No. _____

In the
Supreme Court of the United States

CRANSTON POLICE RETIREES ACTION COMMITTEE,
Petitioner,

v.

THE CITY OF CRANSTON,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Rhode Island and Providence Plantations

PETITION FOR WRIT OF CERTIORARI

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August 30, 2019

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QUESTION PRESENTED

When members of the Cranston Police and Fire Retirees Action Committee (hereinafter, "Petitioner retirees" and/or "CPRAC") retired, they were contractually promised by the City of Cranston a yearly minimum 3% compounding cost-of-living adjustment (hereinafter, "COLA"). Petitioner retirees were policemen and firemen, who paid into a retirement plan under contract with the City of Cranston, served and eventually retired. However, in 2013 the City of Cranston enacted ordinances retroactively altering the benefits earned, on members already retired, imposing a suspension of the COLA for ten years.

In the decision below, the Rhode Island Supreme Court acknowledged that the "suspension" amounted to a sizable diminishment of contractual retirement benefits. However, the City claimed that the unilateral breach of contract was justified as an exercise of its police power to address the City's financial issues. The Rhode Island Supreme Court relied on Circuit precedent that they noted "liberally" construed the meaning of a public purpose to justify impairing a contract pursuant to the Contracts Clause jurisprudence, failing to address contrary Circuit precedent.

The question presented is:

Whether the City's self-interested impairment of the retirees' contractually vested COLA benefits is a violation of the Contracts Clause of the United States Constitution or a taking under the Takings Clause of the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioner is the Cranston Police and Fire Retirees Action Committee. They were the plaintiff in the Rhode Island Superior Court, and the appellant in the Supreme Court of Rhode Island and Providence Plantations.

Respondent is the City of Cranston. It was the defendant in the Rhode Island Superior Court, and the appellee in the Supreme Court of Rhode Island and Providence Plantations.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states as follows:

Petitioner Cranston Police and Fire Retirees Action Committee has no parent corporation and no publicly held company owns 10 percent or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

- *Cranston Police Retirees Action Committee v. City of Cranston,* (Rhode Island Supreme Court) No. 2017-36 (June 3, 2019)
- *Cranston Police Retirees Action Committee v. City of Cranston, et als,* (Rhode Island Superior Court) No. KC-13-1059, formerly PC-13-3212, (July 22, 2016)

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

In a recent decision of this Court, Sveen v. Melin, 138 S.Ct. 1815, 1826-1828 (2018), the Court acknowledged that many jurisdictions' application of the Contract's Clause has far departed from the Constitutional mandate prohibiting states from passing a "any . . . Law impairing the Obligation of Contracts." Art. I, §10, cl. 1. Indeed, disparate treatment of state action relating to the Contracts Clause has left courts in a quandary of applying elements of tests seeking "reasonable" state action, diluting the impact of the Contracts Clause until is seemingly toothless.

At issue in this case is a retiree's rights to contractual benefits that they have paid into, and earned. The impact of the decisions below is that, despite the "protection" of the Contracts Clause, the City of Cranston was allowed to reach back into the benefits of police and fireman who had served the City and already retired, and take from them amounts of compensation previously promised. The City of Cranston promised its police and fire retirees a yearly compounding 3% COLA; a term negotiated into their contracts. Many years after such negotiations, after the actual retirement of its police and fire personnel and vesting of benefits, finding itself reluctant to pay what had previously been promised, the City of Cranston enacted a 10-year suspension of the COLA to put the promised money back in its own pocket.

Both the Rhode Island Superior Court and the Rhode Island Supreme Court looked to the City of Cranston's proffered justifications, and following some Circuit precedent felt that they must give deference to

the City of Cranston's claims of financial difficulty. Mired in sympathy and cautious of respecting the police power of the municipality, the Rhode Island Courts ignored contrary Circuit precedent that would hold the City of Cranston accountable for standing by the promises it has made, which is the very heart of the Contracts Clause.

Jurisprudence balancing the concerns of state or municipality's police power with meaningful protection against the impairment of contracts need not be totally abandoned. However, reasonableness must be viewed through the lens of the Contract Clause, and the need to protect contracting parties from their contract rights being undone when the promises and contractual obligations are less politically expedient. Lower courts have distorted this Court's Contracts Clause reasonableness test, stretching the rationale to such a length that it has abandoned nearly any expectation that states or municipalities must stand by their fiscal contractual obligations. This Court must clarify a test that no longer allows a state or municipality to excuse the escape from their own contractual obligations simply because they face financial difficulties, which are inevitable. Further, guidance from this Court will address the disparate applications of the reasonableness test which is divided among many jurisdictions.

In addition, courts have given short shrift to the application of the Fifth Amendment, or the Takings Clause to contractual benefits such of these. Despite acknowledging that they were vested benefits, already earned by retirees, the Rhode Island courts treated

COLAs as entitlements simply because they were yet to be applied. The courts have ignored a distinction between benefits which have yet to be enforced and benefits yet to be earned.

The United States Constitution Contracts Clause and Takings Clause embraces and protects contractual promises such as the COLA benefit earned by petitioner retirees. Yet despite the protections of the Constitution, the confusion in the tests of reasonableness has allowed the City of Cranston to avoid its own fiscal responsibility for its leaders' own political gains.

OPINIONS BELOW

The Supreme Court of Rhode Island and Providence Plantations opinion is reported at 208 A.3d 557 (R.I. 2019), and reproduced at App. 1-69. The Rhode Island Superior Court's decision regarding the Contracts Clause is reproduced at App. 70-135. The transcript of the Rhode Island Superior Court's decision regarding the Takings Clause is reproduced at App. 136-206.

JURISDICTION

The Supreme Court of Rhode Island and Providence Plantations issued its opinion on June 3, 2019. Petitioners have timely filed this petition for a writ of certiorari, which expires under the Rules of this Court on September 3, 2019. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contracts Clause U.S. Const. Art. 1, § 10, cl. 1; the Takings Clause or the Fifth Amendment, and the ordinances enacted by the City of Cranston are reproduced at App. 207-242.

STATEMENT OF THE CASE

A. Factual Background

Petitioner, Cranston Police Retirees Action Committee ("CPRAC"), is a non-profit corporation whose members (or hereafter, "retirees") retired after service to the City of Cranston as police officers or firefighters. They retired under binding instruments which guaranteed the retirees a minimum three percent (3%) compounding COLA for the life of the retirees and/or their spouses.[1] The COLA was a vested benefit for the retirees and/or their spouses. (App. 100).

In 2013, the City of Cranston enacted Ordinances 2013-5 and 2013-6, which suspended the minimum three (3%) COLA for a period of 10 years. (App. 208-243). This suspension was a breach of contract which took away compensation that the retirees would have otherwise been entitled to, but for the 2013 Ordinances.

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[1] After a review of the contracts of plaintiff retirees, the trial court found that the retirees had vested contractual rights to the 3% compounding COLA benefit, and that the impact of the ordinances was a substantial impairment of that contractual benefit, which was retained by the Rhode Island Supreme Court in its analysis of the Contracts Clause. (App. 22-23).

(App. 97-100). The enactment of these ordinances was the basis for the petitioner's suit.

The 3% compounding COLA was earned compensation. During the term of their employment, prior to retirement, all retirees were required to, and did, contribute amounts of their compensation into the pension funds. Petitioner retirees served as police or firefighters and abided by the terms of their contracts with the City (App. 97). The 3% minimum COLA was a term of a contract that was the result of collective bargaining and negotiations of pension benefits. (App. 73-75). All of the petitioner retirees had already retired and their benefits had vested at the time that the 2013 Ordinances were enacted.

Across Rhode Island, at least 1/3 of the cities and towns had pensions which were so underfunded that they were deemed "critical." The City of Cranston was just one of the many. In 2013, when the Ordinances were enacted, and for many years before, the City of Cranston's pension system was drastically underfunded. This was because the City of Cranston continuously failed, since before 1999, to fund the pensions by failing to pay an amount equal to the Annual Required Contribution ("ARC"), as recommended by the City's own actuaries. (App. 30, 79-80) The City of Cranston was well aware it had underpaid into its pension plan.

Under the stewardship of various administrations, the City of Cranston's unfunded accrued liability of the pension increased to at least $256 million. (App. 110-111). Yet, the City's actions regarding the pension fund were anything but remedial. The City of Cranston

actively depleted the available pension funds by "borrowing" money out of the pension fund to pay for other budget related costs. (App. 77). Instead of paying the full ARC, the City chose to grow a rainy-day fund. Further, the City chose not to engage in collective bargaining to reduce or otherwise eliminate COLA benefits for future retirees as a manner of addressing the growing pension fund problem. In fact, as of 2012, it was still entering into contracts promising a 3% compounding COLA benefit to the current police and fireman working in the City.

Both the trial court and the Rhode Island Supreme Court took notice of the economic downturn and the effects of the recession on the City of Cranston, around 2009-2010. They neglected to properly address that financial difficulties, specifically in regards to the funding of the pension benefits, started at least in 1999, far before. In addition, at the time of the enactment of the ordinances in 2013, Cranston was in a healthy financial state. Finally, the City of Cranston did not raise taxes in fiscal years 2012-2013, 2013-2014, 2014-2015.

The City of Cranston did not consider impairing the contract "on par" with other policy alternatives, such as raising taxes, seeking additional state aid, refinancing the pension unfunded liability, reducing spending, or other possible options. The only evidence of any "consideration" of alternatives other than a COLA suspension was the City of Cranston Mayor's own self-serving testimony of the measures he considered and discounted. The City of Cranston failed to produce any actuarial reports or any evidence of calculations or

assessments addressing the pension fund shortfall with any measures other than a suspension of retirees' contractual COLA.

So focused were the courts on the City of Cranston's claimed financial difficulties that they neglected to truly challenge or test the reasonableness of the City of Cranston's actions in abrogating their own financial responsibility. A true analysis, which would require more than lip service paid to financial woes to escape contractual responsibility, would have shown that the true impetus in enacting the ordinances and robbing the retirees of their COLAs was to save the City of Cranston money for political expediency.

B. Procedural History

Petitioner CPRAC retirees filed a complaint in the Rhode Island Superior Court, alleging, as relevant here, that the enactment of ordinances 2013-5 and 2013-6 breached the retirees' contracts, and violated the Contracts Clause of the United States Constitution. In addition, they alleged the ordinances violated the Takings Clause of the United States Constitutions as a taking of the retirees' property without just compensation. The superior court dealt with the Takings claims summarily, assuming that the claimed financial difficulties justified such a drastic contractual impairment without hearing any evidence. The same justice of the superior court as "fact-finder" thereafter wrote a Decision that reached to embrace the purported justifications.

Petitioner appealed the superior courts' application of the Constitutional provisions to this case, as well as other issues to the Supreme Court of Rhode Island and Providence Plantations. However, the highest court of Rhode Island seemed reluctant to delve into the layers of Contracts Clause jurisprudence, and also employed the use of similar blinders to embrace the findings of fact of the trial judge in regards to financial concerns; ignoring all of the other considerations inherent in the determination of reasonableness necessary to protect the mandate of the Contracts Clause.

Purporting to approve that the standard to be applied to cities abrogating their own financial responsibility should be "less deference," nonetheless the Supreme Court approved as sufficient the trial justice's utilization of the mayor's testimony as "credible" as the sole factor in determining whether the City had acted reasonably. Neither court looked to or required objective evidence of reasonableness. Nor did either court require evidentiary scrutiny of the proffered justifications of the City beyond mere credibility, putting the entire determination of reasonableness on the shoulders of the very parties whom such a contractual impairment would benefit.

The Supreme Court acknowledged that the "cumulative impact of the COLA suspension on CPRAC's members was significant," and yet chose to treat these ordinances as regulations effecting unearned compensation. Lacking guidance on how to treat retirement benefits as distinct from unearned compensation, the Rhode Island Supreme Court applied precedent which was so highly deferential to

state action that it twisted this Court's governance regarding the Contracts Clause and the Takings Clause.

REASONS FOR GRANTING THE PETITION

Since this Court decided United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977), in the endeavor to ensure the police power of the states, courts have struggled with reasonableness. Some courts have so twisted the words of this Court in United States Trust and the case that followed, Energy Reserves Group, Inc. v. Kansas City Power & Light Co., 459 U.S. 400 (1983), that they have stripped the meaning from the Contracts Clause. The City of Cranston's enactment of ordinances which allow it to walk away from its own financial obligations simply because it later determined it was too financially burdensome shows how hollow a shell the Contracts Clause has become.

The Contracts Clause once provided surety that one would be entitled to the benefit of their bargain. Now, petitioner retirees wonder, if the City of Cranston can enact Ordinances to undo contractual pension benefits simply because it "feels" taxes are too onerous and that it faces some financial difficulty, at what point should state or municipalities ever be held to their end of the deal? This Court must once again embrace the Contracts Clause of the United States Constitution and correct the wrong for retirees who have been robbed of their contractual rights. Or, in the alternative, provide to the retirees just compensation for the contractual rights pursuant to the Fifth Amendment.

United States Trust Co. stands alone in applying the Contracts Clause to an instance where a state's self-interest was at stake; and this Court made clear that a state could not use the façade or excuse of police power to justify walking away from its own financial obligations. 431 U.S. at 1. Time and again, the words of this Court from that case are repeated and yet the practical effect is anything but uniform. In this matter, while reciting the warnings of this Court against the very action that has occurred, a municipality avoiding its own financial contractual obligations, Rhode Island has followed the lead of certain Circuit courts who have seemingly washed their hands of the determination reasonableness and allowed the state or municipality to self-determine whether to abide by their own contractual promises.

Yet, this Court has cautioned that "[i]f the Contract Clause is to retain any meaning at all, …it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242 (1978). While there are occasions in which this Court has approved impairing a contract to protect the welfare of the public under a state's police power, a legislative enactment will only "pass constitutional muster under contract clause analysis so long as it is **reasonable and necessary** to carry out a **legitimate public purpose**." United States Trust Co., 431 U.S. at 25-26 (emphasis added).

While the preservation of the police power is important, courts have wandered in such a way that application of this has robbed the Contracts Clause of its power. In the manner that these tests were applied in Rhode Island, states need only recite certain magic words claiming "emergencies" and financial woes, and be forgiven walking away from their own financial obligations. This was clearly not the intention of this Court, and a misinterpretation of the Contracts Clause jurisprudence. This Court has stated that "[w]hen a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets." Energy Reserves Group, 459 U.S. at 412 (1983) n. 14

Although the words of the Contracts Clause itself is a mandate against *any* impediment to contracts, this Court has allowed the state to act in a regulatory manner in the public interest is at stake, allowing a limited grant of the ability to reasonably impair private contact rights. This Court has **never** approved a situation where a state or municipality repudiated their own contract to pay, failing to deliver on their promise because they later decided it was financially unfavorable; yet, this is the very situation that Rhode Island approved. This is a sorry misapplication of the Contracts Clause.

This Court was clear: even if the Contracts Clause does not forbid all impairment of contracts due to the need to preserve police power, "[t]his principle precludes a construction which would permit the state

to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434 (1934). The City of Cranston repudiated its own debt, and the police and fire retirees were powerless to enforce their contracts with the City to ensure the benefits that they had already earned.

I. The City of Cranston's Ordinances Retroactively Robbed Retirees of Their COLA benefits Without Any Meaningful Checks on The Reasonableness of The Enactment of the Ordinances.

The City of Cranston stated that there was a "need" for the Ordinances undoing the contractual rights of the petitioner retirees; that due to circumstances causing financial concerns they were justified in their actions. However, as this Court has stated, "[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised." United States Trust Co., 431 U.S. at 29. As such, any such declaration must be highly suspect. This means that the court should not simply defer to the City's proffered justifications, but must objectively examine the circumstances to determine whether the government action is reasonable. The City of Cranston was not subject to any such scrutiny. "If a state could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." Id.

Despite this, there is tension regarding who bears the burden of establishing that legislation is reasonable and necessary. Rhode Island required the City of Cranston only to testify credibly to their proffered justifications, requiring no objective indications of the reasonableness of their actions, an no analysis as to the content of the testimony of justification other than credibility.

Although there is a dearth of cases that speak specifically as to the burden of proof required of a state or municipality in a Contracts Clause analysis, it is clear that many jurisdictions would have shifted the burden to the City to do more than put words to their justifications. "Defendants bear the burden of proving that the impairment was reasonable and necessary." Univ. of Hawaii Prof'l Assembly v. Cayetano, 183 F.3d 1096, 1106 (9th Cir. 1999). See also Pizza, at 323 (holding that once a plaintiff has established a substantial impairment, the burden shifts to the state to "proffer a significant and legitimate public purpose for the regulation."); Pure Wafer, Inc. v. City of Prescott, 14 F.Supp.3d 1279, 1299 (D.Ariz. 2014) ("Because the Court concludes that the City substantially impaired its obligations under the Agreement, the burden shifts to the City"); Pierce Cnty. v. State, 148 P.3d 1002, 1009, 1015 (Wash. 2006) (stating in its Contract Clause analysis that "the justifications for the reasonableness and necessity of the challenged statute must first be offered by those defending the statute's constitutionality"); Jacobsen v. Anheuser-Busch, Inc., 392 N.W.2d 868, 872 (Minn. 1986) (acknowledging that for Contract Clause purposes, "if a substantial impairment exists, those

urging the constitutionality of the legislative act must demonstrate a significant and legitimate public purpose behind the legislation").

Even those that put the burden on the plaintiff acknowledge there is a tension. "Saddling a plaintiff with the burden of proving a lack of reasonableness or necessity is in some tension with the Supreme Court's instruction that 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate...' United Auto., Aerospace, Agr. Implement Workers of America Intern. Union v. Fortuno, 633 F.3d 37, 45 (1st Cir. 2011)

Rhode Island courts embraced a "credible evidence" standard which effectually meant the City of Cranston merely needed to testify credibly that they believed they were doing the right thing. However, credibility only tests the truthfulness of the testimony as to the belief, not the reasonableness of the belief itself. The burden on the City of Cranston was so negligible that it flies in the face of the mandate that less deference be given due to the self-interest inherent in escaping the City's own contractual promises. The City of Cranston own self-interest, and the political advantage of its leaders, in avoiding raising taxes or maintaining an expensive bargain is undeniable; relying solely on the testimony of a mayor who seeks political approval for his continued position simply ignores the need for there to be a judicial check on the City of Cranston before it can avoid its own obligation. "Neither alternative would have been popular among politician-legislators, but that is precisely the reason that the contract clause

exists--as a "'constitutional check on state legislation.'" Condell v. Bress, 983 F.2d 415, 420 (2nd Cir. 1993).

If reasonableness is to be the standard under which the City of Cranston may escape their own financial obligation, then the court must do more than rubber stamp proffered justifications, no matter how "credible" they are. "The 'some credible evidence' standard does not require the factfinder to weigh conflicting evidence, merely requiring… the bare minimum of material credible evidence to support the allegations… In contrast, the 'fair preponderance' standard allows for the balancing of evidence from both sides, and gives the subject the opportunity to contest the evidence and testimony." Valmonte v. Bane, 18 F.3d 992, 1004 (2nd Cir. 1994). As the First Circuit held, "a state must do more than mouth the vocabulary of the public weal in order to reach safe harbor." McGrath v. R.I. Ret. Bd., 88 F.3d 12, 16 (1st Cir. 1996).

For an impairment to be both reasonable and necessary, "it must be shown that the state did not (1) 'consider impairing the . . . contracts on par with other policy alternatives." Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 371 (2nd Cir. 2006) quoting United States. Trust Co., 431 U.S. at 30-31). An impairment of this nature must be a "last resort measure" which can be chosen "only after other alternatives had been considered and tried." Id. "Such efforts must be genuine and not merely for 'political expediency.'" Ass'n of Surrogates & Supreme Court Reporters v. State of N.Y., 940 F.2d 766, 773 (2nd Cir. 1991).

To satisfy constitutional scrutiny, especially when less deference is due to a municipality because it is impairing its own contract, more must be shown than a mere feeling that an option was unreasonable, and the judiciary needs to assess whether alternatives were properly evaluated. See United States Trust Co., 431 U.S. at 31; Ass'n of Surrogates & Supreme Court Reporters, 940 F.2d at 773 ("if the federal judiciary's proper role [in evaluating alternatives] were as supine as defendants assert it to be, the contract clause would be a 'dead letter.'") "Despite … self-affirmation that it was justified in repudiating and changing the material terms of its contractual relationship with public employees, it is the role of the judiciary to engage in this evaluative analysis, not the legislature." Burnham, William C. (2015) "Public Pension Reform and the Contract Clause: A Constitutional Protection for Rhode Island's Sacrificial Economic Lamb" Vol 20: Iss. 3, Article 7.

However, the lower courts in Rhode Island's employed a highly deferential review standard, following the lead of Baltimore Teachers Union v. Mayor & City Council of Baltimore, 6 F.3d 1012, 1015 (4th Cir. 1993). This decision has been highly criticized for not employing independent judicial review necessary when a state or municipality's self-interest is implicated due to impairing their own contractual obligations. "[T]he opinion granted substantial deference to the city's judgment, as if it were dealing with the impairment of private contracts, and exercised little independent judgment on the reasonableness or necessity of the city's action." Massachusetts Community College Council, 649 N.E.2d at 714 (citing

Baltimore Teachers Union v. Mayor of Baltimore: Does the Contract Clause Have Any Vitality in the Fourth Circuit?, 72 N.C.L.Rev. 1633, 1644-1648 (1994) "The Fourth Circuit's misapplication of United States Trust cannot be explained by compelling factual differences because Baltimore Teachers Union presents an even stronger case for the application of the Contract Clause than did United States Trust"; Note, Fourth Circuit Upholds City's Payroll Reduction Plan as a Reasonable and Necessary Impairment of Public Contract, 107 Harv.L.Rev. 949, 949 (1994) "[T]he court misapplied Supreme Court precedent and undermined the protection of the economic rights of parties to public contracts"). See also, Cayetano, 183 F.3d at fn 6.

The Contract Clause requires more of an independent judicial assessment than employed by the trial justice. Such an assessment would **objectively** consider and weigh whether the City could utilize less drastic options, such as raising taxes, or whether a drastic impairment was necessary. United States Trust Co., 431 U.S. at fn 17 ("words like "'necessary' also are fused with special meaning, …the element of necessity traditionally has played a key role in the most penetrating mode of constitutional review.")

II. The City of Cranston Unreasonably Chose to Legislate Away Their Contractual Responsibility Rather Than Choose a Less Drastic Approach to Address Financial Concerns.

There are a number of concerns inherent in whether the City of Cranston was justified in robbing petitioner retirees of their benefits; however, all can be subsumed

under an assessment of reasonableness. The City of Cranston Ordinances can only survive the Contracts Clause scrutiny if they were reasonable; but an examination of the Ordinances show that they were not.

At the outset, the City of Cranston must have a legitimate public purpose to enact the Ordinances which impaired the petitioner retirees' contractual rights to a COLA. A legitimate public purpose may only "be one meant to address **fiscal emergencies** and not merely a sovereign attempting to save money." United States Trust Co., 431 U.S. at 26. As this Court explained, '[i]f a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.'" United States Trust Co., 431 U.S. at 26.

While arguably the economic climate in the recession posed some challenges to the City of Cranston, "[f]inancial necessity, though superficially compelling, has never been sufficient of itself to permit states to abrogate contracts." Carlstrom v. State, 694 P.2d 1, 5 (Wash. 1985) (citing United States Trust Co., 431 U.S. at 22, n.19) ("An economic emergency . . . is just another factor 'subsumed in the overall determination of reasonableness.'") The Supreme Court in Illinois reflected that an economic recession or underfunded pension system did not justify reduction in pension benefits pursuant to police power: "our economy is and has always been subject to fluctuations, sometimes very extreme fluctuations." Heaton v. Quinn, 32 N.E.3d 1, 22 (Ill. 2015). Simply put, all cities, towns, and states can expect at some point there may

be a recession and face economic challenges. If everyone can utilize a downturn in the economy to avoid their financial responsibility, no contract is safe.

There was no true financial emergency in 2013 requiring the City of Cranston to take drastic action of avoiding its own financial obligations. To find a legitimate public purpose, the necessary ***emergency*** nature of the fiscal crisis cannot be understated: "'[a]lthough economic concerns can give rise to the City's legitimate use of the police power, such concerns must be related to 'unprecedented emergencies,' such as mass foreclosures caused by the Great Depression.'" AFSCME, Local 2957 v. City of Benton, 513 F.3d 874, 882 (8th Cir. 2008). See also Welch v. Brown, 935 F.Supp.2d 875, 883-884 (E.D. Mich. 2013)(City of Flint was in a "financial emergency" as defined by the State, but the City failed to provide evidence of imminent risk of bankruptcy and the need to balance the budget in a single year rather than extend, and thus was not a sufficient emergency to justify impairment.)

The Rhode Island court used the words of financial "emergency" but made no findings of fact relative to a true emergency. Nor was there any to be made because after the recession around 2009, by 2013 the City of Cranston had already been able to improve its financial condition. Despite this, it chose to further save money and avoid a tax increase by avoiding its own financial obligations. However, the court simply rubber stamped the City of Cranston's own assessment that its financial condition was sufficiently poor to justify breaching its own contract with the retirees who had served the city.

The City of Cranston ordinances, causing a COLA freeze and impairing the petitioners earned contractual benefits, under the governing law, should only have been implemented "after other alternatives had been considered and **tried**." Tobe, 464 F.3d at 371. In this matter, there was no evidence that other measures were actually *tried* or actively tested to determine how it would impact the City of Cranston. The City's own Summary of Scenarios for Critical Status Emergence Plan showed that, without any COLA freeze, the City could satisfactorily satisfy the Rhode Island statutory mandate to fund its pension fund, simply by paying 100% of the recommended ARC.

No evidence was introduced about why the City of Cranston could not afford to pay its ARC in **future** years. The City could easily have adjusted the amount of its debt by adjusting the amortization period. Rather, any "reform" scenarios "considered" all included different variations of COLA suspensions. An increase of taxes was not only discounted as a potential solution, but taxes were not increased *at all* in the year that the ordinances were enacted, showing that the City of Cranston actively chose to rob its own retirees of their earned COLAs rather than ask its population to share the burden of the existing contractual obligation since such a tax increase would be highly politically unpopular.

The Rhode Island Supreme Court justified its lack of objective analysis of the financial status of the City of Cranston and relying on the Second Circuit decision of Tobe, 464 F.3d 362. However, this decision has been criticized as "twist"ing the Supreme Court precedent to

employ a highly deferential state-friendly approach. See Michael Cataldo (2015) "Revival or Revolution: U.S. Trust's Role in the Contracts Clause Circuit Split", *St. John's Law Review*: Vol. 87: No. 4, Article 9. Available at: http://scholarship.law.stjohns.edu/lawreview/vol87/iss4/9.

In contrast, other Circuit Courts have emphasized the need for the court to take an active role in analyzing the appropriateness of a state or municipality's action. Holding, for example, that "[t]he absence of any feasibility studies, which it appears were not commissioned by the Government, not only deprives us of any meaningful way to corroborate the District Court's assessment, but also reinforces our concern that the Legislature indeed may have imposed a more drastic impairment than necessary and may not have adequately considered alternatives before impairing its contractual obligations." United Steel Paper & Forestry Rubber Manufacturing Allied Industrial and Service Workers International Union AFL-CIO-CLC v. Government of the Virgin Islands, 842 F.3d 201, 214 (3rd Cir. 2016). See also Toledo Area AFL-CIO Council v. Pizza, 154 F.3d 307, 323 (6th Cir. 1998); City of Benton, 513 F.3d at 882; Cayetano, 183 F.3d 1096; State of Nev. Employees Ass'n, Inc. v. Keating, 903 F.2d 1223, 1228 (9th Cir. 1990)

Further, while Tobe, 464 F.3d at 362 held that "[i]t cannot be the case, however, that a legislature's only response to a fiscal emergency is to raise taxes;" the **same** circuit court just 15 years earlier in Ass'n of Surrogates, 940 F.2d at 773 found that there existed the ability to raise taxes, and thus reasoned that the

extent of the impairment was too extreme as less drastic options were available. There is a distinction between the two cases; prior to the enactment of legislation the city in Tobe had raised taxes, and tried alternatives. 464 F.3d at 362. In the Surrogates case, the state, like Cranston, chose not to raise taxes because it would have been politically unpopular.

An impairment of a contract is not reasonable or necessary if "'a less drastic modification would have permitted' the contract to remain in place." United States Trust Co., 431 U.S. at 25-26. "Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." Id. It was unreasonable for the City to act with haste to resolve the problem of an underfunded pension plan with only one measure when the future could easily hold a solution without necessitating a drastic contract impairment. See Welch, 935 F.Supp.2d at 883-884. Petitioner has argued less drastic options; for example, *any* increase in taxation would have reduced the problem. Therefore, the drastic forfeiture of contract rights would not be necessary. See Keating, 903 F.2d at 1228.

It was not reasonable that the City of Cranston could pessimistically predict, without any evidence, an inability to pay ARCs for future years to excuse a current breach of the contractual rights of CPRAC retirees. The City of Cranston failed to act reasonably in light of the relevant standards, and therefore the ordinances which impaired petitioner contract rights were repugnant to the United States Constitution.

III. The City of Cranston Created the Very Crisis it Used to Try to Excuse its Breach of Contract.

There is no question that the City of Cranston's pension fund was underfunded and in "crisis" status as defined by RI statute, as many Rhode Island cities and towns were. However, it was also clear that this was not a new or "unprecedented" problem. See AFSCME, Local 2957, 513 F.3d at 882. A city cannot claim a "legitimate public purpose" when it has acted, "through its funding decisions, to create the very emergency conditions used to justify its suspension of the rights conferred and protected by the constitution." Jones v. Municipal Employees' Annuity and Benefit Fund of Chicago, 50 N.E.3d 596 (Ill. 2016). It is clear that the pension "crisis" was a creation of the City of Cranston's own actions.

The City of Cranston failed to fully pay the Annual Required Contribution, ("ARC') as determined by its own actuaries, starting at least as early as 1999, long before the recession and the financial "emergency." For 15 years, the City has compounded the issue and grown the pension shortfall.

To allow for a City to create a fiscal disaster through their own consistent disregard of the well-known consequences to its own actions, and then to allow them to use that same fiscal disaster as a reason to impair its own contracts would be unconscionable and unreasonable. It truly would rob the Contracts Clause of any meaning if a city could impair its own contract at any point by creating the very problem it allegedly must solve as a legitimate public purpose.

This Court has held that if a problem existed at the time a contractual obligation began, you cannot then impair the contractual obligation on the basis of that same problem. See United States Trust Co., 431 U.S. at 32.

> "An impairment is not a reasonable one if the problem sought to be resolved by an impairment of a contract existed at the time the contractual obligation was incurred. If the foreseen problem has changed between the time of the contracting and the time of the attempted impairment, but has changed only in degree and not in kind, the impairment is not reasonable." Id.(emphasis added). See also Cayetano, 183 F.3d at 1107; Massachusetts Community College Council v. Commonwealth, 649 N.E.2d 708, 713 (Mass. 1995)

The City of Cranston not only consistently underfunded the ARC, but augmented the problem by continuing to enter into CBAs which included the 3% COLA despite being aware that the pension fund was painfully underfunded. In fiscal years 2008 to 2012, the City of Cranston entered into agreements with the police and firefighters which included a 3% COLA as a pension benefit.

This is a bright line rule of reasonableness, and the City of Cranston should have failed as they created the very issue that they sought deliverance from. See also Mass. Comm. College Council v. Commonwealth, 649 N.E.2d 708, 713 (Mass. 1995) (citing U.S. Trust, 431 U.S. at 29-32). Other courts were more successful in their application. In Carlstrom, the court concluded

that the State's refusal to implement bargained-for salary increases for certain State employees was not reasonable because the State's economic emergency was expected and foreseeable when it entered into the employment contracts. See Carlstrom, 694 P.2d at 5. ("Since the State was fully aware of its financial problems while negotiating and prior to signing the Agreement, it cannot now be permitted to avoid the Agreement based on those same economic circumstances.") See also United Steel Paper, 842 F.3d at 214 ("The Government knew of the economic crisis facing the Virgin Islands at the time it was negotiating with the Unions and when it concluded the collective bargaining agreements… both the Governor -- who signed the agreements -- and the Legislature -- which later voted to impair them -- were fully aware from the outset.") The lower courts deferred to the City's testimony of financial woes relating to the recession as contributing to the situation, ignoring the City of Cranston's active role in creating its own financial peril.

IV. The Petitioner's Loss of Earned Contractual Benefits Was Incorrectly Assessed as a Regulatory Taking Because the Distinction Between Physical and Regulatory Takings Have Been Blurred.

"Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid." United States Trust Co., 431 U.S. at 19 fn 16. As such, the abrogation of CPRAC's COLA benefits by the City's ordinances is a violation of CPRAC's members due process rights as a taking

without just compensation under the Takings Clause of the United States Constitution.

This Court has developed different tests for physical takings, property outright appropriated for use, and regulatory takings, which has diminished or impacted property rights. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 123-124 (1978).

"Physical takings (or physical invasion or appropriation cases) occur when the government physically takes possession of an interest in property for some public purpose." Tobe, 464 F.3d at 374. The distinction is that a "regulatory taking transpires when some significant restriction is placed upon an owner's use of his property for which 'justice and fairness' require that compensation be given.'" Philip Morris, Incorporated v. Reilly, 312 F.3d 24, 33 (1st Cir. 2002).

The City of Cranston ordinances, outright suspending 10 years of earned benefits, should have been clearly a physical taking, for which compensation would be required per se. "The effect of a COLA is not to increase an employee's benefits. Rather, it is to preserve the purchasing power of the **compensation previously awarded**." Liberty Mut. Ins. Co. v. Whitehouse, 868 F.Supp. 425, 431 (D.R.I. 1994). It could not be simpler: CPRAC retirees had *already earned* the 10 years of compounding COLA benefits; the yearly compounding was a manner and method of computation, not an indicator of any uncertainty in value or a benefit. Therefore, when the City of Cranston appropriated 10 years of that earned, compounding benefit, it committed an outright "physical" taking.

Despite this Court's guidance in regards to the distinction from physical and regulatory takings, the application in the lower courts have muddled the tests such that seemingly any legislative enactment, regardless of its actual impact, are treated as regulatory takings. In contrast, this court in Connolly v. Pension Benefit Guaranty Corporation, adopted a regulatory taking analysis when there was a state impairment of some private contractual rights, making clear that the analysis was proper because "the United States has taken nothing for its own use." 475 U.S. 211, 224 (1986). Here, the City **is** directly taking the money already owed to retirees, and they are using that money for other municipal purposes, essentially putting money it owes back into its own pocket. It is no less a physical taking than if they had actively garnished their bank accounts or reached into the retirees' pockets to take the money, as the compounding COLA was already earned. However, because the compounding COLA is not a tangible piece of physical property, which is much easier to conceptualize as a "physical" taking or invasion, the lower courts have unnecessarily treated this contractual impairment as a regulatory taking.

As this Court warned, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree -- and therefore cannot be disposed of by general propositions." Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 416 (1922). The City of Cranston bargained for service from its Police and

Firefighters, and struck a bargain which included a benefit of the compounding COLA for the pension, risking that such payments would compound and become burdensome in the future. "So far as … communities have seen fit to take the risk …, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought." Id. Simply because the City of Cranston may have later thought their promises of a compounding COLA unwise and too costly does not mean that they can simply walk away without "paying for the change." Id.

V. The Treatment of the COLA Suspension as a Temporary Measure Rather Than a Measure Taking Earned, Investment Backed Pension Benefits Disregards the Actual Loss Suffered by Petitioners to Their Earned Contractual Rights.

There was no question in the mind of the Rhode Island Courts that the quantitative loss to the petitioner retirees, suspending their compounding COLA for 10 years, was significant. And yet, despite acknowledging the relevant facts, the word "suspension" caused the City of Cranston ordinances to be treated as a "temporary" measure. This misapplication had dire ramifications on both the Contracts Clause and Takings Clause analysis as both considered the degree of the impairment caused by the City of Cranston Ordinances.

As to the Contracts Clause analysis, the degree or extent of the impairment is another relevant factor in determining whether it is sufficiently reasonable to

achieve a legitimate public purpose. United States Trust Co., 431 US at 7. Relying on primarily only on the Second Circuit case of Tobe, the lower courts reasoned that since the suspension was only for 10 years and did not remove the COLA entirely, the extent of the impairment was minimal. 464 F.3d at 374. While the Second Circuit is distinct in its deferential treatment of state action from other Circuit courts, the comparison of the degree of the impairment in the two cases is also woefully in error. In Tobe, the law in question enacted a wage freeze, which the court reasoned was temporary and subject to review, and only impacted compensation yet to be earned. Id.

Thus, the comparison between Tobe's wage-freeze and the ordinances, which outright undoes earned compensation, ignores the key component of the COLA benefits; they are not future earnings for "services to be rendered" but compensation for services **already** rendered, compensation that is **already** earned. Tobe at 372. A *prospective* impairment was "dissimilar to U.S. Trust Co., [which offered] protection 'to those who invested money, time and effort against loss of their investment through explicit repudiation;'" an impairment which "**does not affect past salary due for labor already rendered or money invested**." Id. (citations omitted)(emphasis added).

Although the 3% COLA increase compounded annually, that was a *schedule* for the payment of an already earned benefit, not a promise of future unearned compensation. If a retiree's length of lifetime was known, a retiree's pension, including the compounding COLA benefit, could be quantified in

total for the retiree at the time of the retirement; the total amount of the benefit should not decrease for any reason because this is compensation already earned. Accordingly, 10 years of that compounded COLA benefit is a defined amount which deducts from the total compensation already earned. Cf. Tobe, 464 F.3d at 371. See also Massachusetts Community College Council, 649 N.E.2d at 714 ("It is significant that the courts struck down a State's attempt at budget balancing which involved only a delay in salary payments, and not… the total elimination of certain compensation.")

The petitioner retirees had earned **and invested** in their contractual retirement benefits. The City of Cranston had promised them a yearly 3% compounding COLA when they retired; the City of Cranston should not be allowed to reach back to alter contract terms after they had negotiated their benefits, served under their contract, invested in their retirement, and then actively retired. This is the very action that this Court warned against in United States Trust. 431 US at 7. Whether the suspension would be for 10 years, or 20, or forever should not alter the analysis much as this matter involved "explicit repudiation" of a promised, earned benefit. Id.

The inaccurate analysis regarding the degree of the impact of the impairment spills over into the Takings analysis as well if this matter was to be treated as a regulatory taking. "Regulatory takings are further subdivided into categorical and non-categorical takings." Sherman v. Town of Chester, 752 F.3d 554, 564 (2d Cir. 2014). "'Anything less than a complete

elimination of value, or a total loss,' is a non-categorical taking." Id.

In a regulatory taking, the question is whether a regulation has gone too far to diminish the value of a property right held. Penn Central Transportation Co., 438 U.S. at 124. Thus, the Court has identified three factors for this analysis to determine whether a taking has occurred: "(1) '[t]he economic impact of the regulation on the claimant,' (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations,' and (3) 'the character of the governmental action.'" Id. This Court has emphasized that an important consideration is the level of interference with "reasonable *investment backed* expectations." Id.. Here, Appellant members had invested in their pensions, which included the compounding COLA.

Again, essentially stealing from petitioner retirees who had earned and invested in benefits including the compounding COLA, simply because the City of Cranston found their contract to be an expensive one, financially difficult to maintain, is abhorrent to the Constitution of the United States. The breach of the retirees' vested benefits flies in the face of this Court's warnings against an impotent Contract Clause. "Adherence to constitutional requirements often requires significant sacrifice, but our survival as a society depends on it. Heaton, 32 N.E.3d at 28.(citing Ex parte Milligan, 71 U.S. 2, 120-21 (1866)).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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August 30, 2019