS would be here  
17 or the United States would be here saying this is very  
18 similar to what we do on a daily basis in compromising  
19 debt on an individual basis.

20 CHIEF JUSTICE ROBERTS: Is there an easier  
21 thing to administer than the system that was struck down  
22 in Allegheny Pittsburgh?

23 MR. STANCIL: No, Your Honor.

24 CHIEF JUSTICE ROBERTS: Whatever you paid,  
25 that's what your assessment was. And they argued, well,

1 this is easy; that's enough. And this Court said, no,  
2 it's an equal protection violation.

3 MR. STANCIL: Correct, Your Honor, and,  
4 again, the administrative burden there was actually  
5 quite significant.

6 JUSTICE SCALIA: You don't believe in the  
7 administrative nightmare exception to the Equal  
8 Protection Clause?

9 (Laughter.)

10 MR. STANCIL: Not when it takes only three  
11 pages and --

12 JUSTICE KENNEDY: Can you tell me -- I'm  
13 curious to know, if other States have provisions like  
14 the Barrett Law and they're concerned about this, can  
15 they provide in the initial documents a -- a promise  
16 that there will be no forgiveness, so that there would  
17 be a contract clause sort of argument against what  
18 happened here? In other words -- and if we could  
19 explore that for just a minute, I'm going to ask what it  
20 is that you thought constituted a promise in this case.

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

22 JUSTICE KENNEDY: And maybe not a promise in  
23 the contract sense.

24 MR. STANCIL: Yes. Four separate provisions  
25 of the Barrett Law -- just -- I'll rattle them off for

1 you. First, it says installment payments shall be  
2 collected in the same manner as other taxes. It  
3 actually says "shall collect" two other times. Requires  
4 a lien. It says that municipal officials who don't  
5 collect installment payments can actually be held  
6 personally liable and removed from office for failing to  
7 discharge their duties. That's on pages 2a to 3a of the  
8 appendix to the blue brief.

9 So, I don't think there's any sensible way  
10 to read the Barrett Law as saying it doesn't require  
11 payment. And none of the State court judges who've  
12 looked at this have suggested that. And --

13 JUSTICE KENNEDY: On the other aspect of my  
14 case, do you think other States could provide protection  
15 against this, in the event you do not prevail here, and  
16 -- and put in the documents that it is understood that a  
17 condition for your approving of this, these sewers, will  
18 be that there will be no forgiveness?

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

21 JUSTICE KENNEDY: Would that then be  
22 enforceable under the contract clause, do you think?

23 MR. STANCIL: I'm not sure it would be  
24 under the contract clause. But could I flip it and  
25 suggest that if a State wanted to preserve its right to

1 forgive willy-nilly, they could include a provision in  
2 their law that says, by the way, if you choose an  
3 installment plan and we change our policy, there shall  
4 be -- you're not entitled to equal treatment with people  
5 who pay up front?

6 JUSTICE KENNEDY: Give you a warning?

7 MR. STANCIL: Right. And let's -- we'll see  
8 who pays up front under that system.

9 (Laughter.)

10 MR. STANCIL: If I can, Your Honor -- if I  
11 can, I'd like to reserve the remainder of my time.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 Mr. Stancil.

14 Mr. Clement.

15 ORAL ARGUMENT OF PAUL D. CLEMENT

16 ON BEHALF OF THE RESPONDENTS

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

19 In 2005, the City of -- the City of  
20 Indianapolis decided that it wanted to abandon its  
21 reliance on the Barrett Law, a program that had proved  
22 unpopular for financing public improvements. In doing  
23 so, they decided to make a clean break and forgive the  
24 outstanding balances that were due under the Barrett Law  
25 program. The alternative of maintaining those accounts

1 and maintaining the tax liens associated with those  
2 accounts for nearly three decades was particularly  
3 unattractive. Now, the --

4 JUSTICE ALITO: I think you've put your  
5 finger on the reason for this, which is that the city  
6 calculated that what it did would be more politically  
7 acceptable than treating the people who paid up front  
8 equally on an economic basis with the people who paid in  
9 installment plans. Now, if that's the reason for this,  
10 is that rational?

11 MR. CLEMENT: Well, Justice Alito, it -- it  
12 might well be rational. I mean, sometimes things that  
13 make policy sense that the public likes also make good  
14 government sense. And in this context, what they wanted  
15 to do is they wanted to get out of the Barrett Law  
16 business. That's the exact words --

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

19 MR. CLEMENT: Can I put it very concretely?  
20 I mean, before this -- you know, when they used to have  
21 the Barrett Law and used it on an ongoing basis, within  
22 the controller's office, they had a Barrett Law office.  
23 They wanted to get rid of the Barrett Law office.

24 How do you get rid of the Barrett Law  
25 office? You get of the obligation to continue to

1 collect these payments for 30 years; you get rid of the  
2 obligations to keep all these files together and see  
3 whether you're in a position to enforce a tax lien.

4 JUSTICE ALITO: That really doesn't seem  
5 very complicated, to collect payments that people have  
6 agreed to pay. And if they didn't want to do it  
7 anymore, I bet they could have contracted that out for a  
8 very modest fee to any number of private entities that  
9 would have done it for them.

10 MR. CLEMENT: Well, Justice Alito, of  
11 course, they could have continued to collect. I think  
12 that's common ground here, which I think ultimately  
13 shows why this is a very curious equal protection  
14 theory, because if the city would have continued to  
15 collect these, you know, for 30 years, then they agree,  
16 there's no Equal Protection Clause problem at all.

17 Now, I think as Justice Kagan was  
18 suggesting, if you now create a rule that says when they  
19 do forgive, they actually have to provide refunds and  
20 face Equal Protection Clause violations, then in the  
21 future, nobody is going to ever forgive. What they're  
22 going to do in the future is, even though they're trying  
23 to move away from this policy, even though they're  
24 trying to get out of the Barrett Law business, they're  
25 going to be stuck.

1 JUSTICE KENNEDY: So, I think maybe if you  
2 prevail in this opinion, we should say the principle we  
3 are adopting in this case is: Don't trust the  
4 government.

5 MR. CLEMENT: No, Justice Kennedy, I don't  
6 think that's right. But the fact that that's your  
7 reaction I think shows that this is not really an equal  
8 protection claim, and it's not really like Allegheny  
9 Pittsburgh because, as your colloquy with Mr. Stancil  
10 suggested, they would admit that if the government said,  
11 as part of the Barrett Law, look, you know, we reserve  
12 the right to abandon the Barrett Law, and if we do so,  
13 we -- you know, we may forgive installment payments --  
14 if they said that, the equal protection claim would go  
15 away in their view.

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

22 Here the law says you have the right to be  
23 treated equally, or whatever it is, the apportionment,  
24 and they weren't. All that you're saying there is that  
25 State law gets to set the base. And if the State law



1 says we don't treat people the same in extending sewer  
2 hook-ups, then that takes away your Equal Protection  
3 Clause. But it just sets the base.

4 MR. CLEMENT: Two differences,  
5 Mr. Chief Justice. First of all, you know, there's  
6 no -- there's no real analogue to Allegheny Pittsburgh  
7 because Allegheny Pittsburgh is a one time in time case.  
8 There the problem was that statute was very different.  
9 It was facially neutral, and it was being applied in an  
10 unequal way.

11 Nothing, not one word, in Allegheny  
12 Pittsburgh suggests that if the State of West Virginia  
13 wanted to change its policy and adopt proposition 13 as  
14 the law of West Virginia, that it couldn't do so. And  
15 that's the anomaly here. This equal -- this equal  
16 treatment requirement they get, they get it from the  
17 Barrett Law.

18 CHIEF JUSTICE ROBERTS: The change in  
19 policy --

20 MR. CLEMENT: That's the exact law that --

21 CHIEF JUSTICE ROBERTS: The change in  
22 policy is from treating people equally to treating  
23 people unequally. I don't see how the fact that they're  
24 changing that policy addresses the issue at all.  
25 They're going from a system where everybody was subject

1 to the same assessment to a system where some pay  
2 something and other people pay 30 times that. Yes, it's  
3 a change, but it's the change that presents the problem.

4 MR. CLEMENT: No, I -- with respect, I think  
5 it's the change that makes this case different from  
6 Allegheny Pittsburgh. It's the change that makes this  
7 government action rational.

8 This would be a different case if they  
9 didn't change the Barrett Law program, and they just  
10 stuck by it and said, you know, we're going to forgive  
11 some people. But here they decide they're going to --  
12 they're going to abandon the very law that imposes,  
13 supposedly -- I want to talk about what State law really  
14 does. But it supposedly imposes this equal protection  
15 requirement. That's the very law they want to move away  
16 from.

17 JUSTICE ALITO: Well, I still don't --

18 MR. CLEMENT: And this idea that --

19 JUSTICE ALITO: Other than political  
20 expediency and administrative convenience, I still don't  
21 understand what rational basis you claim there was for  
22 the distinction that was drawn. Now, maybe one of those  
23 is sufficient, but other than those two possible bases,  
24 I don't see another one.

25 MR. CLEMENT: Well, you know, I count five,

1 Justice Alito. If you want to hear -- I mean, I'll go  
2 through them. One is what I call making a clean break,  
3 having not to deal with the vestiges of the old program.  
4 You may call it political expedience. I don't think it  
5 is. I think that's, you know, a good government  
6 concern.

7           The second is avoiding the administrative  
8 burdens of particularly the refund process. And I think  
9 it's worth recognizing that -- you know, they say, well,  
10 what could be simpler; just cut a check. But to whom  
11 and for what amount? I mean, you know, if you're going  
12 to go back to close accounts, the first thing you're  
13 going to have to confront is what do we do with the  
14 people that have sold their house?

15           Well, I mean, you know, we've got to figure  
16 out where they are now. We've got to figure out, I  
17 mean, do we --

18           JUSTICE ALITO: Those are reasons for not  
19 giving refunds, but what are the reasons for forgiving  
20 the debt that people agreed to?

21           MR. CLEMENT: Well -- okay. But, if I  
22 could, they don't challenge the forgiveness. So, the  
23 reason that I'm trying to explain that there are  
24 rational bases for not giving refunds is because the  
25 challenge that's really brought here is to Resolution

1 101, and it's --

2 JUSTICE KENNEDY: But you don't -- you  
3 don't --

4 MR. CLEMENT: -- it's forgiveness without  
5 refunds.

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

8 MR. CLEMENT: Would have the option what,  
9 Mr. Justice Kennedy?

10 JUSTICE KENNEDY: Just not to forgive the  
11 unpaid balances. The city has the option, I assume.

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

19 I'm not -- I don't -- I'm not aware of any  
20 other area of the law where you can have a statute or an  
21 ordinance that draws an invalid distinction, and one  
22 remedial option is not to invalidate the statute or the  
23 ordinance. And that's the position.

24 Their position is, you know, if you would  
25 have put something in there that said we're not going to

1 do anything, you'd be fine. But having given  
2 forgiveness and said we're not going to give refunds,  
3 you're stuck not only with the forgiveness but also with  
4 giving refunds.

5 JUSTICE KENNEDY: That's a -- that's a big  
6 difference. In one case, there's an expectation; in the  
7 other case, there isn't.

8 MR. CLEMENT: No, Mr. Justice Kennedy,  
9 because the expectation here is at the time of  
10 Resolution 101. At the time of Resolution 101, I think  
11 it's common ground. The city was under no obligation to  
12 provide forgiveness.

13 So, if in 101, by providing forgiveness  
14 without refunds, they violated the Equal Protection  
15 Clause, why isn't the logical remedy for that to simply  
16 invalidate Resolution 101? No forgiveness; everybody  
17 gets equal treatment.

18 JUSTICE SCALIA: Because you would -- you  
19 would eliminate all litigation on Equal Protection  
20 Clause grounds if all that the plaintiff is going to  
21 achieve is not any benefit to him but harming somebody  
22 else.

23 That's -- the classic case is -- is the sex  
24 discrimination case, where a State had a drinking law  
25 which said that -- that men could drink at the age of 18

1 but women at the age of 21. And what happened in the  
2 lawsuit? Did the court say, well, I guess -- I guess  
3 men will be able to drink at 18. No, that's --

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

5 JUSTICE SCALIA: They said men would have to  
6 drink at 18, not that women will have to wait to 21  
7 because --

8 MR. CLEMENT: No, I think they said that  
9 was, with respect --

10 JUSTICE GINSBURG: They said it could go  
11 either way.

12 MR. CLEMENT: Exactly.

13 JUSTICE GINSBURG: It was up to the Oklahoma  
14 legislature. They could make it 21 for everyone or 18  
15 for everyone.

16 CHIEF JUSTICE ROBERTS: And the city retains  
17 that option in this case going forward. The problem  
18 with --

19 MR. CLEMENT: No, but --

20 CHIEF JUSTICE ROBERTS: -- your analogy is  
21 you're dealing with a situation -- you're saying, well,  
22 here's a violation and the law can -- and what does the  
23 law do? But this -- this is exactly 180 degrees away.  
24 There's no violation, and the law creates the violation.  
25 In that situation --

1 MR. CLEMENT: Right. So, then you --

2 CHIEF JUSTICE ROBERTS: -- I think you're  
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's an  
11 important difference.

12 JUSTICE BREYER: Then you're saying that the  
13 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 -- as an expense that does not exist in  
17 respect to the class that has already paid it.

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 -- what  
2 -- it 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, you look to a number of places. I would look to  
8 Carmichael v. Southern Coal where, you know, this Court  
9 is confronting a case where the State says, you know,  
10 we're not going to tax employers -- employers who are  
11 smaller than eight, 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 controller's office.

16                   JUSTICE SCALIA: But here -- here the State  
17 has defined the class. That's the difference. I mean,  
18 to say employers with less than eight is a separate  
19 class, that's fine. But -- but here, the State said  
20 we're creating this class of -- of people who have to  
21 pay for 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, if 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 relevant  
2 time period would be the time period of the ordinance  
3 that's challenged, Resolution 101. At that time, there  
4 is a difference already in real-world fact between those  
5 who've paid in full and those who have outstanding  
6 balance, and are going to keep the city in the Barrett  
7 Law business for three decades.

8 JUSTICE SCALIA: So, you're 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.

18 MR. CLEMENT: And -- and --

19 JUSTICE SCALIA: That's what we're  
20 questioning.

21 MR. CLEMENT: Right, but a rational basis is  
22 -- boy, you know, we have two sets of accounts. Half of  
23 these accounts are going to be a nightmare to maintain.  
24 We have an estimate from our controller -- this is in  
25 the Cox litigation, but it's cited in one of the amicus

1     briefs.  We've got an estimate from our controller  
2     that's going to cost us \$200,000 to upgrade and maintain  
3     this system.  We really don't want to spend that.

4                   CHIEF JUSTICE ROBERTS:  Well, I think I  
5     don't see the answer --

6                   MR. CLEMENT:  Now, is that \$200,000  
7     associated --

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

13                   When you start out it's not equal because  
14    somebody pays \$400 and somebody else pays 10,000, and --  
15    but over the 30-year period, it's the same.  That's why  
16    it's equal in the beginning, even though somebody pays  
17    400 and somebody pays 10,000 because they're going to  
18    pay the same over the period.

19                   Then you lop off the period.  So, you're not  
20    treating them equally.  Go -- when you started.  You can  
21    no longer say don't worry about the inequality; it will  
22    sort out in 30 years.  Now you can't -- you have no way  
23    of telling them why it's not unequal.

24                   MR. CLEMENT:  With all due respect,  
25    Mr. Chief Justice, you're making this sound like it's an

1 estoppel case, like it's a Winstar case. It's not a  
2 broken promise case. This is an equal protection case.  
3 And the reason there's a rational difference at the time  
4 Resolution 101 is, is because that point in time has  
5 passed and they're in an different position.

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

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

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

25 And I -- I do not understand how your

1 administrative convenience argument fits in with the  
2 decision to forgive the debt of the people who agreed to  
3 pay on the installment plan. When the city was  
4 collecting those payments was that a net loss? Were the  
5 administrative costs of making those collections more  
6 than the amount of money that was brought in?

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

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

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

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

1 JUSTICE ALITO: No, but the net -- the  
2 net --

3 MR. CLEMENT: Do you really think --

4 JUSTICE ALITO: If the net -- if it's a net  
5 gain, what is the rationality of abandoning it?

6 MR. CLEMENT: Because they want to get rid  
7 of the office; they want to get out of the business;  
8 they want to make a clean break.

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

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

23 JUSTICE ALITO: You put your finger on it.  
24 They want to get out of the business. What they've done  
25 is to shift the cost of the sewers from a -- from a

1 small group, a small interest group that is able to  
2 presumably exert some political power to -- to  
3 everybody. They spread the cost around to everybody.  
4 And everybody -- the ordinary person who has to pay a  
5 little bit more every month doesn't get all fired up  
6 about it.

7 That's what this -- that's what this is  
8 about, isn't it?

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

17 CHIEF JUSTICE ROBERTS: Well, there is a  
18 provision -- you said I'd search in vain for this  
19 provision in the Barrett Law.

20 MR. CLEMENT: Yes.

21 CHIEF JUSTICE ROBERTS: Well, I went and  
22 searched and 15 --

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: -- 15(b)(3)says,  
25 "The costs shall be primarily apportioned equally among

1 all abutting lands or lots."

2 MR. CLEMENT: Yes, that's the -- I -- I --  
3 that's the provision I already mentioned about  
4 appraisals. That's talking about the costs --

5 CHIEF JUSTICE ROBERTS: It says "costs."

6 MR. CLEMENT: The costs of the project when  
7 they are doing the appraisal. When they're coming up  
8 with the cost for how much it's going to cost to stick  
9 the pipes in the ground, they have a law that says it  
10 has to be divided equally among the lots. That's an  
11 assessment. There's a specific provision that you can  
12 challenge the assessment if you don't like it. Once you  
13 don't challenge it, it's final.

14 There's actually two provisions in the  
15 Barrett Law that you won't search in vain for that talk  
16 about the interest of finality, which is yet another  
17 reason that justifies the differential treatment here  
18 between people who have paid in full, their accounts are  
19 closed, and people who have ongoing outstanding  
20 balances.

21 CHIEF JUSTICE ROBERTS: Where -- where do I  
22 look to find that when they say the costs shall be  
23 apportioned equally, they are not referring to the  
24 costs, but they were referring to the assessments?

25 MR. CLEMENT: They're referring to the costs

1 of the project, the improvement, that will then be  
2 reflected --

3 CHIEF JUSTICE ROBERTS: The costs of the  
4 project are funded by the -- the sewer hook-ups, and  
5 some people pay 400 and some people pay 10,000.

6 MR. CLEMENT: No, but it's the costs that  
7 are then reflected in the assessment on each lot. And  
8 there's then a process for challenging that assessment  
9 on the assumption that the costs are allocated equally  
10 to each lot, and then when that's done, the finality  
11 provisions kick in.

12 JUSTICE KENNEDY: But that just --

13 MR. CLEMENT: And nobody says there was  
14 anything wrong.

15 JUSTICE KENNEDY: That just underscores the  
16 promise of the State -- or the city that all owners will  
17 be treated equally. That just underscores the point  
18 that that was the understanding and the commitment.

19 MR. CLEMENT: With respect, that's not.  
20 The original idea is, sure, you know, we're going to  
21 assess the costs of the project equally among everybody  
22 whose benefiting from the project. And then we're going  
23 to have an assessment, and if the Barrett Law doesn't  
24 change, the assumption is everybody's going to pay the  
25 same amount.



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

6 And I think the question here is at a  
7 different point in time when they've made a different  
8 judgment -- we don't like the Barrett Law. It's proven  
9 unpopular. It's proven unwieldy. It's not just  
10 popularity or political. It's that, you know, they're  
11 facing lots of low-income subdivisions with septic  
12 tanks, and, you know, they're forcing the prospect of  
13 trying to get people to pay \$10,000 to improve a -- the  
14 sewer on a house that's worth \$50,000. They realize  
15 that's a non-starter. We've got to get out of this  
16 business.

17 CHIEF JUSTICE ROBERTS: You just said it's  
18 not popularity. In page 1 of your brief, you say, "The  
19 Barrett Law method eventually proved to be politically  
20 unpopular." Sounds like it's popularity to me.

21 MR. CLEMENT: It's not just popularity. You  
22 know, every once in a while the people have a point.  
23 And it's not just that they don't like something; it's  
24 their right to not like it. And they're very much right  
25 to not like a law that says you got a \$50,000 house and

1 we're going to make you pay for a \$10,000 sewer hook-up.

2 They were right to get out of the business.

3 Having done that, I don't understand why they're saddled  
4 with a provision of law that exists in the old law that  
5 they're trying to get away from.

6 And just to be clear -- I mean, if you want  
7 to look at a case that I think shows you why the State  
8 law is not as equality über alles as they're presenting,  
9 take a look at an old Indiana case called Allendorf, 176  
10 N.E. 240. That's a case where some people in the  
11 project challenged the -- the assessment, said, you  
12 know, that's unfair; it's too much. Other people paid  
13 in full.

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

23 So, the -- and this is, with respect, I  
24 think part of the problem with the Allegheny Pittsburgh,  
25 and particularly this extension of it. You're putting

1 so much weight on the State law, and it gets you in this  
2 business of flyspecking the Barrett Law.

3 I mean, you know, this -- I mean, Justice  
4 Thomas made this point very well in the Nordlinger case,  
5 that there's an anomaly here, which is you're looking --  
6 supposed to be looking at Federal law, and the violation  
7 seems to be tied to potentially a violation of State  
8 law.

9 If I could focus on that for a minute,  
10 because this is another really important difference  
11 between Allegheny Pittsburgh and this case, which speaks  
12 right to the remedy. In Allegheny Pittsburgh, it's a  
13 facially neutral statute. And so, it would be an  
14 anomaly there to say that when there's a facially  
15 neutral statute, you're going to invalidate the -- the  
16 statute. The statute's fine. The problem is you've  
17 been assessed at 100 percent; everybody else has been  
18 assessed at 50 percent. The Court in that unique  
19 context says, you know, there's no obligation to go and  
20 sort of mandamus the assessor, to bring everybody else  
21 up. You get to sort of go back to that level.

22 This is very different. The challenge here,  
23 like in Nordlinger, is a challenge to a distinction  
24 drawn in a law. Resolution 101, unlike the law in  
25 Allegheny Pittsburgh, is not facially neutral. It draws

1 a distinction. So, the relevant question is the  
2 rationality of that distinction. Is it rational?

3 We submit there are multiple reasons why it  
4 is rational. But if you disagree with me, the obvious  
5 remedy is to strike down the statute or at least remand  
6 to the State court with express instructions that they  
7 have the option, which is exactly what happened in the  
8 sex discrimination cases.

9 And, Justice Scalia, if you're worried about  
10 incentives and standing, look at Heckler v. Mathews,  
11 another sex discrimination case. This exact issue came  
12 up. And what the Court said is standing is based on  
13 your right to guaranteed equal treatment. Whether or  
14 not it's a pocketbook injury, you have standing if  
15 you're denied equal treatment.

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

22 JUSTICE KENNEDY: Well, why is that -- why  
23 is that a big deal for us? I mean, that's the law. You  
24 get your -- your choice.

25 MR. CLEMENT: Okay. But, I mean, that's a

1 big difference because that's different from what  
2 they're saying. They're saying there's no remedial  
3 option. They're saying we are stuck now. We -- we have  
4 to give refunds. That's the only permissible  
5 constitutional remedy. And, obviously, the city would  
6 prefer to get out of the Barrett Law business and to  
7 provide these forgiveness, but it would certainly be a  
8 lot better for the city if they would at least -- this  
9 Court made clear, they have the option of leveling up or  
10 leveling down. I do think, though, that gets to Justice  
11 Kagan's --

12 CHIEF JUSTICE ROBERTS: But that -- if I  
13 could -- you mentioned Heckler v. Mathews. In Heckler  
14 v. Mathews, the Court said, quote: "Ordinarily,  
15 extension" -- of the withheld benefit -- "rather than  
16 nullification is the proper course."

17 MR. CLEMENT: Yes.

18 CHIEF JUSTICE ROBERTS: So, while it is true  
19 that you can cure a violation by leveling up or leveling  
20 down, ordinarily, extension of the benefit is the proper  
21 course. And that's for the reason Justice Scalia gave,  
22 because, otherwise, there would be no equal protection  
23 case brought.

24 MR. CLEMENT: If that were the rule, Heckler  
25 v. Mathews would have come out the other way. The Court

1 was -- you know, the Court --

2 CHIEF JUSTICE ROBERTS: Well, what -- what  
3 did the Court mean when they said, ordinarily, extension  
4 is the proper course?

5 MR. CLEMENT: Well, they were talking about  
6 a specific situation (a) under Federal law. So, I don't  
7 know why the rule would be the same. And the sex  
8 discrimination cases are much more on point for purposes  
9 of this. But they're also talking about a very specific  
10 context where you have a limitation on a benefit. And  
11 the idea is, if you strike down the limitation, the  
12 default option is everybody gets the benefit.

13 This is different. I mean, you know, really  
14 what Heckler is talking about is severability concerns.  
15 There's no severability that works here. Resolution  
16 101 -- if you look at it, it doesn't say anything about  
17 refunds. It simply says we're going to forgive the  
18 balances on the outstanding accounts.

19 If that's somehow impermissible, then the  
20 law goes. There's nothing to sever. There's nothing --  
21 there's not one word in the statute about refunds. And  
22 that's different from the context where you have a  
23 general extension of benefits and you have some  
24 limitations on the benefits.

25 JUSTICE BREYER: What do you think would

1 happen if the city says -- if it came out that way -- we  
2 really want to give refunds or cut off -- we want to  
3 stop collecting the money, period? Then to make it fair  
4 on this hypothesis, the city would have to go back and  
5 refund money. To whom? And how many?

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

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

13 Now, what -- I'd like a little comment on  
14 that.

15 MR. CLEMENT: Well, you're absolutely right.  
16 And, you know -- and, you know, I talked about the  
17 question --

18 JUSTICE BREYER: Right, because it's a  
19 question.

20 MR. CLEMENT: Well -- okay. Then the answer  
21 is it would be an administrative nightmare. If I  
22 understand the question --

23 JUSTICE SCALIA: I don't understand that.  
24 Why? I mean, people paid the lump sum.

25 MR. CLEMENT: With respect to --

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

5 JUSTICE BREYER: That's right --

6 JUSTICE SCALIA: Surely, the city has  
7 records.

8 JUSTICE BREYER: Let me try to get my  
9 question, which is, I'm not -- I'm thinking this is  
10 project 1. So, certainly, on the hypothesis, you have  
11 to pay back the people who already paid up for project  
12 1. But in your brief, you say there's project 2 through  
13 20. And is there, in your opinion, a basis for  
14 distinguishing all those people who have paid up in  
15 those projects, or would you have to give them their  
16 money back, too?

17 Now, you heard your friend's statement --  
18 explanation of why you wouldn't have to give them the  
19 money back, and I want to get your response to that.

20 MR. CLEMENT: Well, with respect, what I  
21 heard him say is we probably would. And I think we  
22 certainly would as to most of the projects. There might  
23 be a couple of the projects where the differences are so  
24 small that he would say there's no gross inequality  
25 there. But as to most of the other projects, there are



1 still substantial differences --

2 JUSTICE BREYER: How many people does that  
3 involve, about?

4 MR. CLEMENT: It involves -- you know, I  
5 don't -- I know the number of projects. It's like 20  
6 projects. So, I'm guessing it's at least 1,000 people.  
7 And then, of course, somebody's going to come in if we  
8 do that, as you suggested, and say wait a second --

9 JUSTICE SOTOMAYOR: Was his figure of  
10 2 million accurate? As the stake -- in the other case.

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

14 CHIEF JUSTICE ROBERTS: When you say "the  
15 other case," you mean every other project? Because  
16 that's -- that's, what, a class action; right?

17 MR. CLEMENT: It's -- it's a class action,  
18 the Cox -- the Federal litigation. But still, that's  
19 not a -- that's not an insubstantial amount.

20 Of course, the relevant question is not, you  
21 know, are the damages a set figure after you've had  
22 litigation in Federal court? The question is what is  
23 the city administrator, at the time he's trying to  
24 decide whether he has a refund obligation, to do?

25 And, Justice Scalia, you said, well, it's

1 clear as mud. I mean, did you listen to the answer  
2 about gross inequality? What, are they supposed to run  
3 it through the gross inequality calculator that tells  
4 them, well, you know, it's close, but it's not really --  
5 there's not a discrete obligation? I don't know how --  
6 I would not know how to advise them as to which of the  
7 other 21 projects they owed a refund to and which they  
8 didn't. I would be at a complete loss.

9 And the reason --

10 CHIEF JUSTICE ROBERTS: Well, if  
11 everybody -- if everybody entitled to a refund came  
12 forward, it would cost you \$2.7 million. And it --

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

15 CHIEF JUSTICE ROBERTS: Okay. Three --  
16 \$3 million. And you say the real problem is the huge  
17 administrative cost in trying to figure out who you owe  
18 it to. If it's that huge, all they do is somebody who  
19 comes forward, asks for a refund, verify that they're --  
20 you know, were a homeowner on the project, give them the  
21 refund.

22 MR. CLEMENT: Well, I mean --

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

25 MR. CLEMENT: Yes, in this case. And the --

1 and the law that you develop here is not going to be  
2 limited to this case; it's going to apply in other  
3 contexts as well. Heaven knows where it stops. As I  
4 said, Allegheny Pittsburgh -- it was at least limited to  
5 a particular context. Now, I mean, I don't know why any  
6 city ever -- I mean, maybe this is the limiting  
7 principle that no city ever again will provide amnesty  
8 or forgiveness under any circumstances.

9 CHIEF JUSTICE ROBERTS: Amnesty -- I don't  
10 get -- amnesty is entirely different. Amnesty is for  
11 people who did something wrong. Nobody did something  
12 wrong here; it wasn't wrong to pay with installments.

13 MR. CLEMENT: But, Mr. Chief Justice,  
14 it's the --

15 CHIEF JUSTICE ROBERTS: So the amnesty cases  
16 don't apply.

17 MR. CLEMENT: It's the same principle. I  
18 mean, I could certainly see some -- you know, suppose  
19 the city elects a laissez-faire mayor and says you know  
20 what? Parking tickets -- it's not worth the hassle;  
21 we're going to getting out of the parking ticket  
22 enforcement business, and we're going to forgive  
23 everybody their parking tickets.

24 If I had just paid my parking tickets, I'd  
25 be hacked off, but I wouldn't feel like I had a Federal

1 constitutional right to get my money back. And that's  
2 the difference --

3 JUSTICE KENNEDY: What do you do with the  
4 hypothetical about the income tax and the sales tax?  
5 So, you don't pay any income tax if the sales tax had  
6 gone into effect.

7 MR. CLEMENT: I think if they really got rid  
8 of the -- the Federal tax forever, I don't think there  
9 would be an equal protection violation. I think there  
10 might be a different constitutional violation. If you  
11 listen to him, the first thing he ticked off about why  
12 that would be so horrible is there was no notice. Well,  
13 that sounds like a due process concern to me, not an  
14 equal protection concern.

15 And that's really what's happening here.  
16 When they transport Allegheny Pittsburgh from the  
17 context it arose in to this very different context,  
18 they're converting it from an equal protection case to  
19 something more like a contract clause case or to a  
20 Winstar case or something like that. And not one word  
21 in that opinion suggests that once a State adopts a  
22 certain policy, that it's trapped. It can't make a  
23 reasonable and rational transition away from that policy  
24 to a policy that better serves the citizenry.

25 JUSTICE ALITO: Is --

1 MR. CLEMENT: And if it doesn't --

2 JUSTICE ALITO: Is there some identified or  
3 identifiable demographic difference between the two  
4 groups that either justifies or could on -- on a remand  
5 justify the different treatment?

6 MR. CLEMENT: Well, I think the one -- I  
7 don't think there's a demographic difference. I think  
8 the one concrete difference that really is a difference  
9 is, from the city's perspective, they're looking at two  
10 groups, all of whom are going to have to pay a new  
11 higher monthly fee.

12 And I think they can make a rational  
13 decision that says, look, you know, one of these groups  
14 has to make two monthly payments to the city for sewer  
15 and water. That seems a little crazy. So, why are  
16 we -- what we'll do is we'll just make everybody in the  
17 city in terms of their ongoing payments to the city for  
18 sewer and water -- we will treat them all exactly the  
19 same. One fee.

20 Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Stancil, you have 4 minutes remaining.

23 REBUTTAL ARGUMENT OF MARK T. STANCIL

24 ON BEHALF OF THE PETITIONERS

25 MR. STANCIL: Justice Alito, I want to just

1 pick up right there. What they're actually saying on  
2 these two monthly payments idea is that it's rational  
3 for somebody who's just paid \$300, and now everybody  
4 pays an extra \$10 a month -- we don't want them to have  
5 to make their \$30 a month Barrett Law payment having  
6 paid \$300 and the extra 10.

7 My clients still have to pay the extra \$10 a  
8 month, but we're out of pocket \$9,300. I think that is  
9 -- I think that's patently irrational, to say that we're  
10 trying to help people who are out 300 bucks from having  
11 to pay an extra \$30 a month going forward.

12 JUSTICE KAGAN: Mr. Stancil, here's what  
13 worries me about this case: To me, this is a case about  
14 transition rules. All legislation creates classes of  
15 citizens, and some are -- and -- and puts them all in a  
16 group and says you're going to be treated in the same  
17 way as long as this legislation exists. And then a  
18 legislature comes along and changes that piece of  
19 legislation, and different people are affected  
20 differently by it.

21 And to me what you are suggesting is that  
22 when that break is made and when that transition occurs,  
23 the -- I don't know how you would apply the rule that  
24 you're suggesting, which is that everybody in the former  
25 class has to be treated the same as a matter of

1 transition policy.

2 MR. STANCIL: If you've promised equal  
3 treatment -- and we're talking about a -- this is a -- a  
4 specific case. A specific commonly shared benefit among  
5 people who are indistinguishable on any rational basis.  
6 They live next door to each other; they flush into the  
7 same pipe; and they paid and were promised equal  
8 payment. In that instance, you -- then there has to be  
9 a rational method. You have to treat them equally when  
10 you transition.

11 So, there may be times where the city has  
12 promised and committed, and there is no independent  
13 rational basis for distinguishing.

14 It's not that -- if we want to go forward  
15 and we want to tax blondes instead of brunettes, well,  
16 the fact that we're going to start doing that  
17 prospectively doesn't make that okay. And, moreover,  
18 this isn't prospective. We're talking about an  
19 assessment historically imposed on the very same day for  
20 the very same.

21 JUSTICE ALITO: But time is usually a  
22 rational reason for doing it. If -- suppose everybody  
23 paid on the installment plan. The city could say as of  
24 a certain date we're -- no more installment payments.  
25 And the people who paid up previously, would -- would

1 they be -- would they have an equal protection claim?

2 MR. STANCIL: If we -- I'm sorry. I  
3 thought --

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

10 MR. STANCIL: Right. Because we'd all be  
11 treated equally.

12 Could I quickly get to the administrative  
13 nightmare? In -- if you go to the Cox litigation and go  
14 on Pacer and you pull up document number 98, you'll find  
15 the city's filing in the Cox case, in which they give  
16 the name and address and amount of -- owed to every  
17 taxpayer under any of these 20 other Barrett Law  
18 projects. This is -- I think it's -- I think it's  
19 ludicrous to say there's some Gordian knot that would  
20 have to be cut to issue refunds.

21 But, more generally, I think this is part of  
22 the city's argument. They say, well, perfection may be  
23 difficult to achieve. Well, so be it. It always is;  
24 but that does not justify gross disparities and  
25 "anything goes." You may want to make a clean break and



1 go to a new system, fine. But you have to do it in a  
2 way that treats the same people the same.

3 JUSTICE BREYER: The argument isn't that  
4 it's expensive to administer as much as it is there are  
5 1,000 people in all these projects who are already paid  
6 up. We don't have enough money to pay them all back.  
7 That's why we don't want to pay them back. At the same  
8 time, we don't want to collect the money for 30 years  
9 from these other people who aren't fully paid yet.

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

11 JUSTICE BREYER: The question, I guess, is,  
12 is that rational?

13 MR. STANCIL: No, Your Honor. Simply  
14 sending in your tax bill -- again, if you sent in your  
15 taxes yesterday, are you "too bad, so sad"? I don't  
16 think that's rational.

17 And I want to get back to reliance interest  
18 because -- I can't.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

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

23

24

25

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