No. 19-286

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 Rhode Island Supreme Court

BRIEF IN OPPOSITION

WILLIAM M. DOLAN III
WILLIAM K. WRAY, JR.
Counsel of Record
NICHOLAS L. NYBO
ADLER POLLOCK & SHEEHAN P.C.
One Citizens Plaza, 8th Floor
Providence, Rhode Island 02903-1345
(401) 274-7200
wdolan@apslaw.com
wwray@apslaw.com
nnybo@apslaw.com

Counsel for Respondent

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QUESTIONS PRESENTED

1. Whether the Rhode Island Supreme Court erred in affirming a trial court finding that the City of Cranston met its burden under the established Contract Clause framework when the City proved, through credible evidence, that its ordinances suspending a cost-of-living adjustment were reasonable and necessary for a legitimate public purpose.

2. Whether the city ordinances temporarily suspending prospective cost-of-living increases in retirement benefit contracts violated the Takings Clause of the Fifth Amendment.

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The opinion of the Rhode Island Supreme Court is reported at 208 A.3d 557, and re-printed in the Petitioner's Appendix at pages 1-69. The opinion of the Rhode Island Superior Court is unreported; however, it is printed in the Petitioner's Appendix at pages 70-135.

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In this case, the trial court ruled in favor of the City of Cranston in a lengthy opinion after trial and upheld city ordinances that suspended cost-of-living increases in light of the City's fiscal emergency. In *United States Trust Co. v. State of New Jersey*, this Court held that such impairments do not offend the Contracts Clause if they were reasonable and necessary for a legitimate, important public purpose.[1] Applying that established standard, the trial court found that the City proved, with credible evidence, that the impairment was reasonable and necessary in this case. Petitioner seeks to challenge the court's finding, but it has identified no dispositive legal question, let alone one that has divided the courts.

Perhaps sensing its weakness on the Contracts Clause question, Petitioner throws in a Takings Clause argument. In pressing that argument, which was carefully rejected by the courts below, Petitioner makes

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[1] 431 U.S. 1 (1977).

no attempt to identify a conflict with other decisions or to otherwise establish that the question satisfies the criteria for this Court's review. The courts below were correct that a temporary suspension of future increases under a contract is subject to analysis as a regulatory, rather than a categorical, taking and that it easily passes muster in the particular circumstances of this case. The petition for a writ of certiorari should be denied.

A. Background

For many years, the City of Cranston, Rhode Island (the "City") entered into agreements with its police union providing that it would pay a pension to its retiring members. And, most relevant to this case, the agreements addressed periodic increases to member's pensions. These periodic increases were called COLAs, short for "cost-of-living adjustments."

Despite their name, the COLAs in the agreements were not in any way dependent on actual increases in the cost of living. Most of the agreements provided that "for all [retiring employees] the pension cost-of-living adjustments (COLAs) will be fixed at 3.0% per annum, compounded … ." Pet. App. 74 n.4, *id.* at 75 n.6. Most of these agreements did not specify how often the City would increase the member's pension by 3% per annum, and none specified the duration of this promise.[2] But until 2013, the City applied COLAs to pensions each year, and for the retiree's lifetime.

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[2] State law provides that such contracts cannot exceed a term of five years. *See* R.I. Gen. Laws § 28-9.2-6.

This retirement benefit imposed a significant burden on the City's taxpayers. From 1985 through 2013 the City raised its taxes at least 15 times. Pet. App. 83. Other City services suffered. The trial court in this matter found that "Cranston residents were paying high taxes for extremely limited services." *Id.* The State recognized that the City's high tax burden qualified it as a "[d]istressed [c]ommunity." *Id.*

In 2008 and thereafter, what was a heavy burden became impossible due to the City's "serious fiscal crisis." Pet. App. 27. Beginning in 2008 and 2009, Rhode Island, like much of the United States, suffered from the so-called Great Recession. "The Great Recession had far reaching and devastating economic and general social consequences that affected the entire City." Pet. App. 108. The City experienced high unemployment and its property values—the primary source of the City's tax revenue—decreased by more than $1 billion in just one year. Pet. App. 109. Compounding these economic stressors were extreme weather events that further burdened the City in March 2010. Pet. App. 209.

In addition, a significant component of the City's budget was aid from the state of Rhode Island. But this aid plummeted due to a simultaneous "state budgetary crisis." Pet. App. 78. In 2007, before the recession, about twenty percent of the City's revenue came from state aid. By 2011, state aid had fallen about 75%, from $22 million in 2007 to less than $6 million. *Id.*

Then, in 2011, the state legislature enacted the "Rhode Island Retirement Security Act," or "RIRSA," to promote sustainable municipal pension systems. Pet.

App. 81. RIRSA required cities and towns that administered pension plans to promptly develop a path towards fiscally stable plans within, generally, twenty years. *Id.* at Pet. App. 4. If a city or town failed to comply with RIRSA and did not present a reasonable plan to restore the plan to fiscal health, it faced the loss of all state aid for any purpose other than education. *Id.*

The combination of the Great Recession, the decline in state aid, and other factors "created an unprecedented fiscal emergency neither created nor anticipated by the City." Pet. App. 112. The crisis deepened when, in a vicious circle, Moody's Investors Service downgraded the City's bonds and thereby impaired its ability to finance its liabilities. *Id.*

In 2013, and as a last resort, the City enacted two ordinances providing that 3% COLAs would not be applied to police retirees' pensions for ten years. Pet. App. 118; *see also* Pet. App. 208-231; Pet. App. 232-242. The members' "base" pensions and the increases effected by all previous COLAs were left untouched.

Most of those affected by the ordinances settled their differences with the City or did not sue. In June of 2013, the Cranston Police Retirees Action Committee ("CPRAC"), an association purporting to comprise a group of police retirees who had opted out of a settlement with the City over the ordinances, filed its complaint alleging, among other things, that the ordinances violated the Contracts Clause and the Takings Clause of the United States Constitution.

B. Procedure

After more than two years of litigation, on November 2, 2015, the trial court granted the City summary judgment on CPRAC's Takings Clause claim. *See* Pet. App. 195-206.

Petitioner had argued that the COLA suspension should be analyzed as a categorical taking that would *per se* require the payment of compensation. *See* Pet. App. 37. The trial court disagreed and analyzed the impairment as a regulatory taking per this Court's decision in *Penn Central*. Applying that framework, it determined that the City was entitled to summary judgment because there had been no compensable regulatory taking effected by the ordinances. The retirees maintained most of the values of their pensions and the City had promulgated a negative restriction rather than an affirmative exploitation. Pet. App. 202. The trial court concluded that the case was analogous to the Second Circuit's decision in *Buffalo Teachers Fed'n. v. Tobe*, and reasoned that "the economic impact on the plaintiffs as well as the extent to which the regulation interfered with distinct investment-based expectations do not rise to the level" of an illegal taking.[3]

The court held a six-day bench trial on CPRAC's remaining claims, including its Contracts Clause claims. In its 53-page decision, the trial court explained that to demonstrate a Contracts Clause violation, CPRAC had to show that the ordinances substantially

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[3] Pet. App. 201 (citing *Buffalo Teachers Fed'n. v. Tobe*, 464 F.3d 362, 370-71 (2d Cir. 2006), *cert denied*, 550 U.S. 918 (2007).

impaired a contract. If it did so, the burden of production would shift to the City to establish that the ordinances were reasonable and necessary to fulfill a significant and legitimate public purpose.

The trial court held that the ordinances substantially impaired the contract and turned to the fact-specific public purpose inquiry. Relying on this Court's *U.S. Trust Co.* decision, the trial court required the City to prove, through sufficient credible evidence, that it "did not (1) 'consider impairing the … contracts on par with other policy alternatives' or (2) 'impose a drastic impairment when an evident and more moderate course would serve its purpose equally well,' nor (3) act unreasonably 'in light of the surrounding circumstances.'" Pet. App. 115.

The court found that the City met its burden through the corroborated testimony of, among others, an actuary who testified as an expert witness, the City's current mayor, Allan Fung, and the City's finance director. Pet. App. 121.

The court found that the City had employed a number of measures to cut costs and increase revenues, many of which are cited in the trial court's decision. Among other measures, the City implemented wage freezes, laid off City employees, and increased health care co-share requirements. Pet. App. 78-79. The City—which already had one of the highest tax rates in the state—raised taxes each year between 2009 and 2012. City residents paid more on houses that were worth less. Pet. App. 117. The trial court found that "[a]ny subsequent tax increases to deal with the crisis were not feasible," and "a tax increase would defy the

state['s statutory] property tax cap." Pet. App. 83. And, citing the Second Circuit, the trial court noted that raising taxes while cutting City services will at some point *decrease* the City's revenues—residents are not rooted to the ground. *Id.* The trial court determined that the enactment of the ordinances was "genuinely a last resort measure." Pet. App. 118.

The Rhode Island Supreme Court unanimously affirmed the judgment of the trial court in all respects. The Supreme Court, like the trial court, sided with *Petitioner* on the legal question of who had the burden of proof and production on the reasonable/necessary prong of the Contracts Clause analysis. Pet. App. 19. But it specifically rejected Petitioner's argument that the trial court erred in the determination and application of the burden of proof at trial. The Supreme Court held that the trial court shifted the burden of production to the City, and properly determined that the City should prevail after "weigh[ing] the evidence and ma[king] credibility determinations." Pet. App. 22.

The Supreme Court also affirmed the trial court's decision on the Takings Clause issue. It agreed that the suspension of increases to a member's pension payments should not be analyzed as a physical taking nor as a physical invasion of property because it applied temporarily and prospectively to contract rights. The Supreme Court instead analyzed the impairment under the framework created in *Penn Central Transportation Company v. City of New York*, and affirmed the trial court's grant of summary judgment in the City's favor. Pet. App. 34-42. Within the *Penn Central* framework, the court reasoned that

"the COLA suspension impacts only part of the total pension benefits received; it does not take aware the base pension payments or any other retirement benefits." Pet. App. 40. "[T]he government action was focused on future benefits and did not affect any COLA payments made prior to its enactment" and "was motivated by a critical need to improve the health of the City's pension system." *Id*. at 41.

The state Supreme Court issued its decision on June 3, 2019. CPRAC filed its Petition for Writ of Certiorari (the "Petition") on August 30, 2019.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Contracts Clause question should not be reviewed.

This case does not present any question about the governing legal framework for Contracts Clause questions. That burden-shifting framework, announced by this Court in *U.S. Trust Co.*, has been employed for decades with minimal deviation by federal and state courts. Rather than presenting a legal question about that framework, Petitioner attacks the trial court's dispositive legal finding that the City proved at trial that the impairment of its members' contracts was reasonable and necessary. Because the fact-bound decision below does not conflict with the decision of any other court, it does not warrant this Court's review.

The Contracts Clause provides that "[n]o state shall … pass any law … impairing the Obligation of

Contracts."[4] In its 1934 decision in *Home Building & Loan Assn. v. Blaisdell,* this Court held that the "prohibition" in the Contracts Clause "is not an absolute one, and is not to be read with literal exactness, like a mathematical formula."[5]

In 1977 the Court addressed a state's impairment of a contract where its own "self-interest" as a contracting party was at stake. *See United States Trust Co. of N.Y. v. New Jersey* ("*U.S. Trust Co.*").[6] The Court stated the general rule, that a state actor's "impairment of [contracts] may be constitutional if it is reasonable and necessary to serve an important public purpose." *Id.* at 25. But when a state actor substantially impairs a contract to which it is a party, its "self-interest is at stake," and "complete deference to a legislative assessment of reasonableness and necessity is not appropriate … ." *Id.* at 25-26.

In *U.S. Trust Co.*, this Court determined that the state had acted for a legitimate, important public purpose. *Id.* at 28. But because complete deference to the legislative assessment of reasonableness and necessity was not appropriate, it scrutinized the State's justification. The Court noted that "a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well," and that a state actor "is not completely free to consider impairing the obligations of its own contracts

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[4] U.S. Const., Art. I, § 10, cl. 1.

[5] 290 U.S. 398, 428 (1934).

[6] 431 U.S. 1 (1977).

on a par with other policy alternatives." *Id.* at 30. The Court also examined whether the state acted unreasonably "in light of the surrounding circumstances." *Id.* at 31.

The state courts here applied the correct standard for review of a state actor's "self-interested" impairment of contractual relations. The courts expressly cited and relied on this Court's *U.S. Trust Co.* decision and subsequent Circuit precedent that applied this Court's decisions (and which this Court declined to review).[7]

In interpreting this framework, the Rhode Island Supreme Court sided with Petitioner. It held that the City, not Petitioner, carried the burden of production in establishing that the impairment was reasonable and necessary. Pet. App. 20. And it again adopted a Petitioner-friendly interpretation of the deference due to the Rhode Island legislature, adopting a "less deference" standard. Pet. App. 21.[8]

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[7] Pet. App. 16 (citing *United States Trust Co. of N.Y. v. New Jersey,* 431 U.S. 1, 21 (1977)); *id.* at 25 (citing *Buffalo Teachers Fed'n. v. Tobe*, 464 F.3d 362, 370-71 (2d Cir. 2006), *cert denied*, 550 U.S. 918 (2007); *id.* at 21 (citing *Baltimore Teachers Union, Am. Fed'n of Teachers Local 340, AFL-CIO v. Mayor & City Council of Baltimore*, 6 F.3d 1012, 1019 (4th Cir. 1993) *cert denied,* 510 U.S. 1141 (1994).

[8] Petitioner notes that some courts have adopted a standard less favorable to its position, putting the burden of production on the plaintiff rather than shifting it to the defendant. Pet. 14. This case does not present an opportunity to resolve any disagreement on this point because Petitioner lost despite the courts putting the burden on the City.

Rather than challenging the governing framework, Petitioner complains about the trial court's fact-bound application of this framework. In particular, it argues that the trial court's finding that City witnesses "testif[ied] credibly" about the necessity of the challenged legislation was not enough, and that the trial court should have required further external corroborations for that testimony. Pet. 13. Petitioner has identified no court that has micromanaged a fact-finder's determination in this way.

Petitioner argues that a trial court must "weigh conflicting evidence," instead of simply ruling for a government entity that puts forward some credible evidence for its decision. Pet. App. 15 (citation omitted). But the trial court did exactly what Petitioner asks: the trial court "weighed" conflicting evidence, "made credibility determinations," and found the City's evidence more persuasive. Pet. App. 22. The Rhode Island Supreme Court found no error in the trial court's application of this Petitioner-friendly standard. *See id.*

Petitioner's other arguments run headlong into the trial court's factual findings. Petitioner argues that "[t]here was no true financial emergency" requiring the legislation. Pet. 19. But the trial court found to the contrary, explaining that the "budgetary crises, inherited deficits, unanticipated cuts in state aid, and the 2010 natural disasters constituted an unexpected fiscal emergency" at the relevant time. Pet. App. 80; *see* Pet. App. 23. Similarly, Petitioner contends that "there was no evidence that other measures were actually *tried*." Pet. 20. But the trial court found that "the City

presented sufficient credible evidence that it adequately considered and tried other policy alternatives." Pet. App. 116-119. And it found that "a more moderate course was not available." Pet. App. 119. And again, Petitioner argues that the City's action was improper because it had "acted . . . to create the very emergency conditions" it used to justify the impairment. Pet. 23. But the trial court found that the fiscal emergency was "neither created nor anticipated by the City," Pet. App. 112, but rather was caused by several factors, many of them not within the City's control. Pet. App. 80; *see* Pet. App. 27.

Petitioner dwells on one factor that contributed to the City's fiscal crisis, i.e., that beginning nine years before the Great Recession, the City "failed to fully pay the Annual Required Contribution" to the members' pension plan "as determined by its own actuaries … ." Pet. 23. But Petitioner does not state the amount by which the City missed the ARC, and has never presented evidence that if the City had funded the full ARC for eight or nine years before the Great Recession, the City's crisis would have been averted or its choices could have been any different.

Petitioner would retry the case before this Court. But it has identified no significant legal question that satisfies the Court's criteria for review. The state courts stated the correct rule of law, and the Petitioner has also failed to show an erroneous factual finding or the misapplication of the rule of law. Accordingly, the Petition should be denied.

II. The Regulatory Takings question should not be reviewed.

Petitioner similarly seeks error correction of the state courts' application of this Court's regulatory takings jurisprudence to the City's pension reform. It does not identify any conflict between the decision below and the decision of any other court. It simply launches into a merits argument, pressing an impossibly broad view of the Takings Clause that would shackle governments from regulation that "adjusts the benefits and burdens of economic life." *See Connolly v. Pen. Ben. Guar. Corp.*, 475 U.S. 211, 225 (1986).

In fact, the state courts properly applied this Court's regulatory takings analysis as originally set forth in the 1978 *Penn Central Transportation Co. v. New York* decision.[9]

The state Supreme Court declined Petitioner's request to apply the *per se* takings analysis because that analysis is only appropriate when the government effects a categorical taking which occurs "when the government physically takes possession of an interest in property for some public purpose." Pet. App. 38. It affirmed the trial court's application of the regulatory takings analysis to the contract-rights question here because the "City's ordinances do not present the classic taking in which a government directly appropriates private property for its own use. … Rather, the interference with the plaintiffs' COLA

[9] 438 U.S. 104, 124 (1978).

benefits arises from a public program adjusting the benefits and burdens of economic life to promote the common good." Pet. App. 39.

Petitioner asserts that the ordinances, "outright suspending 10 years of earned benefits, should have been clearly a physical taking, for which compensation would be required per se." Pet. 26. But the state courts' application of the regulatory takings analysis to review the ordinances was faithful to this Court's 1986 decision in *Connolly v. Pension Ben. Guar. Corp.*[10]

In *Connolly*, the Court reviewed a Fifth Amendment challenge to the Multiemployer Pension Plan Amendments Act of 1980. *Id.* That Act required an employer withdrawing from a multiemployer pension plan to pay its proportionate share of the plan's unfunded vested benefits before withdrawing. *Id.* The challenger argued that it "was protected by the terms of its contract from any liability beyond the specified contributions to which it had agreed." *Id.* at 223.

The *Connolly* Court agreed that in some cases, the taking of contractual rights may violate constitutionally protectable property rights that require just compensation. But it also recognized that, in such cases, "we have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case." *Id.* "To aid in this determination . . . we have identified three factors which have 'particular

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[10] 475 U.S. 211 (1986).

significance': (1) 'the 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.'"[11]

Federal courts across the country have applied the regulatory takings analysis to legislation which impairs private parties' contractual rights.[12] And, more specifically, federal courts have applied the regulatory takings analysis to legislation impairing public employees' contractual rights.[13]

Petitioner asserts that this litigation is distinct from *Connolly* because "[h]ere, 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." Pet. 27. But as the decisions below explained, the City's pension reform legislation does not "take" money from the retirees, it temporarily interferes with the retirees' right to future monies. The state Supreme Court held

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[11] *Id.* at 225 (quoting *Penn Central*, 438 U.S. at 124).

[12] *Raceway Park, Inc. v. Ohio*, 356 F.3d 677, 684 (6th Cir. 2004); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 677 (3d Cir. 1999) ("We decline to enter into the conceptual morass that would be engendered by the plaintiffs' total takings theory. . . Instead, the size of the deprivation inflicted by a law must be evaluated in the context of the other relevant facts."); *In re Chateaugay Corp.*, 53 F.3d 478, 493-94 (2d Cir. 1995).

[13] *See Buffalo Teachers Fed'n. v. Tobe*, 464 F.3d 362, 374 (2d Cir. 2006); *Degan v. Board of Trustees of Dallas Police & Fire Pension Sys.*, 2018 WL 4026373, *7 (N.D. Tex. Mar. 14, 2018).

that "the City did not physically take back a payment already made to retirees to appropriate the money for its own use," but rather temporarily impaired the retirees' contractual rights to future COLA increases. Pet. App. 39.

Government regulation that interferes with contractual rights is analyzed under the multi-factor test set forth by this Court in *U.S. Trust Co., supra.* If the Court treated every interference with contractual rights as a *per se* taking, then this Court's Contracts Clause jurisprudence would be effectively moot. Where Contracts Clause jurisprudence would require contextual consideration of legislation, the Takings Clause would immediately invalidate that same legislation subject to the payment of just compensation. Application of Takings Clause jurisprudence here would prevent a state actor from ever impairing a contract, even to ameliorate the most severe fiscal emergencies. That result directly contradicts *U.S. Trust Co.*

Lastly, to the extent that Petitioner takes issue with the Rhode Island courts' finding that the ten year COLA suspension was a "temporary" reform (Pet. 28-32), Petitioner is requesting that this Court engage in fact-intensive error correction. The state Supreme Court concluded that "[b]ecause the 2013 ordinances apply only temporarily and prospectively to contract rights, the City did not physically take back a payment already made to retirees to appropriate the money for its own use." Pet. App. 39. The court affirmed the superior court's conclusion which was informed by six days of trial testimony. Petitioner does not call into

question the legal authorities used but rather the court's application of those authorities to the testimony. Therefore, for the reasons noted *supra*, the Petition should not be granted.

CONCLUSION

Petitioner has failed to show that the Rhode Island Supreme Court has "decided an important federal question in a way that conflicts with the decision of another State court of last resort or of a United States court of appeals."[14] Petitioner has also failed to show that the state Supreme Court "decided an important question of federal law that has not been, but should be, settled by this Court," or in a way that "conflicts with relevant decisions of this Court."[15] The Petition should be denied.

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[14] Rule 10(b).

[15] Rule 10(c).

Respectfully submitted,

WILLIAM M. DOLAN III
WILLIAM K. WRAY, JR.
Counsel of Record
NICHOLAS L. NYBO
ADLER POLLOCK & SHEEHAN P.C.
One Citizens Plaza, 8th Floor
Providence, Rhode Island 02903
(401) 274-7200
wdolan@apslaw.com
wwray@apslaw.com
nnybo@apslaw.com

Counsel for Respondent

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