No. 05-___

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

PETITION FOR A WRIT OF CERTIORARI

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September 15, 2005

QUESTION PRESENTED

Municipalities regularly confront the question of how to ensure that they receive payment for utility bills on rental properties. Renters frequently leave without paying outstanding balances. Many municipal utilities address this concern by making the landlord, rather than the tenant, responsible for payment. They provide service to rental properties only through contracts with landlords and terminate service to the property for nonpayment. As a consequence, new renters will be unable to secure utility service if their landlords fail to pay an outstanding arrearage. The courts of appeals are avowedly divided over the constitutionality of these common schemes.

The Question Presented is:

Whether the government's termination of water service to a rental property based on the landlord's failure to pay the unit's outstanding utility bill violates the equal protection rights of a current tenant who did not incur the arrearage.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, Cheryl Roberto, Director of Public Utilities for the City of Columbus, was a defendant below and is a petitioner here. Nikki Mara was a plaintiff in the district court, but did not participate in the proceedings on appeal and accordingly is not a respondent in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners City of Columbus et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-28a) is reported at 404 F.3d 950. The opinion of the district court (Pet. App. 29a-50a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2005. Justice Stevens extended the time to file this petition to and including September 15, 2005. App. No. 05A29. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The relevant statutory and constitutional provisions are reproduced in the appendix to this petition (at 51a - 58a).

STATEMENT

1. The City of Columbus (City), through its Department of Public Utilities, supplies water to residents of central Ohio. The City finances this service by charging customers an amount sufficient to cover the operating expenses for the Division of Water. Because of the difficulty in collecting unpaid water bills from often transient tenants, city ordinances provide that the "owners of real estate premises installing or maintaining water service shall be liable for all water charges incurred for service at said premises." City of Columbus Code 1105.045(C) (reproduced at Pet. App. 53a). Accordingly, all water bills are sent to the landlord, although

a copy may also be sent to the tenant if the landlord and tenant agree to such direct billing and there is no current arrearage on the property at the time of the direct billing application. *Id*. § 1105.045(D). The direct billing does not, however, relieve the landlord of responsibility for the water bill. *Id*. § 1105.045(E). Instead, all water charges are "made a lien upon the corresponding * * * premises served by a connection to the water system of the city." *Id*. § 1105.045(A).

If an arrearage develops, the City will provide notice to the landlord and to the service address. City of Columbus Code 1101.03(b). If the bill is not paid within twenty-one days of the notice, the City may terminate water service to the premises. *Id*. §§ 1101.03(a), 1105.12(D). "Water service will not be resumed until all service charges due and payable have been collected or a suitable payment agreement has been received from the customer of record or the owner of the real estate." *Id*. § 1105.12(D).

2. Respondent Hazel Golden is a former tenant of a rental house in Columbus. At the time she moved into the house, there was an outstanding balance on the water bill for the premises which neither the prior tenant nor the landlord had pa*id.* Pet. App. 4a. During the first few months of respondent's tenancy, the City sent notices of this delinquency both to the premises and to the landlord on numerous occasions. When the landlord did not pay the bill as required by city ordinances, water service to the house was terminated. *Ibid*. Service was resumed on several occasions at the request of the City's code enforcement department, but turned off again when the landlord continued to fail to pay the outstanding water bill.[1] Respondent eventually vacated the premises in October 2001. *Id*. 5a.

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[1] During this time, respondent submitted an application for direct billing, but received no response. Pet App. 5a. Because there was a pending arrearage, however, respondent did not qualify for a direct billing arrangement under the code. See City of

3. On July 25, 2001, respondent filed suit in the Southern District of Ohio, alleging among other things that petitioners violated her right to equal protection of the laws by terminating water service to her rental unit because of a debt for which she was not responsible.

On June 6, 2002, the district court dismissed respondent's equal protection claims. Pet. App. 39a. The court rejected respondent's assertion that "because water is a necessity of life it is therefore a 'fundamental' need and therefore the City must have a compelling reason for treating landowners and non-landowners differently." *Id*. 36a. Instead, the court applied rational basis review because the City's policy affected only economic interests rather than fundamental constitutional rights. *Ibid*. The district court then held that the City's policy was a rational means of ensuring payment of water bills and of "maintaining a financially stable municipal utility." *Id*. 37a.[2]

4. On appeal, the Sixth Circuit reversed. Although the court of appeals agreed with the district court that rational basis scrutiny applied to respondent's claims, it disagreed with the district court's determination that the City's policy was rational. Instead, the court concluded that the City's

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Columbus Code 1105.045(E). In any event, even if a direct billing arrangement had been approved, this would not have removed the prospect of termination of service to the premises based on the unpaid bills arising under the prior tenancy. See *id*. § 1101.03.

[2] Respondent also alleged that petitioners violated her right to due process of law by terminating her water service without adequate notice and a hearing, that the Division of Water violated its "common law duty to serve" by terminating her water service in an arbitrary and unreasonable manner, and that petitioners' policy of authorizing only property owners to open water service accounts violated the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*, because it results in a disparately high rejection rate for women and minority applicants. Pet. App. 29a. The court rejected these claims and denied class certification. *Id.* 50a.

policy "divides tenants in an irrational manner because it denies water service only to those tenants whose predecessors or landlords failed to pay the water bills." Pet. App. 17a. The court explained that this conclusion was compelled by its prior decision in *Craft* v. *Memphis Light, Gas & Water Div.*, 534 F.2d 684 (CA6 1976), aff'd on other grounds, 436 U.S. 1 (1978), which in turn adopted the reasoning of the Fifth Circuit's decision in *Davis* v. *Weir*, 497 F.2d 139 (1974). The court in *Davis* held unconstitutional a similar policy, reasoning that "[t]he City has no valid governmental interest in securing revenue from innocent applicants who are forced to honor the obligations of another or face constructive eviction from their homes for lack of an essential to existence – water." *Id.* at 145. Because the court in *Davis* construed such policies as an illegitimate attempt to extract payment from the new tenant, it held that scheme was "devoid of logical relation to the collection of unpaid water bills from the defaulting debtor." *Id.* at 144-45.

Petitioners argued to the Sixth Circuit that this conclusion was based on a mistaken premise. The City's termination practice, petitioners explained, is directed at securing payment from the landlord, who is legally responsible for the debt, not from the new tenant, who is not. But the Sixth Circuit was not persuaded. "Whether the City's goal is that it be repaid by the person who owes the debt or by the tenant who is directly affected by its collection scheme is immaterial for constitutional purposes." Pet. App. 20a. The court held that while it would be rational for the City to sue a landlord or prior tenant to collect the debt, "'refusing service to an unobligated new tenant is not.'" *Ibid.* (citation omitted).[3]

[3] The court also noted that subsequent to the events at issue in this litigation, the City amended its ordinances to allow a tenant in respondent's position to avoid termination of water to her unit by paying rent into an escrow account. Pet. App. 20a (citing City of Columbus Dep't of Pub. Utils. Rule and Regulation No. 2002-01).

The Sixth Circuit noted that its decision was consistent with decisions from the Fifth, Seventh, and Ninth Circuits, but in conflict with a decision of the Third Circuit. See Pet. App. 18a-19a (citing *Davis* v. *Weir*, 497 F.2d 139, 144-145 (CA5 1974); *Sterling* v. *Vill. of Maywood*, 579 F.2d 1350, 1355 (CA7 1978); *O'Neal* v. *City of Seattle*, 66 F.3d 1064, 1067-68 (CA9 1995); *Ransom* v. *Marrazzo*, 848 F.2d 398, 412-13 (CA3 1988)).[4]

5. This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents an important opportunity for this Court to resolve a recurring conflict among the federal courts of appeals regarding the authority of local governments to institute effective collection systems for municipal utilities. The Fifth, Sixth, Seventh, and Ninth Circuits have each held that the Equal Protection Clause prohibits a municipality from making landlords responsible for the payment of utility bills for their rental properties and terminating service to the property if the bill is not paid and the tenant living in the unit at the time of termination is not responsible for the arrearage. As the court of appeals acknowledged below, that conclusion conflicts with the law of the Third Circuit. It also conflicts with the law applied in the state courts in Ohio, creating an untenable conflict between the state and federal courts in that state. In addition, the decision below departs substantially

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The court declined to decide whether, so amended, the City's ordinances "pass constitutional muster," *ibid*., given that respondent was seeking damages for a termination under the prior regime. The court also concluded that the amendment did not moot respondent's suit for damages and a declaratory judgment, noting that the City had not claimed that the new rule was a permanent, rather than temporary, change. *Id*. 20a n.10.

[4] The court of appeals affirmed the district court's denial of class certification and grant of summary judgment with respect to respondent's due process and ECOA claims. Pet. App. 2a.

from this Court's deferential standard of review for equal protection claims involving economic legislation, invading the prerogatives of local governments and impeding the ability of thousands of local water authorities to efficiently manage their water systems. It is not merely "rational," but entirely sensible, for the government to hold landlords responsible for utility bills on their rental properties and to terminate service for nonpayment – such a policy creates a powerful incentive for landlords to pay for the water already delivered to their property in order to be able to rent the property to a new tenant. Review by this Court is warranted.

I. The Courts Are Deeply Divided Over Whether The Equal Protection Clause Permits A City To Terminate Utility Service To A Rental Property When The Current Tenant Is Not Responsible For The Debt.

This Court's intervention is required to resolve an entrenched division of authority among the federal courts of appeals, and between the Sixth Circuit and the Ohio state courts, over whether a municipal utility may terminate service to a property based on unpaid bills for the premises when the property is currently occupied by a tenant who did not incur the arrearage.

1. Four circuits have held that the Equal Protection Clause prohibits municipal utilities from refusing to provide water service to a rental property based on the landlord's failure to ensure payment of a bill accrued by a prior tenant. The first court to do so was the Fifth Circuit in *Davis* v. *Weir*, 497 F.2d 139 (1974). The plaintiff in that case rented an apartment in Atlanta for a monthly fee that included all water charges. The landlord, however, refused to pay a disputed water bill for the premises. Service to the tenant's unit was eventually terminated for nonpayment. The tenant asked to have a new account opened in his name and service restored. However, the city water department refused to do so until the existing arrearage was pa*id.*

The Fifth Circuit held that "the Department's discriminatory rejection of new applications for water service based on the financial obligations of third parties fails to pass XIV Amendment muster under traditional 'rational basis' analysis." *Id*. at 144. The city's policy, the court held, divided applicants for water services "into two categories: 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." *Ibid*. While the court recognized that "[n]o one could doubt that the Department's methods are calculated to expedite the liquidation of unpaid bills," it concluded that the city's collection scheme "divorces itself entirely from the reality of legal accountability for the debt involved." *Ibid*. The court then held that the scheme was "devoid of logical relation to the collection of unpaid water bills from the defaulting debtor," *id*. at 144-45, and therefore failed rational basis scrutiny.

The Fifth Circuit's rationale in *Davis* has been adopted by the Sixth, Seventh, and Ninth Circuits, each of which has held unconstitutional a city water department's refusal to provide service to a rental unit based on the landlord's failure to pay a water bill accrued by a prior tenant. See Pet. App. 18a; *O'Neal* v. *City of Seattle*, 66 F.3d 1064, 1067-68 (CA9 1995); *Sterling* v. *Vill. of Maywood*, 579 F.2d 1350, 1355 (CA7 1978); see also *Craft* v. *Memphis Light, Gas & Water Div.*, 534 F.2d 684, 689-90 (CA6 1976), aff'd on other grounds, 436 U.S. 1 (1978). In each of these cases, a municipal water authority required landlords to bear ultimate responsibility for water bills accrued at their rental properties. In each case, city ordinances permitted the water authority to terminate service to the premises if the water bill for the unit went unpa*id.* And in each case, the court of appeals held that this system of collection failed rational basis scrutiny because of its effect on innocent tenants. See Pet. App. 18a; *O'Neal*, 66 F.3d at 1068; *Sterling*, 579 F.2d at 1355; *Craft*, 534 F.2d at 690.

2. As the Sixth Circuit acknowledged in this case (Pet. App. 18a-19a), however, its conclusion conflicts with the Third Circuit's decision in *Ransom* v. *Marrazzo*, 848 F.2d 398 (1988). In that case, the court rejected the claim that a "city's practice of denying service to applicants at properties encumbered by past due charges violates the Equal Protection Clause of the Fourteenth Amendment." *Id*. at 412. The court acknowledged the contrary holdings of the Fifth and Sixth Circuits, but was "not persuaded by the equal protection analysis" in those cases. *Ibid*. The court rejected the Fifth Circuit's conclusion that a city's only legitimate interest is in the collection of unpaid water bills "'from the defaulting debtor.'" *Id*. at 413. Instead, the Third Circuit concluded that the "city has a valid interest in collecting the unpaid [bill] from any source." *Ibid*. "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*, there certainly is a logical relation between such a scheme and the more general goal of collecting debts, period." *Ibid*. (emphasis in original) (citations omitted).[5]

3. The Sixth Circuit's decision in this case also conflicts with the law followed in the state courts of Ohio. In *Morrical* v. *Village of New Miami*, 476 N.E.2d 378 (Ohio Ct. App. 1984), a municipal water authority terminated service to a rental property after a prior tenant moved out, leaving an

[5] The Eleventh Circuit's decision in *DiMassimo* v. *City of Clearwater*, 805 F.2d 1536 (1986), is also in substantial tension with the Sixth Circuit's decision below. The plaintiffs in *DiMassimo* challenged the city's refusal to open a water account in a tenant's name unless the landlord agreed to the arrangement and guaranteed payment of the bill. *Id*. at 1537. The Eleventh Circuit rejected the plaintiff's claim that "providing water only to those tenants who obtain their landlord's permission to receive utility services" lacked a sufficient relationship to the city's "objective of maintaining a financially sound utility system." *Id*. at 1541.

arrearage the landlord refused to pay. *Id.* at 379. The refusal to resume service to the new tenant was upheld against an equal protection challenge. After reviewing prior precedent from the Supreme Court of Ohio and other states, the court held that "a municipal ordinance which imposes liability on a property owner for water services provided to a tenant on the premises does not violate the Equal Protection clauses of either the state or federal Constitutions." *Id*. at 381. The court therefore refused to order the municipality in that case to resume service to the newly occupied rental unit. *Ibid*.

Accordingly, a system like petitioners' will be held unconstitutional in a federal court in Ohio, but upheld if the suit is brought in a state court. This division between the federal and state courts in Ohio is untenable and grounds for review by this Court. See, *e.g.*, *Johnson* v. *California*, 125 S. Ct. 2410, 2414 (2005); *Hagen* v. *Utah*, 510 U.S. 399, 409 (1994); *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985).

4. The division of authority is considered, mature, and entrenched. In reaching its decision in this case, the Sixth Circuit acknowledged the circuit split and specifically rejected the reasoning of the Third Circuit. Pet. App. 18-19a. The Ninth Circuit likewise reviewed the divided authority and chose to side with the Fifth and Sixth Circuits over the Third. *O'Neal*, 66 F.3d at 1067-68. The Third Circuit, in turn, specifically considered the views of the Fifth and Sixth Circuits, but found them unpersuasive. *Ransom*, 848 F.2d at 412. Moreover, the division has persisted for more than fifteen years, during which time the split has widened, rather than narrowed. Accordingly, it is unlikely that the conflict among the circuits will be resolved without intervention by this Court.

This case also presents an ideal vehicle for resolving the division among the courts of appeals. The constitutional question is directly presented by the facts of the case, was fully litigated below, and formed the sole basis of the court of appeals' decision in respondent's favor.

II. The Question Presented Is Recurring And Important, Affecting The Financial Stability Of Tens Of Thousands Of Municipal Utilities.

Review is also warranted because the legal question over which the lower courts are divided has important practical and legal consequences for municipal utilities and local governments. Approximately three-quarters of Americans obtain their drinking water from one of the more than 25,000 municipal water systems throughout the nation. See Congressional Budget Office, *Financing Municipal Water Supply Systems* 1-2 (1987). The ability to effectively collect payment for water services is vital to the financial viability of municipal water authorities, many of which receive no outside financial assistance from the government and must, therefore, cover all operating expenses through the revenue collected from their customers. Many systems operate under precarious finances, struggling to meet an expanding demand for service with an aging infrastructure while at the same time customers fail to pay millions of dollars in utility bills.[6] A survey by the Environmental Protection Agency, for example, reported that twenty percent of large public water authorities were operating at a deficit in 2000. See Environmental

[6] See, *e.g.*, Anthony DePalma, *Water Isn't Free, New York Is Told*, N.Y. TIMES, July 3, 2005, § 1, at 1 (water authority for New York City estimates $16 billion in capital improvements needed in next decade, while $625 million in bills go unpaid); Sylvia Cooper & S.B. Crawford, *Unpaid Bills Cost City Millions: Bad Debts to Water System Hit $2.6 Million Since 1996*, AUGUSTA (GA.) CHRONICLE, Sept. 26, 1999, at A1 (Augusta wrote off $1.24 million in unpaid debt and had another $1.37 million on the books in 1999); D'Vera Cohn, *For Some D.C. Water Authority Workers, Bottled Is the Way to Go*, WASH. POST, Sept. 5, 1997, at B1 (in 1997, the D.C. Water and Sewer Authority was owed $30 million in unpaid water bills); Tom Barnes, *Water Rate Increase Plan May Be Dropped*, PITTSBURGH POST-GAZETTE, Nov. 8, 1996, at A-1 (Pittsburg still owed $9 million in unpaid water bills after a crackdown effort that netted $10 million in past due fees).

Protection Agency, Community Water System Survey 2000 Vol. 1, at 37. Effective collection of water debts, therefore, is essential to ensuring the financial health of these public utilities and maintaining the affordability of this important service for American consumers.

Holding property owners responsible for the cost of the water provided to their properties is the norm, whether the property is used by the owner as a primary residence, business, or rental property. While some utilities make an exception for rental units, contracting directly with tenants, a great many municipalities do not, for good reason. Attempting to collect on delinquent accounts from renters is difficult, expensive and, frequently, futile. Renters, as a group, are often transient and frequently have no assets from which to collect a judgment even if one were secured. Accordingly, the cost of collecting an unpaid water bill from a tenant frequently exceeds the amount recovered. As a result, a great many municipalities in Ohio and throughout the nation refuse to provide special treatment for rental properties and, instead, contract only with landlords or require landlords to maintain ultimate responsibility for payment of tenants' water bills. For example, in Ohio alone, such policies are employed by the cities of Cincinnati, Toledo, Cleveland, Akron, and a number of smaller municipalities and counties.[7] Terminating service to landlords who fail to pay the water bills for which they are responsible is a traditional and

[7] See Cincinnati City Ordinance 401-71, 401-95; Toledo Mun. Code 933.07; Cleveland Mun. Code 535.16; Akron Water Works Rule 305, 308 (available at *http://ci.arkon.oh.us/146/office/ rules-regs.pdf* (visited Sept. 14, 2005)); Green County Office of Sanitary Engineering, Regulations and Specifications, Part A, § 307 (available at *http://www.co.greene.oh.us/saneng/REGS/REGSAPT3 (SEC3).pdf* (visited Sept. 14, 2005)); Loraine City Ordinance 911.215; New Breman City Ordinance 50.06; Streetsboro City Ordinance 925.03.

widespread method of effectively and inexpensively securing compliance with the terms of the landlord's obligations.[8]

The decisions of the Fifth, Sixth, Seventh, and Ninth Circuits preclude municipal utilities within their jurisdiction from employing this long-standing and reasonable method of collecting outstanding water bills from landlords.[9] The

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[8] See Cincinnati City Ordinance 401-93-A; Toledo Mun. Code Part IX, Title III, App. C, §§ 101.021, 101.03, 101.07; Cleveland Mun. Code 535.15-535.16; Akron Water Works Rule 112, 306, 308; Green County Office of Sanitary Engineering, Regulations and Specifications, Part A, § 307; Loraine City Ordinance 911.220; New Breman City Ordinance 50.06; Streetsboro City Ordinance 925.03(j); see also Missouri Landlord Accountability Ordinance 1 (available at *http://www.mocities.com/default.asp?pageID=11521&sectionID=59* (visited Sept. 14, 2005)) (model ordinance published by Missouri Municipal League).

See generally New York City Water Board, Statement of Basis and Purpose, Regulation Governing the Discontinuance of Water Supply and/or Sewer Service Because of Nonpayment 1 (1999) (available at *http://www.nyc.gov/html/dep/pdf/shutoff.pdf*) ("Most water utilities have shut-off regulations as an integral part of their enforcement policy. Water utilities with high collection rates tend to use shut-offs more frequently than utilities with lower rates.").

See further Sylvia Cooper & S.B. Crawford, *supra* (comparing the $2.6 million in unpaid water bills in Augusta to Columbus, Georgia, where the low amount of unpaid bills was due to a strict cut-off policy for accounts in arrears); Frederic Pierce, *Syracuse Threatens Water Shutoff*, THE POST-STANDARD, July 31, 2002, at A1 (describing the decision to shut off water service for delinquents in Syracuse, New York); Michael C. McDermott, Crackdown Vowed on Overdue Bills, THE PATRIOT LEDGER, July 27, 2001, at 13 (stating that Braintree, Massachusetts, considered terminating service in order to collect on unpaid bills).

[9] Thus, for example, the Ninth Circuit's decision in *Davis* has partially invalidated a Washington State statute that permits municipalities to terminate utility service to a premises based on non-payment for services provided to the property, without regard

unresolved division also creates substantial uncertainty for water systems in other circuits seeking ways to improve their collection rates and practices. Cf., *e.g.*, Anthony DePalma, *Water Isn't Free, New York Is Told*, N.Y. TIMES, July 3, 2005, § 1, at 1 (stating that City of New York considering authorizing termination of services as means of collecting a portion of more than $625 million in unpaid water bills and penalties).

III. Review Is Warranted To Correct The Sixth Circuit's Substantial Departure From The Deferential Standard Of Review Required For Ordinary Economic Legislation.

The Sixth Circuit's decision is wrong, the result of a substantial departure from the deferential standard of review this Court's equal protection precedents apply to ordinary economic legislation.

The court of appeals recognized that respondent's equal protection claim is subject to rational basis scrutiny. Pet. App. 16a. Neither this Court, nor any court of appeals, has held that provision of municipal water services is a "fundamental right," triggering strict equal protection scrutiny. While access to water services is no doubt important, "the importance of a service performed by the State does not determine whether it must be regarded as fundamental" for equal protection purposes. *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 30 (1973). "Rather, the answer lies in assessing whether [the right is] explicitly or implicitly guaranteed by the Constitution." *Id*. at

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to whether the current resident is responsible for the arrearage. See R.C.W. 35.21.290-.300; Municipal Research & Svc. Ctr. of Washington, *Collection Practices for Delinquent Utility Accounts* (available at *http://www.mrsc.org/Subjects/PubWorks/utilbill collect.aspx#landlord* (visited Sept. 14, 2005)) (advising Washington municipalities that "[t]his statutory authority was modified by O'Neal v. Seattle")

33-34. The right to water service is "not among the rights afforded explicit protection under our Federal Constitution." *Id*. at 35. Moreover, there is no basis for construing the Constitution to implicitly recognize water service as a fundamental right. Cf. *ibid*. (finding no basis for saying that the right to education is implicitly protected).

Accordingly, to pass muster under the Equal Protection Clause, petitioner's water service policies need only be "rationally related to a legitimate state interest." *Friedman* v. *Rogers*, 440 U.S. 1, 17 (1979) (citation omitted). This standard is highly deferential, affording the challenged classification "a strong presumption of validity." *Heller* v. *Doe*, 509 U.S. 312, 319 (1993). Indeed, under rational basis scrutiny "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Id*. at 320 (citation omitted).

The purported constitutional infirmity identified by the court of appeals arises from the interaction of two aspects of the City's policy: (1) the City's decision to contract only with landlords for the provision of water services to rental properties;[10] and (2) the resulting consequence that terminating service to a delinquent landlord may cut off water to a tenant who did not incur the liability. See Pet. App. 17a. Both aspects of the policy are rationally related to a legitimate governmental purpose.[11]

As all courts considering this issue have recognized, a municipality has an important interest in ensuring the fiscal

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[10] While the City permits dual billing of landlord and tenant (if the landlord consents and the account is current), the contract remains with the landlord. See Pet. App. 3a; City of Columbus Code 1105.045.

[11] Indeed, the policy would withstand substantially greater constitutional scrutiny. See, *e.g.*, *Ransom* v. *Marrazzo*, 848 F.2d 398, 413 (CA3 1988) (finding Philadelphia's water shutoff policy bears "substantial relation" to "important governmental objectives").

soundness of its utility system by collecting unpaid utility bills from the individuals who are legally responsible for these debts. Because of the difficulty in collecting unpaid bills from tenants, the City has chosen to contract for water services only with landlords and to subject the rental property to a lien in the event that the landlord fails to pay the water bill for the property. City of Columbus Code 1105.045(A). That decision is entirely rational. As the Eleventh Circuit explained in *DiMassimo* v. *City of Clearwater*, 805 F.2d 1536 (1986), a city may rationally conclude that unpaid debts can be collected more readily from landlords than from tenants, since the landlord owns property in the jurisdiction that can be subject to a lien, while tenants are often transient and frequently lack substantial assets. At the same time, landlords are better positioned than the water authority to collect the cost of water service from the ultimate user, since landlords are already collecting rents from the tenants. A policy like the City's also has the salutary effect of providing the landlord an incentive to minimize wasteful water use in the building by, for example, maintaining the plumbing in the facility.

Accordingly, this Court has long recognized the legitimacy of holding landlords liable for tenants' unpaid water bills. More than eighty years ago, in *Dunbar* v. *City of New York*, 251 U.S. 516 (1920), this Court rejected a constitutional challenge to a New York City ordinance that converted tenants' unpaid water charges into a lien upon the property, payable by the landlord. The Court found this requirement nothing more than "an ordinary and legal exertion of government to provide means for its compulsory compensation" for the water services it provided. *Id*. at 518. The Court recognized that the landlord might not be the direct consumer of the water, but held that it was "of no consequence * * * at whose request the [water] meters were installed in the property." *Ibid*. For while the tenants obviously benefited from the water service, so did the landlord – the property "would be unfit for human habitation

if it could not get water," and therefore of no value to the owner as a landlord. *Ibid.*

Likewise, the City's policy of requiring landlords to bear responsibility for water contracts recognizes that owners of rental property receive substantial benefit from the city's provision of water to the units, even if the tenants are the direct recipients. It is both fair and entirely rational to require the landlord to ensure payment for a government service that makes its business possible.

At the same time, there is nothing irrational in terminating service to a rental property when the landlord fails to pay the bill, even though this may impose a burden on the landlord's tenants. Terminating service to a landlord is a particularly effective means of ensuring payment of a past-due account since, as this Court recognized in *Dunbar*, without water, the landlord's units are uninhabitable and cannot be a source of revenue for the debtor.[12] At the same time, refusing to continue to provide water to a landlord who has demonstrated his unwillingness to pay the water bill is a prudent measure to prevent further financial losses.

The court of appeals nonetheless concluded that the City's policy was irrational because "the person directly penalized by the scheme is not the debtor but an innocent third party with whom the debtor contracted." Pet. App.

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[12] In Columbus, landlords who fail to ensure water service to their tenants are in violation of city housing codes, guilty of a third-degree misdemeanor, and subject to fines of up to $500 and imprisonment of up to sixty days. City of Columbus Code 4509.99(A), 4521.01-.02. "Each day that any such person continues to violate any of the provisions of this Housing Code shall constitute a separate and complete offense." *Id*. Failure to provide water service also violates Ohio's landlord-tenant statute. See Ohio Rev. Code 5321.04(A)(6). In most cases, upon proper notice to the landlord, a tenant denied water service may terminate the lease, pay rent into court, and/or seek a court order against the landlord to restore service. See *id*. § 5321.07.

20a.[13] The Fifth Circuit elaborated on this concern in *Davis*, finding that such policies are unconstitutional because a city "has no valid governmental interest in securing revenue from innocent applicants who are forced to honor the obligations of another or face constructive eviction from their homes for lack of an essential to existence–water." *Davis*, 497 F.2d at 145.

This conclusion rests on the flawed premise that the purpose of such termination policies is to extract payment from the current tenant, rather than from the landlord who is legally responsible for the debt. Even if rational basis scrutiny authorized an inquiry into the actual subjective motivation behind the enactment of the City's ordinance, which it does not,[14] respondent has presented no evidence that

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[13] This statement is incorrect as a factual matter. Nothing in the policy "directly" penalizes tenants, innocent or otherwise. Indeed, the ordinances impose no facial classification on tenants at all but rather distinguish between landlords who have paid the water bills for which they are liable and those landlords who have not. The policy may have a *disparate impact* on innocent tenants, but disparate impact "alone is insufficient" to prove a violation of the Equal Protection Clause "even where the Fourteenth Amendment subjects state action to strict scrutiny." *Bd. of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 372-73 (2001) (citing *Washington* v. *Davis*, 426 U.S. 229, 239 (1976)). See also *Califano* v. *Boles*, 443 U.S. 282, 294-95 (1979) (denial of social security benefit to unwed mothers did not classify children based on illegitimacy, even though illegitimate children suffered collateral consequences from denial of benefits to their mothers). As discussed *infra*, such collateral effects are a common and unavoidable consequence of any government regulation of landlords and of government action generally.

[14] Under rational basis review, it is "constitutionally irrelevant [what] reasoning in fact underlay the legislative decision" under challenge. *U.S. Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980) (quoting *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960)). See also *Heller*, 509 U.S. at 320-21 (plaintiff bears burden

the rules were enacted for the illegitimate purpose of extracting money from innocent tenants. Nothing in the City's policy makes new tenants legally responsible for the prior debt. The water authority is not, for example, authorized to pursue a collection action against the new tenant. To the contrary, the policy is plainly adapted to securing payment from the *landlord* who *is* legally responsible for ensuring payment. While an innocent tenant may, on occasion, offer to pay the existing arrearage, the City could rationally conclude that it is much more likely that current tenants would respond by pressuring their landlords to pay the arrearages (by, for example, refusing to move in, threatening to move out, calling code enforcement, or withholding rent, see note twelve, *supra*.).

Viewed as a means of collecting debts from defaulting landlords, the City's termination practices easily meet the rational basis standard. While respondent may claim that this effective system is *unfair* to the innocent tenant, that does not render it irrational or unconstitutional. Indeed, as this Court has emphasized, economic legislation will ordinarily be sustained "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer* v. *Evans*, 517 U.S. 620, 632 (1996). In any case, the perceived unfairness of the government action in this case is no different than that occasioned by innumerable government decisions that have collateral consequences for innocent parties. Tenants, for example, may suffer when a government forecloses on a tax lien, condemns a building for code violations, or exercises its powers of eminent domain. Every such act represents a balancing of interests, one the Constitution assigns to the people's elected representatives. In this case, the City was faced with various policy alternatives for responding to

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of disproving every conceivable rational basis for the regulation, "whether or not the basis has a foundation in the record") (citation omitted).

unpaid water bills, all of which impose costs on innocent third parties. For example, if the City simply ignored unpaid water bills by prior tenants – or undertook expensive and frequently unsuccessful collection procedures against prior tenants or landlords – that added cost would be passed on to other innocent tenants and water consumers. See DePalma, *supra* (noting that New York City does not terminate service to non-paying customers and has more than $625 million in unpaid bills outstanding, the cost of which is passed on to consumers).[15] As permitted by the Constitution, the City made a rational decision to pursue the most effective collection scheme available and to mitigate the harsh effects on tenants through a variety of other measures, see note 12, *supra*. The Equal Protection Clause does not authorize the federal courts to superintend these policy decisions. The Sixth Circuit's substantial departure from ordinary principles of deferential review of state economic regulation should be corrected.

[15] See also Harold McNeil, *City Could See Water Rate Rise by 12%; Official Ties Budget Gap to Delinquent Accounts*, BUFFALO NEWS, May 27, 1994 (describing possible water rate increases to make up for money owed in unpaid water bills); Michael C. McDermott, *Crackdown Vowed on Overdue Bills*, THE PATRIOT LEDGER, July 27, 2001, at 13 (quoting a water and sewer commissioner in Braintree, Massachusetts as saying that "[w]e have so many accounts in arrears that we're really using the good payers' money to run the system").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 15, 2005