No. 05-354

IN THE

Supreme Court of the United States

City of Columbus et al.

Petitioners,

v.

Hazel Golden.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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November 2, 2005

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REPLY BRIEF FOR THE PETITIONER

This case presents a frequently recurring question of law of manifest importance to the nation's municipalities that the Sixth Circuit decided in direct conflict with this Court's precedents. The court of appeals held that a municipal policy that terminates utility service to a rental unit when the landlord does not pay the bill fails rational basis scrutiny whenever the rental unit is occupied by a tenant who did not incur the unpaid charges. That decision is clearly wrong, for terminating utilities in such circumstances is an entirely rational and effective means of enforcing a landlord's obligation to pay for services to his rental units. The court of appeals was able to reach a contrary conclusion only by applying a substantially higher degree of scrutiny than is permitted under this Court's precedents governing challenges to ordinary social and economic legislation. That holding – along with parallel holdings by the Fifth, Seventh, and Ninth Circuits – constitutes a massive invasion of the sovereign authority of states and municipalities around the nation. That invasion is, in itself, a sufficient basis for certiorari. But intervention by this Court is also needed to resolve the acknowledged and entrenched split between these courts and the Third Circuit, and between the state and federal courts within Ohio. Respondent fails to provide any convincing reason for this Court to delay any further the resolution of that conflict and the restoration of the proper constitutional balance between these local governments and the federal courts.[1]

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[1] The only petitions previously raising even related questions (see BIO 7 n.8) were either presented to this Court before the circuit conflict arose (*Sterling* v. *Vill. of Maywood*, 579 F.2d 1350 (CA7 1978), cert. denied, 440 U.S. 913 (1979)) or presented only a distinct procedural due process challenge that is not the subject of the conflict (*Turpen* v. *City of Corvallis*, 26 F.3d 978 (CA9 1994), cert. denied, 513 U.S. 963 (1994)).

1. Respondent and the court of appeals acknowledged that petitioner's water collection policy is subject to ordinary rational basis scrutiny. BIO 11; Pet. App. 16a. The petition for certiorari demonstrated that municipal policies such as petitioners' are not only rational, but entirely reasonable, placing responsibility for payment of utilities directly on the shoulders of a landlord and terminating services to rental properties as a means of enforcing that obligation. Pet. Br. 14-19.

Respondent asserts that this argument is "based on [the] flawed premise that the only way to hold the landlord responsible for the debts of tenants * * * is to withhold service from landlords for nonpayment, no matter what the consequences are to innocent subsequent tenants." BIO 11.[2] That defense of the Sixth Circuit's ruling is both wrong and telling. It is wrong because petitioners' premise is *not* that Columbus's collection scheme is "the only way" to collect a landlord's debt, but rather that the policy is *one* way to collect the debt, and a way that is an entirely rational means of avoiding financial losses to the City even though it may impose costs on innocent tenants that could be avoided under a less restrictive policy.

Respondent's answer is telling because it betrays the actual mode of review respondent urged, and the court of appeals applied below, a standard that effectively required the City to adopt the policy that would infringe upon the interests of tenants as little as possible, even at considerable sacrifice of the goal of encouraging payment for utility services. This is precisely the type of analysis courts employ under intermediate or strict scrutiny, balancing interests and requiring less restrictive alternatives if they are available. See, *e.g.*, *Craig* v. *Boren*, 429 U.S. 190, 197 (1976)

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[2] Respondent also attempts to defend the decision below by pointing out that the court of appeals described its review as "rational basis review." BIO 11. But petitioner's complaint is with the Sixth Circuit's analysis, not its labels.

(intermediate scrutiny); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (strict scrutiny). But it is manifestly *not* the analysis this Court has required for review of ordinary social and economic legislation such as this. Under true rational basis review, a policy fails constitutional muster "only if [its] classification rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961). The existence *vel non* of alternative means of pursuing a governmental interest is entirely irrelevant. See, *e.g.*, *New York Transit Auth.* v. *Beazer*, 440 U.S. 568, 592 (1979).

What this Court has repeatedly instructed, and what the court of appeals ignored, is that in the absence of a suspect classification or fundamental right, the Constitution leaves the choice among rational alternatives to elected officials whose balancing of affected interests is subject to supervision by the electorate, not the judiciary. See *Hodel* v. *Indiana*, 452 U.S. 314, 331-32 (1981). The decision of the Sixth Circuit in this case – and those of the Fifth, Seventh and Ninth Circuits which it followed – fundamentally violate that division of legislative and judicial power.

2. Respondent does not dispute that these decisions have invalidated the collection policies of large numbers of major municipal utilities throughout the country. The *amicus* brief of the Ohio Municipal League demonstrates that the City's policy is replicated in many of the largest metropolitan areas in that State, including Cincinnati, Springfield, and Akron. Joint Br. of *Amici Curiae* In Support of Petitioners 1-5.[3] Reported decisions and published ordinances further demonstrate that such policies are by no means unique to

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[3] For smaller Ohio cities, see also, *e.g.*, New Bremen Code of Ordinances 50.01, 50.06; Codified Ordinances of City of Streetsboro 925.03; Regulations and Specifications of Greene County Office of Sanitary Engineering, Part A, Sec. 307, available at http://www.co.greene.oh.us/saneng/REGS/COVERPG(Intro).pdf; Codified Ordinances of Sidney 911.13.

Ohio, but rather have been adopted by such diverse major cities as Atlanta, Memphis, Seattle, Chicago, Sacramento, St. Louis, Buffalo, and many others.[4]

Respondent attempts to belittle the importance of this wholesale invalidation of municipal collection practices, arguing that the decisions only "prohibit *one* means of enforcement of a municipality's right to collect from a landlord * * *." BIO 9 (emphasis altered). That argument overlooks the fact that termination – and, more importantly,

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[4] See, *e.g.*, *O'Neal* v. *City of Seattle*, 66 F.3d 1064, 1067-68 (CA9 1995) (Seattle); *Craft* v. *Memphis Light, Gas & Water Div.*, 534 F.2d 684, 689-90 (CA6 1976) (Memphis); *Davis* v. *Weir*, 497 F.2d 139 (CA5 1974) (Atlanta); see also Sacramento, Cal., Mun. Code 13.12.010, 13.12.110; City of St. Louis, Mo., Rev. Code 23.06.130; Scottsdale, Ariz. Rev. Code 49-22; Buffalo, N.Y., City Ordinances 3.05; Aurora, Colo., City Code 138-211, 138-225; Code of City of Pawtucket, R.I. 401-10. See also Chicago, Ill., Code 11-12-330, 11-12-480; but see Ill. Public Act 83-1098 (eff. July 1, 1984) (amending state law subsequent to *Maywood* decision). Even municipalities whose ordinances do not specify their shut-off policies in great detail often suggest that water would be cut off under the same circumstances as in Columbus. See, *e.g.*, Fort Worth, Tex., Code of Ordinances 35-10 ("If there is any change in tenant as customer on rented property and there exist, at that time, charges in arrears for past leakage, the property owner or tenant shall be held to account for payment for such leakage before service will be extended and water furnished to any new tenant."); *id.* § 7-92 (providing that landlord may not generally cause interruption of tenant's utility service and that "[t]he phrase 'cause the interruption of' includes the cutoff of a utility by a utility company due to the landlord's nonpayment of the bill"); Mun. Code of City of Rochester, N.Y. 23-17 ("All water charges * * * shall be a debt and personal obligation of the owner of the parcel of property to which the water was supplied and also of the consumer of the water."); *id.* § 23-22 ("If directed by the Commissioner of Environmental Services, water service may be shut off, as provided in this section, to any parcel for which water bills have remained delinquent and unpaid for a period of at least six months.").

the credible *threat* of termination – is the most effective and efficient method of collection available. Indeed, because the cost of a litigated collection action generally far exceeds the potential recovery, termination is often the *only* practical option for collecting a landlord's debt.

3. The question presented also implicates a substantial, longstanding, and entrenched division among the courts of appeals and between the state and federal courts in Ohio.

a. The courts of appeals have themselves repeatedly acknowledged the square circuit split. As the Sixth Circuit explained in this case, the Fifth Circuit's decision in *Davis* v. *Weir*, 497 F.2d 139 (CA5 1974), "remains intact in the Fifth Circuit, was adopted by this circuit in [*Craft* v. *Memphis Light, Gas & Water Div.*, 534 F.2d 684, 689-90 (CA6 1976)], and has been adopted by the Ninth and Seventh Circuits." Pet. App. 18a (citing *O'Neal* v. *City of Seattle*, 66 F.3d 1064, 1067-68 (CA9 1995); *Sterling* v. *Vill. of Maywood*, 579 F.2d 1350 (CA7 1978), cert. denied, 440 U.S. 913 (1979)). The court went on to explain, however, that "[a]t least one circuit, the Third, has rejected *Davis*." *Ibid*. (citing *Ransom* v. *Marrazzo*, 848 F.2d 398 (1988)).

The Third and Ninth Circuit have likewise acknowledged the split. See *O'Neal*, 66 F.3d at 1068 (Ninth Circuit explaining that it "reject[ed] the *Ransom* court's technical narrowing of the legislative purpose and agree[ed] with the Fifth Circuit's opinion in *Davis*"); *id*. at 1067 ("The Fifth and Third Circuits have both addressed the inquiry in similar contexts and have come to differing conclusions."); *Ransom*, 848 F.2d at 412 ("We are not persuaded by the equal protection analysis of the * * * [Fifth Circuit's] *Davis* and [Sixth Circuit's] *Craft* opinions.").

Respondent argues that all of these courts are wrong, because the division between the Third Circuit and the others "may hinge on factual distinctions" rather than differences in legal analysis. BIO 6. In particular, respondent points out that the relevant plaintiffs in *Ransom* were classified as

"occupants" rather than as "tenants" under the utility regulations at issue in that case. See *Ransom*, 848 F.2d at 401 n.1. Respondent suggests that had the plaintiffs in *Ransom* been tenants like herself, the Third Circuit would have adopted the holding of the Fifth Circuit in *Davis* just as the Sixth Circuit did in this case.

This suggestion is entirely implausible. It is true that the Third Circuit noted that the plaintiffs before it were "occupants" and not "tenants." But the court expressed substantial doubt that this distinction had any relevance, noting that an "occupant might conceivably be considered a tenant-at-will and, indeed, the regulations treat occupants and tenants similarly." 848 F.2d at 401 n.1. While the court had no occasion to decide definitively whether the occupant-tenant distinction had any relevance, its opinion makes abundantly clear that its rejection of the *Davis* line of cases had nothing to do with that distinction.

Rather than distinguish *Davis* and its progeny, the Third Circuit rejected those decisions in their entirety, concluding that they "reflect[ed] faulty reasoning and mischaracterization," 848 F.2d at 412:

> The *Davis* court unnecessarily restricts the characterization of the city's interest as not merely the collection of unpaid rents, but the collection of those rents "from the defaulting debtor." *Davis*, 497 F.2d at 145. But this is an unnecessary and misleading embellishment, which simply begs the question of the relation of means and ends. The city has a valid interest in collecting the unpaid rents from any source. Whether the means it adopts to achieve that end are legitimate is a separate question. Although there may be no logical relation between a classification scheme based on encumbrances on property that ignores personal liability and the narrow goal of collecting debts *from debtors*, *see Davis*, 497 F.2d at 145, *Craft*, 534 F.2d at 690

> (quoting *Davis*) and *Koger*, 412 F. Supp. at 1391 (same), there certainly is a logical relation between such a scheme and the more general goal of collecting debts, period. Therefore, we conclude, *contra Davis*, *Craft* and *Koger*, that the classification of service eligibility according to the presence or absence of encumbrances on the property does survive rational relationship scrutiny.

Id. at 413. Indeed, the Third Circuit held that the city's termination policy would survive even intermediate scrutiny. *Ibid.*

Respondent has provided no grounds to believe that the Third Circuit would have concluded that an identical policy would fail the much more lenient standard of rational basis scrutiny if the plaintiff were a tenant rather than an occupant. Thus the Ninth Circuit acknowledged the footnote in *Ransom* upon which respondents relies, see *O'Neal*, 66 F.3d at 1067 n.3, but nonetheless concluded that the Third Circuit's decision conflicted with *Davis*, see *id*. at 1067-68.

At the same time, there can be no doubt that the equal protection claim rejected in *Ransom* would have been accepted in the Fifth, Sixth, Seventh, or Ninth Circuits. Nothing in *Davis* or the cases that followed turned on any distinction between occupants and tenants. To the contrary, the analysis of *Davis* and its progeny has focused instead on the rationality of differences in treatment for classes of "applicants" for utility services. See, *e.g.*, *Davis*, 497 F.2d at 144 (concluding that it is irrational to draw a distinction between "*applicants* whose contemplated service address is encumbered with a pre-existing debt (for which they are not liable) and *applicants* whose residence lacks the stigma of such charges") (emphasis added); Pet. App. 17a (same); see also *O'Neal*, 66. F.3d at 1068 (explaining that city cannot refuse service "to an unrelated, *unobligated third party*, whether that third party be the new tenant or any other stranger to the prior service agreement") (emphasis added).

b. The Sixth Circuit's decision also conflicts with the law applied in the state courts of Ohio. Contrary to respondent's contention (BIO 8), *Morrical* v. *Village of New Miami*, 476 N.E.2d 378 (Ohio Ct. App. 1984), decided more than simply whether a municipality may make a landlord liable for water services provided to his tenants. The case also decided whether that liability could be enforced by refusing to provide service to the landlord's new tenant. See *id*. at 439-40 (plaintiff sought injunction against denial of service to new tenant); *id*. at 442-43 (affirming denial of injunction). Although the court was not entirely clear whether it was considering a substantive due process or an equal protection claim, or whether it was considering only the rights of the landlord or also the rights of the tenant, such distinctions would not have affected the analysis. The constitutional question in each instance would be whether the policy was rationally related to a legitimate government interest, a test that does not vary depending on the identity of the plaintiff.[5] In *Morrical*, the court concluded that the city's termination policy was not "arbitrary or unreasonable" and therefore violated neither the Equal Protection Clause nor the Due Process Clause. *Id*. at 442. That holding would be dispositive of respondent's equal protection claim in this case and is irreconcilable with the Sixth Circuit's contrary decision. Certiorari is warranted to resolve this untenable conflict between the state and federal courts in Ohio.

c. Respondent's citation to *Midkiff* v. *Adams County Regional Water District*, 409 F.3d 758 (CA6 2005), is also unavailing. In *Midkiff*, the court upheld a city's policy of refusing to contract for water services directly with tenants, finding a rational basis for treating landlords and tenants

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[5] See *Ferguson* v. *Skrupa*, 372 U.S. 726, 730-32 (1963) (rational basis scrutiny for substantive due process claims not implicating fundamental rights); *Pennell* v. *City of San Jose*, 485 U.S. 1, 14 (1988) (same for equal protection claim by landlord); Pet. App. 16a (same for equal protection claim by tenant).

differently. The court of appeals acknowledged the decision in this case, but concluded that it was distinguishable because this case involved termination of services to different classes of tenants, while *Midkiff* involved distinctions between tenants and landlords in opening water accounts. *Id*. at 770-71. To the extent respondent suggests, BIO 7-8, that the Third Circuit might some day rely on a similar difference in "factual circumstances" as grounds for adopting the *Davis* line of precedent, that suggestion is implausible. As described above, the Third Circuit rejected *Davis* because of a fundamental disagreement with the foundations of the Fifth Circuit's analysis, not because it concluded that the case before it was factually distinguishable from *Davis*.

If anything, *Midkiff* enhanced the need for review of the question presented. As the law of the Sixth Circuit now stands, a city may insist on contracting only with landlords, see *Midkiff*, 409 F.3d at 760, 770, but is unable to terminate service to the landlord when he fails to pay the water bill if the current tenant was not responsible for the arrearage, see Pet. App. 19a-21a. Moreover, while the city may terminate service to an innocent tenant at a landlord's request, see *Midkiff*, 409 F.3d at 760, a city is prohibited from terminating service to a property in order to enforce the landlord's payment obligations, see Pet. App. 19a.

The decision in *Midkiff* thus provides no remedy for the injury to municipal interests inflicted by the decision below. Moreover, there is no reason to believe that the Sixth Circuit will itself resolve this problem – the plaintiff in *Midkiff*, represented by respondent's lawyer in this case, petitioned for rehearing en banc, asserting an intra-circuit conflict with this case, but that petition was denied without dissent. *Midkiff* v. *Adams County Reg'l Water Dist.*, No. 04-3508, 2005 U.S. App. LEXIS 19,254 (CA6 Aug. 30, 2005). In any case, even if the Sixth Circuit reversed course, that would only convert the circuit split from a four-one to a three-two split that would still require resolution by this Court, and this case is an ideal vehicle in which to resolve the conflict.

5. Respondent's failure to preserve her procedural due process claim is also no reason to deny certiorari. Contra BIO 11-13. The two claims are analytically distinct, the first asking *whether* the Constitution permitted the City to terminate respondent's service and the second asking *how* such termination should be effected if it is permitted at all. Respondent suggests no reason, other than her own desire to have both issues addressed by this Court, why the constitutional questions cannot be addressed separately.

Moreover, respondent's due process challenge does not merit review by this Court. Contrary to respondents' suggestion, BIO 12-13, there is no circuit conflict on whether a tenant has a property interest in water service protected by the Due Process Clause. That question depends on whether state law creates a "legitimate claim of entitlement" to continued service. See, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). The difference in outcomes among the cases respondent cites turns entirely on differences in state law. See, *e.g.*, Pet. App. 9a; *Midkiff*, 409 F.3d at 764-65; *DiMassimo* v. *City of Clearwater*, 805 F.2d 1536, 1539-40 (CA11 1986). As a result, respondent's due process claim is wholly fact-bound and presents no question of general import.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

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