No. 20-

IN THE

Supreme Court of the United States

BRIAN SULLIVAN, *et al.*,

Petitioners,

v.

NASSAU COUNTY INTERIM FINANCE AUTHORITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2011, a New York State-created oversight authority, the Nassau County Interim Finance Authority ("NIFA"), along with Nassau County (the "County"), enacted a wage freeze resolution that suspended the contractual rights of some 2,400 police officers, 7,000 civil servants and 750 corrections officers in Nassau County. After nine years of litigation, the Second Circuit, applying the Contract Clause, agreed that the wage freeze operated as a substantial impairment of contractual rights and that the measure was entitled to "less deference" review because the government had impaired its own contracts. Yet, despite agreeing to apply a more stringent standard, the Circuit nonetheless summarily deferred to NIFA's and the County's judgment that they had "no other discernible options" short of freezing wages, without analyzing the budgetary situation in Nassau County and without scrutinizing whether the wage freeze was in fact imposed as an emergency and "last resort" measure as required by governing Supreme Court and Circuit Court precedent.

The questions presented are:

(1) Whether the Court should re-examine the "reasonable and necessary" test, applied under a "less deferential" standard, when a State impairs its own contractual obligations, implicating the Contract Clause of the U.S. Constitution?

(2) When a State impairs its own contractual obligations, should it bear the burden of establishing that the impairment was "reasonable and necessary" under the circumstances?

PARTIES TO THE PROCEEDING

The following Petitioners were plaintiffs-appellants in the Second Circuit:

Brian Sullivan, as President of the Nassau County Sheriff's Correction Officers Benevolent Assoication, James Carver, as President of the Nassau County Police Benevolent Assoication, Gary Learned, as President of the Superior Officers Association of Nassau County, Thomas R. Willgigg, as President of the Nassau County Police Department Detectives' Association, Inc., Jerry Laricchuita, as Local President of CSEA Nassau County Local 830, Danny Donohue, as President of the Civil Service Employees Association, Inc. Local 1000, AFSCME, AFL-CIO, Civil Service Employees Association, Local 1000 AFSCME, AFL-CIO.

The following Respondents were defendants-appellees in the Second Circuit:

Nassau County Interim Finance Authority, Ronald A. Stack, as Chairman and Director of the Nassau County Interim Finance Authority, George J. Marlin, Leonard D. Steinman, Thomas W. Stokes, Robert A. Wild, Christopher P. Write, as Directors of the Nassau County Interim Finance Authority, Edward Mangano, in his official capacity as County Executive of Nassau County, George Maragaos, in his official capacity as Nassau county Comptroller.

STATEMENT OF RELATED CASES

The related cases to this proceeding are:

- *Carver v. Nassau County Interim Finance Authority,* No. CV 11-1614, U.S. District Court for the Eastern District of New York. Judgment entered April 27, 2018.

- *Donahue v. Nassau County Interim Finance Authority*, No. CV 11-900, U.S. District Court for the Eastern District of New York. Judgment entered April 27, 2018.

- *Laricchiuta v. Nassau County Interim Finance Authority,* No. 11-2743, U.S. District Court for the Eastern District of New York. Judgment entered April 27, 2018.

- *Larricchiuta v. Nassau County Interim Finance Authority,* No. 18-1634, U.S. Court of Appeals for the Second Circuit. Judgment entered May 13, 2020.

- *Carver v. Nassau County Interim Finance Authority,* No. 18-1606, U.S. Court of Appeals for the Second Circuit. Judgment entered May 13, 2020.

- *Sullivan v. Nassau County Interim Finance Authority,* 18-1587, U.S. Court of Appeals for the Second Circuit. Judgment entered May 13, 2020.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Second Circuit under review is published at 959 F.3d 54. (App. 1a-33a.) The district court's opinion is unpublished, but available on Westlaw at 2018 WL 1970740. (App. 42a-64a.)

Prior decisions in this litigation decided on statutory grounds can be found at 923 F. Supp. 2d 423 (E.D.N.Y. 2013), 730 F.3d 150 (2d Cir. 2013), 2014 WL 12585634 (N.Y. Sup. Ct. Nassau Cnty. Mar. 11, 2014), and 142 A.D.3d 1003 (2d Dep't 2016).

STATEMENT OF JURISDICTION

The Second Circuit Court of Appeals entered judgment on May 29, 2020. By order dated March 13, 2020, this Court extended the dealine to file any petition for a writ of certiorari by 150 days from the date judgment or order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Contract Clause provides: "No State shall…pass any…Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10 cl. 1.

STATEMENT OF THE CASE

I. Introduction

The Contract Clause ensures that a municipality cannot avoid its contractual obligations even when it experiences financial hardship. When private contracts are at issue, courts ordinarily "defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Rsvrs. Grp., Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 413 (1983). However, this Court has long recognized that the government is afforded "less deference" when it impairs its own contracts. *U.S. Trust Co. of New York v. New Jersey,* 431 U.S. 1, 26 (1977) (public contracts stand on different footing because "the State's self-interest is at stake"). Thus, instead of "defer[ring] to legislative judgment," courts conduct a more searching review, and it must be shown that the government did not (1) "consider impairing the…contracts on a 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." *Id.* at 23, 30-31.

In the Second Circuit's leading Contract Clause decision, *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006), the court decided that this "less deferential" test – when viewed alongside a financial control board enactment providing that a wage freeze could only be imposed when "essential" to the city's budget – meant that a wage freeze could only be imposed as a "last resort" measure. The phrases "essential" and "last resort" square with the narrow exception to the Contract Clause's prohibition in the limited and extreme circumstances when it conflicts with a State's legitimate exercise of its

police power. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) ("*Blaisdell*").

Yet, as the dissent to this Court's recent decision in *Sveen v. Melin*, 138 S. Ct. 1815, 1827 (2018) (Gorsuch, J, dissenting) noted, the balancing test of modern Contract Clause jurisprudence, as first articulated in *U.S. Trust* and as applied by the Circuit Courts since, has eroded into a largely discretionary determination by courts, unmoored from a finding of true fiscal emergency. The "police power exception is so broadly construed under current law that it engulfs the entire clause." Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 750 (1984). The result is that the "scrutiny applied to state retrospective legislation is too lenient," and the current Contract Clause test, while interpreting a provision designed to provide certainty to contracting parties, "maximizes the unpredictability of its application." Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 526, 559 (1987). The authors of this article note that:

> the present Court's jurisprudence is at odds with the Framers' interest in providing certainty to those who enter into contracts, because in evaluating the constitutionality of an impairment the Court has adopted widely differing standards of review and balanced the extent of the impairment against the policy that the state seeks to advance. Based on an ad hoc policy calculus, the Court's decisions are largely unpredictable.

Id. at 545.

This case illustrates how in practice the three-pronged "less deferential" Contract Clause standard is too lenient and unpredictable. It is emblematic of how courts are typically unwilling to wade into matters of municipal finance, turning the more "searching inquiry" of policy alternatives or more moderate courses into a superficial and deferential review. Here, NIFA and the County chose to freeze wages not as a "last resort" or because they had considered and exhausted other more moderate courses, but because it was politically expedient to do so and, as the Second Circuit recognized, alternative proposals to cure its budgetary woes were "unpopular in the news media." *Sullivan v. NIFA*, 959 F.3d 54, 67 (2d Cir. 2020) (App. 27a.) Despite correctly deciding it should apply a more exacting level of review to the wage freeze, the Second Circuit devoted but a few short paragraphs to the lengthy record of policy alternatives and potential moderate courses available that were revealed through extended discovery.

Indeed, the court of appeals wrongly determined that its "job" under the "reasonable and necessary" prong was not to conduct a searching review, but "simply to determine whether the wage freeze was imposed in order to renege on a contract (to get out of a bad deal) or as a governmental action intended to serve the public good, as the government saw it." *Id.* at 69 (App. 31a.) It chose to focus on whether the measure was "reasonable," rather than whether it was truly "necessary" under the circumstances.

That cannot be the stringent review that this Court mandates and the more rigorous "necessary" component cannot be read out of the test. A government should be

required to do more than simply mouth the words "public interest," or point to a municipal budget deficit, or, as here, summarily conclude that it had "no other options" but to unilaterally abrogate its contractual obligations. It should, at the very least, be required to demonstrate a record of budgetary alternatives considered and tried short of impairing contracts before a breach of contractual obligations is permitted. If, as this Court stated, "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).

This case presents the Court with an opportunity to rebalance the Contract Clause test and to clarify how courts should analyze the constitutionality of a State's impairment of its own contracts. The majority opinion in *Sveen* noted that on the facts of the case, it "ha[d] no occasion to address" the contention that the Court abandon its Contract Clause test "to whatever extent it departs from the Clause's original meaning and earliest applications." 138 S. Ct. at 1822 n.3. It has that occasion here.

Even if the Court decides not to modify the test, the case also provides the Court with an opportunity to resolve a Circuit split as to how the burden of proof should be allocated in demonstrating whether an impairment is "reasonable and necessary" under the circumstances.

II. Facts and Proceedings Below

A. Factual Background

In 2000, the New York State Legislature enacted the NIFA Act (the "Act") which created NIFA to assist Nassau County in avoiding insolvency and overseeing the County's finances. (JA-150-151, ¶¶ 11-13.)[1] At the time of enactment, the County's bond ratings were one level above junk and it was facing a deficit of over $100 million. (JA-202-203, ¶ 131.) Under the Act, the State directly subsidized the County by providing it with $100 million in State funds through 2004. (JA-203, ¶ 132.)

Modeled after the New York Financial Emergency Act of 1975, the Act provides for two distinct monitoring periods during NIFA's existence: (1) the "interim finance period" and (2) a subsequent period with more limited monitoring powers and responsibilities. (JA-203, ¶ 134.) The Act also gives NIFA the power to impose a "control period" upon its determination that there exists a substantial likelihood of an operating funds deficit in the budget of 1% or more. (JA-153, ¶ 21.) During such a period NIFA has the discretion to: (i) direct the County to prepare a revised financial plan in a form acceptable to NIFA; (ii) modify the revised financial plan; (iii) approve/disapprove contracts; (iv) approve/disapprove borrowing; and (v) conduct operational/financial audits of the County government to identify opportunities for savings. (JA-204, ¶ 138.) The Act contemplated that, over time, the County would wean itself from the State's financial assistance. (JA-203, ¶ 133.)

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1. Citations to "JA" refer to Carver Joint Appendix, ECF Nos. 99-103 and "SPA" refer to Special Appendix.

The Act also authorizes NIFA to enact a wage freeze under extreme circumstances. During a control period, upon a finding that a wage freeze is "essential to the adoption or maintenance of a county budget or a financial plan," NIFA "after enactment of a resolution so finding" may declare a "fiscal crisis," and upon such a declaration may freeze municipal wages. (JA-243) Prior to 2011, NIFA had never exercised its control period or wage freeze power in its eleven years of existence, not even in 2000 when the County's overall fiscal health was far worse than the financial circumstances surrounding the wage freeze. (JA-220, ¶ 229.)

A new Nassau County Executive took office on January 1, 2010, having pledged that he would not raise taxes and would repeal certain existing taxes, including the Nassau County Residential Energy Tax (the "Home Energy Tax"). (JA-204-206, ¶¶ 142-145, 150.) As his very first act in office he signed a bill repealing the Home Energy Tax, costing the County approximately $19.8 million of revenue in 2010, an estimated $41.4 million for 2011, $43 million for 2012 and $44.6 million for 2013. (JA-205, ¶ 146.) In addition, the County Executive chose not to impose a previously planned 3.9% property tax increase in the County's 2010 budget. *Id.* The elimination of the planned property tax increase cost the County approximately $32 million of recurring revenue each year for 2011, 2012 and 2013. (JA-206, ¶ 151.)

By way of comparison, the wage freeze challenged here saved the County approximately $10 million in 2011. (JA-212, ¶ 184.) In sum, then, the County created its own financial predicament.

In early January 2010, recognizing the budgetary "imbalance" that would result from these decisions, NIFA inquired of the County how it intended to make up for the lost revenue. (JA-207, ¶ 157.) Over the next several months, the County made numerous efforts to persuade NIFA that its budget proposals for 2011 would lead to a balanced budget, but NIFA rejected those projections as unrealistic. (JA-179, ¶ 79.)

Despite Nassau County being among the wealthiest counties in the country, boasting a median household income ninth among all counties, (JA-220, ¶ 228), on January 26, 2011, NIFA enacted a resolution imposing a control period. (JA-209, ¶ 169.) NIFA determined this action was warranted because of a substantial likelihood that in 2011 the County would imminently incur an operating fund deficit of 1% or more. *Id.* Shortly thereafter, the County commenced a proceeding in State Supreme Court, Nassau County, challenging NIFA's authority to impose a control period. The County argued that, even if it had the authority, NIFA's imposition of a control period was arbitrary and capricious because it was insisting on new accounting standards for the first time. The County Executive called the invocation of a control period a "political attack." (JA 431-32.) On March 11, 2011, the court held that NIFA had the authority to impose a control period while its bonds remained outstanding pursuant to subsection 3669(1) of the Act. *Cnty. of Nassau v. NIFA*, 33 Misc. 3d 227, 247-48 (N.Y. Sup. Ct. Nassau Cnty. 2011). Following this decision, the County withdrew its lawsuit before briefing the issue of whether the invocation of the control period was an improper exercise of NIFA's power. (JA-182 ¶ 88.)

Less than a week later, the County Executive reversed his prior position that the budget was balanced, and expressly requested that NIFA take action to freeze wages by April 1, 2011. (JA-210, ¶ 174.) NIFA responded by passing two wage freeze resolutions on March 24, 2011, Resolution Nos. 11-303 and 11-304 (hereinafter the "wage freeze"). (JA-276-298.)

After the wage freeze was implemented, the County took numerous cost saving and revenue generating measures to address its budgetary gap. These measures – including exercising its statutory authority to retain a consultant, Grant Thornton LLP, to conduct an operational review of County's finances – could and should have been taken prior to resorting to a wage freeze. The resulting report from Grant Thornton, the "Fiscal Sustainability Initiative," identified between $251 and $319 million of potential budgetary savings. (JA-213-214, ¶¶ 189, 192, 198.)

B. Procedural History

Petitioners brought this action challenging the imposition of the wage freeze by NIFA at the request of the County, on the grounds that the wage freeze substantially impaired Petitioners' contractually bargained for rights in violation of the Contract Clause of the United States Constitution.

Petitioners sought a temporary restraining order, which the district court denied. But the court permitted discovery prior to conducting a hearing on the request for a preliminary injunction. (JA -7.) On April 22, 2011, Petitioners filed an Amended Complaint, invoking federal supplemental jurisdiction to assert two additional state

law claims, challenging the validity of the wage freeze under the terms of the NIFA Act. (JA-47.)

The parties engaged in eighteen months of discovery, including depositions, third-party discovery and the exchange of thousands of documents –all targeted at identifying what, if any, cost-saving and revenue-enhancing alternative measures the County attempted before imposing a wage freeze and whether the freeze was considered "on par" with other policy options. At the close of discovery, all parties moved for summary judgment.

Petitioners contended that NIFA and the County were unable to satisfy the multi-part test for establishing that the wage freeze did not impermissibly impinge on individual contract rights. Petitioners argued that unlike the dire economic situations of New York City in the 1970s and the City of Buffalo in 2004 – where municipalities in New York were forced to impair their own contracts as a fiscal tool of last resort – NIFA and the County treated the wage freeze just as it would any other budgetary tool, violating Petitioners' contractually bargained for rights. (JA-14, Dkt JA-14, Dkt No. 78 pp. 37-60.) Under Second Circuit case law, wage freezes were imposed and upheld in New York City and Buffalo during times of increasing poverty, unemployment and only *after* trying other alternatives (such as consolidating departments, implementing a hiring freeze and raising taxes). By contrast, in Nassau County, one of the wealthiest counties in the country, a *repeal* of taxes triggering a control period was the first step, and a wage freeze was the second step, with budgetary alternatives being explored and accomplished *only after the imposition of that wage freeze. Id.*

The district court issued a Memorandum Opinion and Order, granting Petitioners summary judgment on their supplemental state law claim, holding that the Wage Freeze Resolutions violated subsection 3669(3) of the Act, and that "the language of Section 3669 unambiguously limits NIFA's power to impose a control period wage freeze to the end of the interim finance period – which period ended in 2008." (SPA-10.) The district court determined that it need not reach the constitutional issue. (SPA-12.)

The Second Circuit vacated and remanded the district court's decision on the ground that it should have declined to exercise supplemental jurisdiction over the state statutory interpretation claim because the case presented an "unresolved question of state law" better suited to be resolved by the New York State courts. *See Carver v. NIFA*, 730 F.3d 150 (2d Cir. 2013). The court did not address whether the Contracts Clause applied to the wage freeze.

Following that decision, Petitioners commenced a proceeding in state court raising only the state law claims, which were dismissed at the trial court level and affirmed by the appellate court. *See Carver v. NIFA*, No. 602947/2013, 2014 WL 12585634 (N.Y. Sup. Ct. Nassau Cnty. Mar. 11, 2014); *Carver v. NIFA,* 142 A.D.3d 1003 (2d Dep't 2016).

Having exhausted the state law claims, Petitioners returned to federal court on the previously briefed Contract Clause claims. The district court denied Petitioners' motion for summary judgment and granted NIFA's and the County's cross-motion. It avoided a Contract Clause analysis of the wage freeze entirely,

ruling instead that the Contract Clause did not apply. The court reasoned that NIFA's imposition of a wage freeze suspending the contract rights of all public sector employees in Nassau County did not constitute a "law" or a "new rule," but was instead a ministerial exercise of administrative authority delegated to the agency by the Legislature under the NIFA Act approximately a decade earlier.

C. The Decision Below

Petitioners appealed to the Second Circuit, arguing that the wage freeze was a "legislative" rather than "administrative" act and that under the "less deferential" standard, the wage freeze was a substantial impairment that was neither reasonable nor necessary under the circumstances. Petitioners argued in the Circuit that the trial court should make the determination of "reasonableness" and "necessity" in the first instance, but provided the court with ample record evidence demonstrating that the wage freeze was not implemented as a last resort measure.

The court of appeals assumed that the wage freeze was "legislative" and then correctly held under the Contract Clause analysis that: (i) the wage freeze was a substantial impairment of the Unions' Collective Bargaining Agreements; (ii) the Unions could not have reasonably expected to have their wages frozen; and (iii) the Unions met their burden of demonstrating that the decision to impair the Unions' contracts constituted a self-serving act entitling NIFA and the County to less deference within the constitutional analysis. *Sullivan*, 959 F.3d at 54, 64, 65. (App. 21a, 22a, 27a.) However, the

Circuit broke with controlling precedent in its final and dispositive analysis, concluding – *without the benefit of any district court analysis below* – that the wage freeze was "reasonable and necessary" under the circumstances.

Employing its view of the "less deferential" standard, the Second Circuit held that the "key to all this" was to determine whether the wage freeze was imposed "in order to renege on a contract (to get out of a bad deal) or as a governmental action intended to serve the public good…" *Id.* at 65, 69. (App.31a.) On the question of "reasonableness," the court found that the County was experiencing a significant budget deficit and summarily concluded that the freeze was reasonable, largely based on NIFA's unsupported and incorrect position that there were "no other discernible options" available short of freezing wages. *Id.* at 68 (App. 30a.) On the question of "necessity" the Circuit quickly dismissed two potential alternatives – the comprehensive audit of County finances and refinancing of its debt – finding that the freeze was necessary to further the County's and NIFA's legitimate public purpose. . *Id.* at 69. (App. 31a.) None of the litany of alternatives proffered by Petitioners were analyzed nor was the County's or NIFA's decision-making process examined.

No one disputed that Nassau County was one of the wealthiest counties in the country. Nor was it disputed that upon his election, the County Executive made a political decision and created an immediate budget deficit by repealing and rescinding certain taxes without providing for alternative revenue, triggering the need for the control period. Nonetheless, the wage freeze was upheld.

REASONS FOR GRANTING THE WRIT

Since 1934, the Supreme Court has only once – in *U.S. Trust Co.*, 431 U.S. 1 – struck down a state law that interfered with a government contract on Contracts Clause grounds. While under this Court's long-standing precedent "less deference" is required to be afforded to a state's decision to impair its own contractual obligations, in practice "*complete* deference" is often granted, as courts rarely second-guess legislative decision-making. The rubber-stamping of state-sponsored contractual breaches as "reasonable and necessary" runs afoul of the Court's requirement of a more exacting constitutional review and perverts the intent of the Contract Clause, designed to protect the sanctity of contract against impairment by the state. In *Sveen*, Justice Gorsuch recognized the chorus of criticism to the exceedingly pliable "reasonable and necessary" standard that affords nearly unlimited discretion to courts and suggested the criticisms "deserve a thoughtful reply, if not in this case then in another." 138 S. Ct. at 1828 (Gorsuch, J, dissenting).

This Petition presents the opportunity for that "thoughtful reply," offering a vehicle to provide needed clarity in Contract Clause jurisprudence.

The Circuit's exceedingly lenient application of the "less deference" standard has far-reaching implications, particularly in today's current fiscal climate, where many states face ballooning budget deficits. If the Contract Clause is to have any meaning, municipalities and their agencies cannot be permitted – as NIFA and the County were here – to abrogate constitutional rights in order to fulfill campaign promises or resolve political disputes.

In the years since *U.S. Trust Co.*, as demonstrated here, the Contract Clause has provided little protection when municipalities chose to impair their own contracts, because courts have emphasized the "reasonableness" of impairment over its "necessity". Indeed, emblematic of the prevalence of an assumed reasonableness review, is the Court's most recent Contract Clause opinion, in which the dissent highlighted the omission of the the "necessary" component of the test, stating that "[o]ur modern cases permit a state to 'substantially impair' a contractual obligation in pursuit of 'a significant and legitimate public purpose' so long as the impairment is '*reasonable*'" *Sveen*, 138 S. Ct. at 1828 (Gorsuch, J., dissenting) (*quoting Energy Rsvrs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (emphasis added)).

The root cause of the lenient application of the standard lies in its construction. A "reasonableness test is a fairly relaxed or minimal standard of constitutional review while formulations employing necessity have been viewed as calling forth a more exacting standard." Kmiec & McGinnis, *supra,* at 546. These two conflicting methods of review combined into the same underlying test have resulted in an "incoherent jurisprudence." *Id.* at 547.

The "incoherent jurisprudence" is evident here as the Circuit viewed its role as determining whether the impairment was imposed as a government action "intended to serve the public good." *Sullivan*, 959 F.3d at 69 (App. 31a), rather than deciding whether the freeze was necessary or essential in a fiscal emergency.

The lenient reasonableness test also leads to unpredictability. With the primary focus on

"reasonableness" – within the balancing test of whether the impairment with an existing contract is reasonable and necessary to serve a legitimate public purpose – litigants cannot predict when a court might defer to legislation that is neither "reasonable" nor "necessary" because of a particular policy preference. The result, as recognized in *Sveen*, leaves significant uncertainty when contracting with the government: "[H]ow are the people to know today whether their lawful contracts will be enforced tomorrow, or instead undone by a legislative majority with different sympathies?" 138 S. Ct. at 1827 (Gorsuch, J., dissenting). Of course uncertainty in contracting was precisely the ill that the Contract Clause was designed to remedy. *U.S. Trust Co.*, 431 U.S. at 15 (the Contract Clause was written to "promot[e] confidence in the stability of contractual obligations").

This concern is highly relevant today. Public sector labor unions, like Petitioners, rely on the sanctity of contract and would have little incentive to agree to concessions or other changes in their contracts in exchange for wage increases if those increases could be eliminated under a "reasonableness" balancing test that "invest[s] judges with discretion to choose which contracts to enforce – a discretion that might be exercised with an eye to the identity (and popularity) of the parties or contracts at hand[.]" *Sveen*, 138 S. Ct. at 1827 (Gorsuch, J., dissenting).

Further, the broad and flexible standard of reasonableness typically employed "seems hard to square with the Constitution's original public meaning." *Id.* The Constitution, as Justice Gorsuch reasoned, "does not speak of 'substantial' impairment[;]" nor does it contemplate

analyzing more moderate courses available or other policy alternatives. Instead, the constitutional provision "bars '*any*' *impairment*" at all." *Id.* at 1827 (emphasis added). The language of the Contract Clause is absolute, prohibiting states from passing *"any* … Law impairing the Obligations of Contracts," yet courts routinely permit abrogation of contracts in far from absolutely necessary circumstances. Even if the Clause does not call for an absolute bar to impairment, under current case law, it is far too easy to abrogate its protection. *See Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 744 (7th Cir. 1987) (Posner and Easterbrook, J.J. concurring) ("Imagine what freedom of speech would have come to mean if the Court had interpreted the First Amendment – which is no more absolute in its language or clearcut in its history than the contract clause – as loosely as it now interprets the contract clause.").

The current test under *U.S. Trust Co.* loosely indicates that the government should not (1) consider impairing the…contract on par with other policy alternatives or (2) impose a drastic remedy when an evident and more moderate alternative would serve its purpose equally well. 431 U.S. at 30. This test lacks both specificity and certainty. To "square" the absolute constitutional language with what is required of litigants, this Court should require the State to affirmatively establish that an impairment is "necessary" by providing an evidentiary record of budgetary alternatives or more moderate policies considered and tried before impairing its own contracts.

Should the Court decline to modify the current test, it should at least resolve an existing Circuit split and clarify the respective burdens in proving a Contract

Clause violation. Successful challenges to Contract Clause impairment are rare not only because courts tend to be deferential to legislative impairments but also because the allocation of the burden of proof raises an additional barrier. In this case, the Second Circuit acknowledged the nationwide split, and then assumed, without deciding, that the burden to show whether an impairment is reasonable and necessary lies with the defendant. Yet, when it conducted the analysis, the Circuit placed the burden on *plaintiffs*, analyzing their proffered budgetary alternatives to the wage freeze, rather than defendants' failure to consider or implement alternative policies. As noted, impairing existing contracts is a "last resort," not the first.

Despite the language in *U.S. Trust Co.* stating that "the *State* has failed to demonstrate" the legislation was necessary, 431 US. at 31 (emphasis added), not all Circuit Courts have agreed that the *U.S. Trust Co.* decision casts the burden on the State and have expressly looked to the Supreme Court to resolve the issue. As the First Circuit's concurring opinion in *United Auto., Aerospace, Agric. Implement Workers of Am. Int'l Union v. Fortuño* ("*Fortuño*") explained, "[n]o one short of the Supreme Court is capable of definitively resolving a problem that may well have considerable importance in light of the current financial difficulties." 633 F.3d 37, 48-49 (1st Cir. 2011). The Court should do so here.

In sum, this Petition should be granted to (1) re-examine and modify the Court's Contract Clause jurisprudence, and (2) to resolve the divide among the circuits as to where the burden of establishing "reasonableness" and "necessity" lies in Contract Clause

litigation. With a clearly articulated test requiring a more searching analysis, the case should be remanded to the district court to review the record of budgetary options short of freezing wages that were available to NIFA and the County at the time contract rights were impaired.

1. This Case Is an Ideal Vehicle to Re-Examine the "Reasonable and Necessary" Test

A. The "Reasonable and Necessary" Test Should Be Re-examined and Modified

The Second Circuit's faulty analysis presents the Court with an opportunity to articulate a more exacting standard of review. A Supreme Court decision re-setting the proper Contract Clause analysis will reinvigorate the provision as it was meant to operate – as a safeguard against legislation that unilaterally rewrites existing contracts, particularly the government's own contracts.

The history of the Contract Clause is well-documented and has been recently briefed before the Court. *See Sveen,* 138 S. Ct. 1815. It is referenced here to emphasize the troubling malleability of the one constitutional provision that, more than any other, was designed to ensure stability and predictability in contractual relationships.

In THE FEDERALIST No. 44, James Madison characterized the Contract Clause as a "constitutional bulwark in favor of personal security and private rights." The Contract Clause was so vital at the country's founding that it is "one of the few provisions [explicitly limiting states' powers] which the Framers deemed of sufficient importance to place in the original Constitution." *City of*

El Paso v. Simmons, 379 U.S. 497, 523 (1965) (Black, J., dissenting). It was written and debated during a period of financial hardship and the Framers believed that the sanctity of contracts was essential, *particularly* in troubled economic times, for it was then that people and governments would seek "legislative interference" with their contractual obligations. *Blaisdell*, 290 U.S. at 454-55 (Sutherland, J., dissenting). "[T]reating existing contracts as 'inviolable' would benefit society by ensuring that all persons could count on the ability to enforce promises lawfully made to them – even if they or their agreements later prove unpopular with some passing majority." *Sveen*, 138 S. Ct. at 1827 (Gorsuch, J., dissenting) *(citing Sturges v. Crowninshield*, 17 U.S. 122, 206 (1819)). Throughout the first century of the Court, the Contract Clause was treated as the categorical prohibition it was written to be and the Court regularly struck down state legislation. *See* Kmiec & McGinnis, *supra*, at 525, 529–30.

Starting with its decision in *Blaisdell*, however, the Court began to carve out a police power exception to the absolute proscription, holding that the Clause "is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Blaisdell,* 290 U.S. at 428; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 502 (1987) ("[I]t is well settled that the prohibition against impairing the obligation of contracts is not to be read literally."). The balancing test first articulated in *Blaisdell* – whether the legislation addresses a legitimate end and whether the measure is reasonable and appropriate to that end – opened the door to significant encroachment on the sanctity of contract. James W. Ely, Jr., *The Contract Clause: A Constitutional History*, Univ. Press of Kansas, 2016. The existence of an

"emergency," which was necessary for the impairment to be upheld in *Blaisdell,* became so "fictionalized" and watered down that by 1978, the Court found it necessary to "remind bench and bar that the contract clause was 'not a dead letter.'" *Chicago Bd. of Realtors, Inc.*, 819 F.2d at 744 (*quoting Allied Structural Steel Co., v. Spannaus,* 438 U.S. 234, 241 (1978)).

In *U.S. Trust Co.*, a decision coming after decades of desuetude, the Court sought to pare back the ability of a state to use the police power and the "essential attributes of sovereign power" to impair existing contracts. 431 U.S. at 21. There, the Court applied the Contract Clause to strike down a New Jersey statute that abrogated an agreement to which the state was a party. The Court reasoned that under the reigning balancing test, which allowed impairing legislation in "appropriate" circumstances, a state could excuse itself from its own contractual obligations and abuse its power in taking that action. Thus, less deference to the State's action was appropriate. *Id.* at 26. Beyond recognizing the need for "less deference," the Court held that the determination of "necessity" could be made by considering whether the legislation was "essential" – that is, whether a less drastic modification would have achieved the same purpose. *Id.* As the Court expressed, "a state is not completely free to consider impairing obligations of its own contracts on a par with other policy alternatives"; nor is it "free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *Id.* at 30-31.

Yet, in deciding whether a policy option is a "more moderate course," and what it means to consider contractual impairment "on par" with other alternatives,

the lower courts have been left with too much discretion to navigate the difficult task of assessing government decision-making. Such assessments typically involve complicated municipal finance or budgetary choices – and tend to defer to government action. Courts have found that the Contract Clause does not require them "to sit as super legislatures," choosing among various options and that judges are "ill-equipped even to consider the evidence that would be relevant to such conflicting policy alternatives." *Balt. Teachers Union of Am. Fed'n of Teachers Local 340, AFL-CIO v. Mayor & City of Balt.*, 6 F.3d 1012, 1021-22 (4th Cir. 1993). Untethered from the original constitutional text, the boundaries set by *U.S. Trust Co.* have continued to erode, leaving a "defanged" Contracts Clause. *Chicago Bd. of Realtors*, 819 F.2d at 744 ("By exploiting the unfortunate ambiguities that surround the word 'reasonable', the Supreme Court has 'defanged' the contract clause.") (Posner and Easterbrook, J.J., concurring).

Particularly when a municipality or state invokes the magic words "financial crisis" or "budgetary crisis," courts appear unwilling to second-guess a legislative determination. In practice, rather than engage in objective budgetary analysis, the determination often amounts to whether the government's rationale for the impairment appears to be pre-textual – or, as here, whether it was "designed to serve a public good." *See Balt. Teachers Union*, 6 F.3d at 1019 n.10 ("Although the Court has never specified what it intends by the requirement of a more searching examination, it appears to mean by this only that the legislature's asserted justifications for the impairment shall not be given the complete deference that they would otherwise enjoy.").

This imprecise standard and lack of doctrinal guidance has produced varying levels of deference circuit by circuit. *U.S. Trust Co.* provides that "complete deference" to a legislature is inappropriate in the public contract context, but did not elucidate what level of deference *is* appropriate. The Ninth Circuit, for example, has narrowed the scope of the "reasonableness" review to whether the problem addressed existed at the time of the contract. *S. Cal. Gas Co. v. City of Santa Ana,* 336 F.3d 885 (9th Cir. 2003). The First Circuit has held that "less deference" does not equal "no deference," and has still accorded significant deference to the State even under a "less deference" standard. *Fortuño*, 633 F.3d at 37.

At the very least, to satisfy constitutional scrutiny, the contractual impairment must be not only "reasonable," but *necessary,* a word with special constitutional significance. *U.S. Trust Co.*, 431 U.S. at 54 n.17 ("words like 'reasonable' and '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"). The Court's use of the word "necessary" suggests that a court must do more than rely on governmental assertions of feasibility and instead conduct an independent analysis to determine whether a contract impairing measure is truly borne of emergency circumstances and enacted as a last resort. *See id.* at 31; *Ass'n of Surrogates & Supreme Court Reporters within the City of New York v. State of New York,* F.2d 766, 773 (2d Cir. 1991) ("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'").

As commentators have suggested for some time, the Contract Clause analysis should be re-examined because courts have not consistently applied the required "less deferential" review. The constitutional test has produced confusing and unpredictable decisions by the lower courts and its application has strayed considerably from the Framer's original intent. *See, e.g.,* Michael Cataldo, Note, *Revival or Revolution: U.S. Trust's Role in the Contracts Clause Circuit Split*, 87 St. John's L. Rev. 1145 (2013); Michael B. Rappaport, Note, *A Procedural Approach to the Contract Clause*, 93 Yale L.J. 918 (1984); Richard A. Epstein, *supra*, 51 U. Chi. L. Rev. 703 (1984).

B. This Case Illustrates the Unworkability of the "Reasonable and Necessary" Standard

This case illustrates the propensity of courts to defer to the State in their application of the "reasonable and necessary" standard. The Second Circuit's decision illuminates how far courts have strayed from the once inviolability of contract and the "bulwark" constitutional protection of the Contract Clause.

The Circuit should have inquired into whether emergency circumstances justified the use of the police power to impair the State's contracts with its employees when less drastic alternatives would have sufficed. Instead, though purporting to conduct a "less deference" review, the Second Circuit completely eliminated the "necessary" component of the test, relying solely on its own idiosyncratic view of reasonableness. *See U.S. Trust Co.*, 431 U.S. at 29 (reasonableness looks to balance whether the impairment comports with the public purpose to be served). The Circuit failed to analyze whether the

wage freeze was essential and implemented as a "last resort."

On the factual record here, the government considered contractual impairment not only "on par" with other policy alternatives, but preferable to other measures. Yet, the Second Circuit focused on and was influenced by the amounts of the budget deficits that NIFA and the County contended were unsolvable, rather than by the efforts (or lack of effort) taken by the government defendants to address financial needs. Indeed, before even undertaking the reasonable and necessary review, the court of appeals stressed that the County faced a purported 2011 budget deficit of $176 million, as if the size of the deficit rather than the hard choices that might have been made to reduce that deficit, were the subject of the inquiry. *Sullivan*, 959 F.3d at 67. (App. 28a.)

The court's reliance on the size of the budget deficit tracked defendants' position in their submissions to the court focusing on the purported severity of the County's fiscal problems. Defendants did not demonstrate or establish a substantial record that alternatives to the wage freeze were considered or tried. No affidavits of County officials were submitted detailing any measures pursued short of a wage freeze. The depositions of the Chairman of NIFA and the County Executive yielded no evidence that less drastic measures were seriously explored. (JA-433) The County Executive admitted that no one in his administration conducted any analysis or issued reports of other available options because when they came into office they "had very little time" to prepare for the transition and NIFA stated that resolving the County's finances would almost certainly require a contribution from the labor side of the ledger. (*E.g.* JA-206, ¶ 153).

When analyses *were* performed, like a Comptroller's non-tax revenue study, the County failed to consider it. (JA-214, ¶ 195). Proposed amendments to the budget from the legislature, which identified millions in savings, were ignored. (JA-207-208, ¶ 161). Despite these and other available options and NIFA's wide-reaching control over the County's finances, NIFA's Chairman self-servingly suggested that the wage freeze was "the one thing" NIFA could do. (JA-424).

The record shows otherwise and demonstrates that NIFA's and the County's actions were designed to reach a politically expedient result, not to comply with constitutional strictures. Yet this is precisely what the Contract Clause was designed to prevent. Probative of the failure to consider alternatives before impairing contracts are the host of alternatives contemplated and implemented *after* the wage freeze took effect. After imposing the freeze, the County and NIFA took numerous revenue-raising and expense-cutting measures to close the budgetary gap. Among them:

- The County combined the real estate and public works departments;

- The County consolidated some of its departments;

- The County merged managerial functions of the health, mental health and youth boards;

- The administration increased certain fees and fines expected to raise $2.5 million in 2012 and $12.8 million on a recurring, on-going basis;

- The County hired a company to find ways to use strategic sourcing in procurement, hoping to save $25 million by realigning some of its contracts;

- The County negotiated voluntary separation incentive programs with County unions, which were expected to yield approximately $20 million dollars;

- NIFA refinanced $313 million of existing debt, saving the County $30 million in annual interest costs;

- NIFA allowed the County to continue non-GAAP compliant borrowing for tax certioraris and judgments; and

- NIFA commissioned the operational audit by Grant Thornton which found between $251 and $319 million of potential savings that could largely be achieved within twelve months.

(JA-212-217 ¶¶ 188, 189, 199, 200, 203, 207, 214, 216). No justifiable reason was given by NIFA or the County as to why these measures were not taken *before* the wage freeze was imposed.

Rather than delve into these alternatives and their potential savings to the County, or determine whether they were adequately considered before the wage freeze, or remand to the trial court to do so, the court deferred to NIFA's assertions that it had no power to tax and "no other discernible options to improve the County's fiscal

state." *Sullivan,* 959 F.3d at 68 (App. 30a.) It summarily concluded that all of the proposals that Petitioners suggested as alternatives were "solely under the County's purview and outside of NIFA's control." *Id.*. (App. 28a.) Of course, NIFA and the County were acting in concert in implementing the wage freeze, with NIFA exercising nearly complete control over the County's finances and budgeting. Although the court accepted NIFA's argument that it could not directly raise taxes or impose fines, NIFA could have forced County leaders to utilize other budgetary tools to cure its deficit through its oversight process rather than impose a wage freeze. *See, e.g.*, Public Authorities Law § 3669 (a)(ii)-(iv), (d).

Foregoing a close examination of potential alternatives, the Second Circuit summarily pointed to three proposed measures in one short paragraph as evidence that other alternatives were considered: (1) a headcount reduction of 400 employees through an early retirement program; (2) a proposed cut of 213 employees through layoffs and department closures; and (3) a proposed 13 days of unpaid furloughs for County employees. *Id.* at 68 (App. 29a.)

The court erroneously stated that these three measures "came on the heels of, and simultaneously with" the wage freeze. *Id.* But the fact is that none of these action were tried and considered *before* the wage freeze. And many more alternatives with far greater savings were identified in the Grant Thornton report and implemented *after* the wage freeze. Still left unanswered in all the years of this litigation by both the Respondents and the courts is why Grant Thornton was not retained before the wage freeze to review County operations. Nothing prevented the study from being undertaken before the

wage freeze, particularly when the need for additional sources of revenue and savings was identified by NIFA as early as January 2010. NIFA and the County never made any attempt to avoid violating constitutionally guaranteed rights.

The court aknowledged that NIFA could have commissioned an audit of County operations, but "[did] not see why NIFA should have delayed taking action until this was done." *Sullivan*, 959 F.3d at 69 (App. 30a-31a.) The reason, of course, is because the Contract Clause demands it. At the very least, the case should have been remanded for judicial fact finding on the "reasonable and necessary" prong. As noted in the Sixth Circuit Contract Clause case cited by the Second Circuit in its decision, Petitioners raised "'serious, substantial and difficult' questions with regard to the reasonableness and necessity of the Defendants' actions, which render these issues 'a fair ground for litigation and thus for more deliberate investigation.'" *Welch v. Brown*, 551 F. App'x 804, 812 (6th Cir. 2014) (affirming the award of a preliminary injunction and finding that further fact finding on the "reasonable and necessary" prong was necessary in the district court) (*quoting Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir. 1997)).

If allowed to stand, the court of appeals' decision provides a roadmap for any municipality to breach its own public contracts, even under a "less deference" standard. To withstand constitutional scrutiny, a municipality can point to a large budget deficit, declare a "fiscal crisis," trot out the familiar draconian alternatives of layoffs and furloughs, and declare breaching public contracts a reasonable and necessary measure to serve the public

good. That roadmap to constitutionality betrays the Framers' intent.

2. The Court Should Resolve the Circuit Split on the Allocation of Burden in Contract Clause Cases

Granting *certiorari* would also provide the opportunity to resolve a circuit split over the allocation of burden in the "reasonable and necessary" prong of the current Contract Clause test.

The Second Circuit concluded that the burden of setting forth sufficient evidence to show that "less deference" scrutiny should apply lies with the plaintiff, but it left open the question and "[took] no position" on whether the plaintiffs or the State bear the burden of proving the reasonableness and necessity of the government's contract impairing actions. *Sullivan*, 959 F.3d at 66. (App. 24a) It found that the question of burden on the "reasonable and necessary" prong had not been addressed in the court's *Buffalo Teachers* decision and acknowledged the circuit split. *Id.* at 67. (App. 24a.)

Because this Court has not had occasion to decide many Contracts Clause cases, the contours of the "less deference" standard have been infrequently applied and the courts of appeals have reached different conclusions on how it should be administered. Specifically, the circuits are divided over whether it is plaintiff's obligation to demonstrate the government did not explore other, less drastic alternatives, or whether it is the government's burden.

The burden should rest with the government. In addition to the massive informational advantage enjoyed by the government – the party making the decision to impair contracts – if the government is being afforded "less deference," it would stand to reason that the government should bear the obligation to demonstrate that its actions were reasonable and necessary.

Thus, in *U.S. Trust Co.*, this Court found that "*the State* has failed to demonstrate that repeal of the 1962 covenant was similarly necessary." *Id.* at 31 (emphasis added). Despite this language, the Court did not explain whether its articulation was purposefully designed to place the burden on the government.

In *Fortuño*, the First Circuit recognized that "many courts have concluded that this burden rests with the state" and even acknowledged that the Court has used language that supports such a finding, but nonetheless concluded that neither the First Circuit nor the Supreme Court "have analyzed the issue in detail." 633 F.3d at 43-44.

In placing the burden on plaintiff, the First Circuit reasoned that though state action impairing its own contracts is entitled to "less deference," the standard does not imply "no deference." It held that placing the burden on plaintiff would not inhibit meritorious contract claims "'[b]ecause the record of what and why the state has acted is laid out in committee hearings, public reports and legislation', it is not difficult to discern the state's motivation." *Id.* at 45 (*citing Buffalo Teachers*, 464 F.3d at 365). If a "state purports to impair a contract to address a budgetary crisis," the First Circuit posited that "a

plaintiff could allege facts showing that the impairment did not save the state much money, the budget issues were not as severe as alleged by the state, or that other cost-cutting or revenue-increasing measures were reasonable alternatives to the contractual impairment at issue." *Id.*

In reaching its conclusion, the First Circuit expressly relied upon the Second Circuit decision in *Buffalo Teachers*, where the court of appeals held with little explanation that plaintiff had the burden of producing evidence that the state's interest rather than the general welfare motivated the state's conduct. *Fortuño,* 633 F.3d at 44 (citing *Buffalo Teachers,* 464 F.3d at 365).

Yet, in this case, the Second Circuit made clear that plaintiff's evidentiary burden relates only to the question of whether a measure has a "legitimate public purpose," and that *Buffalo Teachers did not* specifically address the burden of proof on the "reasonable and necessary" prong. *Sullivan*, 959 F.3d at 64.

The First Circuit's approach conflicts with that of the Sixth and Ninth Circuit. In *Univ. of Haw. Pro. Assembly v. Cayetano,* for example, the Ninth Circuit analyzed whether a statute requiring a pay lag of state employee salaries, which breached plaintiffs' collective bargaining agreement, was a reasonable and necessary impairment of government contracts. In applying this Court's analytical framework, the court squarely held that "[d] efendants bear 'the burden of proving the impairment was reasonable and necessary because the burden is placed on the party asserting the benefit of the statute only when that party is the state.'" 183 F.3d 1096, 1106 (9th Cir. 1999) (*quoting In re Seltzer*, 104 F.3d 234, 236 (9th Cir. 1996)).

The court recognized that a "higher level of scrutiny" is required to assess "abrogations of government obligations" and, on the facts, found that other options were available to the State including additional budget restrictions, the repeal of tax credits and the raising of taxes. *Id.* at 1107 Defendants in *Cayetano* did not sufficiently shoulder their burden in explaining why it was "reasonable and necessary that the brunt of Hawaii's budgetary problems be borne by its employees." *Id.*

The Sixth Circuit, too, in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 323, 326 (6th Cir. 1998), held that once a plaintiff has established a substantial impairment, the burden shifts to the state to "proffer[] such a significant and legitimate public purpose for the regulation," and found that the state had not made a sufficient showing to overcome the high hurdle, given the state's "obvious self-interest", that the impairment was reasonable and necessary.

Within the Second Circuit, the question of burden for whether a law is "reasonable and necessary" remains unresolved. In a Contract Clause case following *Buffalo Teachers*, the Northern District of New York squarely found that it was *defendants'* burden to show that options short of breaching municipal contracts were actually considered and tried and that there were no other evident and moderate courses available. *Donohue v. Paterson*, 715 F. Supp. 2d 306, 322 (N.D.N.Y. 2010). To meet the burden, the district court found that it was insufficient to make broad reference to an economic problem or a "fiscal crisis," because that "does not speak to the policy consideration and tailoring that is required to pass scrutiny…" *Id.* at 323. Without defendants showing "a substantial record" of

considered alternatives, the reasonableness and necessity of the challenged actions were "cast in serious doubt." *Id.* at 322.

In the instant case, although "assuming" that the burden rested with the defendants, the court held that *plaintiffs* had not provided "a response" to the budgetary deficit problem and analyzed *plaintiffs'* proffered alternatives, rather than any policy options offered by defendants. *Sullivan*, 959 F.3d at 68 (dismissing *plaintiff's'* "alternative proposals" and lack of *plaintiffs* "proffer[ed] evidence" on the powers of NIFA and the County).

If plaintiff is successful in bearing the burden of demonstrating that the impairment was substantial and that the government was acting in its self-interest, as the Circuit Court found for Petitioners here, it defies logic to then place the burden on plaintiffs to also show, under a "less deference" standard, that the government action was neither reasonable nor necessary. Information about more moderate budgetary courses tried and policy alternatives considered falls largely within the possession of the government. Had the Second Circuit appropriately placed the burden on defendants and required them to set forth a substantial record of measures considered and tried, there is little question that the burden would not have been met. At the very least, as in *Donohue,* NIFA's and the County's action would have been "cast in serious doubt."

To properly place the burden on defendants and to restore and clarify the standard under the "less deference" standard, the Second Circuit's decision warrants review.

CONCLUSION

The Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 13, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 18-1587-CV (L), 18-1606-CV (CON),
18-1634-CV (CON)

BRIAN SULLIVAN, AS PRESIDENT OF THE NASSAU COUNTY SHERIFF'S CORRECTION OFFICERS BENEVOLENT ASSOCIATION, NASSAU COUNTY SHERIFF'S CORRECTION OFFICERS BENEVOLENT ASSOCIATION, JAMES CARVER, AS PRESIDENT OF THE NASSAU COUNTY POLICE BENEVOLENT ASSOCIATION, GARY LEARNED, AS PRESIDENT OF THE SUPERIOR OFFICERS ASSOCIATION OF NASSAU COUNTY, THOMAS R. WILLDIGG, AS PRESIDENT OF THE NASSAU COUNTY POLICE DEPARTMENT DETECTIVES' ASSOCIATION, INC., JERRY LARICCHIUTA, AS LOCAL PRESIDENT OF CSEA NASSAU COUNTY LOCAL 830, DANNY DONOHUE, AS PRESIDENT OF THE CIVIL SERVICE EMPLOYEES ASSOCIATION INC. LOCAL 1000, AFSCME, AFL-CIO, CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 1000 AFSCME, AFL-CIO,

Plaintiffs-Appellants,

v.

Appendix A

NASSAU COUNTY INTERIM FINANCE AUTHORITY, RONALD A. STACK, AS CHAIRMAN AND DIRECTOR OF THE NASSAU COUNTY INTERIM FINANCE AUTHORITY, GEORGE J. MARLIN, LEONARD D. STEINMAN, THOMAS W. STOKES, ROBERT A. WILD, CHRISTOPHER P. WRIGHT, AS DIRECTORS OF THE NASSAU COUNTY INTERIM FINANCE AUTHORITY, EDWARD MANGANO, IN HIS OFFICIAL CAPACITY AS COUNTY EXECUTIVE OF NASSAU COUNTY, GEORGE MARAGOS, IN HIS OFFICIAL CAPACITY AS NASSAU COUNTY COMPTROLLER,

Defendants-Appellees.

August Term, 2019
September 23, 2019, Argued
May 13, 2020, Decided

Appeal from the United States District Court
for the Eastern District of New York.
Nos. 11-CV-1614, 11-CV-1900, 11-CV-2743 –
Joanna Seybert, District Judge.

Before: CALABRESI, LOHIER, and PARK, *Circuit Judges*.

On March 24, 2011, the Nassau County Interim Finance Authority ("NIFA") instituted a year-long wage freeze for all Nassau County employees. The various unions representing these employees sued NIFA, its directors, and other County leaders, alleging that this wage freeze,

because it was a legislative act that was not reasonable and necessary to achieve NIFA's purported goal of fiscal soundness, violated the Contracts Clause of the United States Constitution. The district court (Seybert, J.) granted summary judgment for the defendants, holding that NIFA's implementation of the wage freeze was administrative, as opposed to legislative, and therefore did not implicate the Contracts Clause. We assume without deciding that NIFA's imposition of the wage freeze was legislative in nature. We, however, conclude that the wage freeze was a reasonable and necessary means to achieve NIFA's asserted end of ensuring the continued fiscal health of the County. For that reason, we hold that it did not violate the Contracts Clause, and we therefore AFFIRM the judgment of the district court.

Judge Park concurs in a separate opinion.

Appendix A

GUIDO CALABRESI, *Circuit Judge*:

Plaintiffs, various unions and union leaders, represent much of the workforce of Nassau County in the state of New York. They brought this suit alleging that in 2011, the defendants—several County leaders as well as the Nassau County Interim Finance Authority ("NIFA") and its members—froze wages for County employees in violation of the Contracts Clause of the United States Constitution. The parties filed cross-motions for summary judgment, and the district court granted summary judgment for the defendants. It concluded that NIFA's implementation of a wage freeze was administrative in nature. Because the Contracts Clause applies only to legislative acts, the district court held that the wage freeze did not violate, indeed did not even implicate, the Contracts Clause.

We assume *arguendo* that the wage freeze was a legislative act that implicated the Contracts Clause. We nevertheless affirm the district court's grant of summary judgment because, even if the wage freeze was legislative, the defendants have met their burden of showing that it was a reasonable and necessary means of accomplishing a legitimate public purpose: remedying the County's fiscal problems.

BACKGROUND

A. The Nassau County Interim Finance Authority

Around the turn of the millennium, Nassau County was in the throes of a fiscal emergency. To rescue it, the

New York Legislature passed the Nassau County Interim Finance Authority Act. N.Y. Pub. Auth. Law § 3650 *et al.* ("NIFA Act"). That act provided Nassau County with $100 million of direct funding and created NIFA, a "corporate governmental agency and instrumentality of the state constituting a public benefit corporation" that would oversee the County's finances. NIFA Act § 3652. Among the powers given NIFA by that act was the power to impose a "control period" when NIFA determined that, "assuming all revenues and expenditures are reported in accordance with generally accepted accounting principles," there exists "a substantial likelihood and imminence of" an operating funds deficit in the County's budget of one percent or more. *Id.* § 3669(1).

Under the NIFA Act, once NIFA declares a control period it gains significant oversight authority of the County's finances. This includes the ability to approve or disapprove any proposed "contract or other obligation" or "long-term and short-term borrowing by the [C]ounty." *Id.* §§ 3669(2)(d)(iii), (2)(e).

Most relevant here, however, when a control period is in place, NIFA is given the ability to freeze County employees› wages. Thus, when a control period has been declared, NIFA may make a finding "that a wage freeze is essential to the adoption or maintenance of a county budget" and enact a resolution declaring that a "fiscal crisis" exists in the County. *Id.* § 3669(3)(a). NIFA may then suspend all wage increases of County employees for one year. It may do so even though doing this negates the wage increases called for in those employees' previously

negotiated contracts. *Id.* NIFA may, in its discretion, end the wage freeze at any time if it finds that the fiscal crisis has been alleviated or for any other valid reason. *Id.* § 3669(3)(c).

B. The County's Agreements with The Plaintiffs

Each of the plaintiffs-appellants represents a County employee union that had an agreement affected by NIFA's decision to freeze wages. Plaintiffs Brian Sullivan, James Carver, Gary Learned, and Thomas Willdigg are the presidents of four law-enforcement unions: the Nassau County Sheriff's Correction Officers Benevolent Association, the Nassau County Police Benevolent Association, the Superior Officers Association of Nassau County, and the Nassau County Police Department Detectives' Association, Inc., respectively. Plaintiffs Jerry Laricchiuta and Danny Donohue are presidents of affected branches of the Civil Service Employees Association.

Each union had a collectively bargained agreement that was settled after the passage of the NIFA Act in 2000, but before NIFA implemented a wage freeze in 2011. All these agreements were the result of arbitration proceedings, as the unions and the County were unable to reach agreement through their own negotiations. Among other concessions and benefits, each of these agreements granted union members a wage increase during every year that they were in effect.

Appendix A

C. Nassau County's Financial State

In 2010, the County's finances were in an unhealthy state. The County had been counting millions of dollars of borrowing as revenue, thereby making a potential liability appear to be a boon. Meanwhile, the County had limited ability to reduce its expenses because much of its budget was tied to either state or federal mandates. In 2007, for example, the County's Office of Management and Budget estimated that "approximately 70%" of the County's budget was "beyond its control." No. 18-1606, Joint App'x 122. At the same time, about half of the County's expenditures were labor costs—including the salary and benefits of the plaintiffs here. Nevertheless, the County's bond rating was "fine." No. 18-1587, Joint App'x 887. It was not approaching bankruptcy, and it had a sufficient flow of cash to meet its obligations. There were also signs, such as increasing sales-tax revenue and decreasing unemployment, that the County's financial state was on the upswing.

Despite its financial woes, Nassau County was one of the wealthiest counties in New York, and indeed the nation, with a median annual household income approaching $100,000. But the County also had the highest median property taxes in the nation. In part this was because of the value of homes in the County, but it was also in part due to the tax rate the County imposed on those homes. Given this backdrop, many County residents were opposed to the imposition of additional taxes. And so, when Defendant Edward Mangano ran for County Executive on an "anti-property tax platform," No. 18-1587, Joint App'x 157, he won.

Mangano's first act in office was to sign the repeal of a home energy tax which had been projected to produce tens of millions of dollars in revenue in future years. An act to repeal that tax had been passed on a bipartisan basis in the County Legislature and was sent to him immediately after the election. Mangano also chose not to include in the County's budget for 2010 a previously planned 3.9% property tax increase. This tax increase had been projected to raise approximately $32 million each year in 2011, 2012, and 2013.

D. The 2011 Wage Freeze and Its Aftermath

Shortly after Mangano took office, the NIFA Chairman, Defendant Ronald Stack, inquired as to how the County intended to make up the lost revenue from these foregone taxes. The County's proposed budget for 2011 sought to answer that question, but NIFA found that numerous items in that budget—amounting to approximately $244.4 million—were too uncertain to be relied on in determining whether the County's budget would be balanced.

The predicted budget imbalance was not, however, all the County's doing. NIFA had recently reversed course on allowing several accounting measures that the County had used in past budgets to help achieve balance. Specifically, NIFA forced the County to conform its 2011 budget to Generally Accepted Accounting Principles ("GAAP") and no longer allowed the County to borrow to pay property tax judgments, known as "tax certs," which the County owed to its residents from overcharging them on their real property tax assessments.

Despite continued discussions between the County and NIFA, the County ultimately went forward with a 2011 budget that NIFA believed was unbalanced. Shortly after the County passed this budget, Moody's downgraded the County's credit rating, deeming approximately $158 million of projected revenue to be at risk.

On January 26, 2011, based on its conclusion that there was a likelihood and imminence of a major operating funds deficit—defined by the NIFA Act as a deficit of greater than one percent—in the County's 2011 budget, NIFA declared a control period. As stated earlier, the implementation of a control period gave NIFA significantly greater oversight powers. Among those additional powers was the ability to implement a wage freeze if NIFA concluded that there was a fiscal crisis and "a wage freeze [was] essential to the adoption or maintenance of a county budget ...." NIFA Act § 3669(3)(a).

On March 24, 2011, NIFA passed two resolutions: the first, finding that a wage freeze was essential to the County's budget; the second, implementing such a wage freeze. NIFA gave numerous reasons for its decision. In addition to its own analysis of the County's financial state, NIFA relied on County Executive Mangano's explicit request for a wage freeze, the numerous other labor cuts, such as layoffs and furloughs, that the County had budgeted, and the County's own attempt to implement a similar wage freeze in the previous year.

After NIFA imposed the wage freeze, both NIFA and the County took numerous additional steps to improve

the County's fiscal health. NIFA commissioned an outside consultant, Grant Thornton, to study County operational efficiencies and potential sources of revenue. That study identified between $251 and $319 million in possible savings for the County from a variety of initiatives and methods. While the County was generally favorable to some of these proposals, Nassau County Police Benevolent Association President (and plaintiff) James Carver called others "draconian" and potentially in violation of previously agreed to contracts.

The County took steps to lay off hundreds of workers during 2011 and has, in the years since 2010, eliminated more than 1,000 positions. Moreover, in October 2012, NIFA refinanced several hundred million dollars of debt, saving the County approximately $34.8 million. Significantly, had NIFA refinanced this debt when the County originally requested it (before the wage freeze) the County would have saved notably less.

E. Procedural History

The unions brought suit in the federal district court for the Eastern District of New York in 2011, shortly after the wage freeze went into effect. They argued that NIFA did not have the power to freeze wages under state law, and that the wage freeze violated the Contracts Clause of the United States Constitution. The district court ruled in their favor on state law grounds, holding that NIFA lacked the power to freeze wages after 2008. Accordingly, it did not reach the constitutional, Contracts Clause claim. *See Carver v. Nassau County Interim Fin. Auth.*, 923 F. Supp. 2d 423, 429 (E.D.N.Y. 2013).

We, however, held that the state-law issue that the district court had decided was a novel one that should have first been decided by the state courts. And so, we vacated and remanded the district court's decision. *See Carver v. Nassau County Interim Fin. Auth.*, 730 F.3d 150, 155-56 (2d Cir. 2013).

The unions then brought suit in state court, while the district court stayed the federal constitutional issue. The state courts reached the opposite conclusion of the district court and held that NIFA had the power to impose a wage freeze in the relevant year. *See Matter of Carver v. Nassau County Interim Fin. Auth.*, 142 A.D.3d 1003, 38 N.Y.S.3d 197 (App. Div. 2d Dep't), *leave to appeal denied*, 28 N.Y.3d 911, 47 N.Y.S.3d 226, 69 N.E.3d 1022 (2016) (Table).

After losing in state court, the unions returned to the district court to litigate their constitutional, Contracts Clause, claim. The parties filed cross motions for summary judgment, and the district court ruled in the defendants' favor. It held that NIFA's decision to impose a wage freeze was administrative and not legislative in nature, and so did not implicate the Contracts Clause. The unions moved to reconsider, and those motions were denied. Each union timely appealed, and we consolidated the three appeals by joint motion of the parties.[1]

1. The Sullivan plaintiffs filed an amended notice of appeal additionally appealing the denial of their motion for reconsideration. They, however, make no arguments specific to their reconsideration motion, and so we do not discuss it further.

Appendix A

STANDARD OF REVIEW

We review the district court's evaluation of cross-motions for summary judgment *de novo*, "examining each motion 'on its own merits.'" *Vugo, Inc. v. City of New York*, 931 F.3d 42, 48 (2d Cir. 2019) (quoting *Chandok v. Klessig*, 632 F.3d 803, 812 (2d Cir. 2011)). "Summary judgment is proper only when 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)).

DISCUSSION

A. Legislative, Administrative, and Judicial Acts

The Contracts Clause of the United States Constitution states that "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts." U.S. Const. Art. I § 10, cl. 1. A prerequisite to any violation of that Clause is that the challenged action be a "[l]aw" or, as the Supreme Court has explained, that it be legislative in nature. *See New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U.S. 18, 30-32, 8 S. Ct. 741, 31 L. Ed. 607 (1888).

In most Contracts Clause cases, whether the challenged action is legislative in nature is obvious and so does not bear mentioning. A State passes a statute that allegedly impairs a plaintiff's contract, and the plaintiff attacks that statute directly. *See, e.g., Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362 (2d Cir. 2006).

But in other cases, whether an action is legislative is not so clear. As here, there is a statute underlying an action challenged by a plaintiff, but the action taken could itself be labeled as judicial or administrative rather than legislative. This triumvirate of possibilities—legislative, judicial, or administrative—is further complicated by the Supreme Court's long and consistently held view that whether actions are legislative "depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" *I.N.S. v. Chadha*, 462 U.S. 919, 952, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) (quoting S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897)). *See also New Orleans Waterworks Co.*, 125 U.S. at 30-31 ("[I]t is not strictly and literally true that a law of a state, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a constitution ...."); *Williams v. Bruffy*, 96 U.S. 176, 183, 24 L. Ed. 716 (1877) ("Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited ....").

What does it mean, then, for an action to be legislative? Part of the inquiry revolves around whether the action is forward or backward-looking. "Legislation ... looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226, 29 S. Ct. 67, 53 L. Ed. 150 (1908). By contrast, "[a] judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts

and under laws supposed already to exist." *Id.* Similarly, an action has been deemed not legislative if it involves the application, as opposed to the creation, of a rule.

For example, Louisiana once passed legislation granting a company exclusive rights to provide water to the city of New Orleans, but in the same legislation allowed the New Orleans city council to "grant[] to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his own or their own use." *New Orleans Waterworks Co.*, 125 U.S. at 20. Acting pursuant to this legislation, the city council allowed the Louisiana Sugar-Refining Company to set up a water and sewage system for its own use only. *Id.* at 21. The New Orleans Water-Works Company sued, alleging that this grant impaired its contract for the exclusive provision of water to all within New Orleans. But the Supreme Court held the city council's decision was the mere application of the state's previously established rule because "[t]he legislature itself [] defined the class of persons to whom, and the object for which, the permission might be granted. All that was left to the city council was the duty of determining what persons came within the definition...." *Id.* at 32. The city council's decision was thus administrative, and not subject to the Contracts Clause's requirements. *Id.*

When combined with the well-established idea that contracts necessarily incorporate the law as it stands at the time of contract formation, *see 2 Tudor City Place Assoc. v. 2 Tudor City Tenants Corp.*, 924 F.2d 1247, 1254 (2d Cir. 1991), the Supreme Court's treatment in

New Orleans Waterworks Co. would seem to create a bright line: actions taken to implement a statute enacted by a legislature prior to the creation of a contract do not implicate the Contracts Clause. *See also Ogden v. Saunders*, 25 U.S. 213, 295, 6 L. Ed. 606 (1827) (explaining that the Contracts Clause's concern is contracts entered into prior to the taking of the challenged legislative action). But that potentially simple rule is complicated by two additional and commingled factors: the Supreme Court's holding that the exercise of some powers, no matter who exercises them, is necessarily legislative; and the advent of oversight agencies like NIFA, with authority to act under broad delegations of state power. Such powers may be too broad to be viewed as simply applications of a previously established rule.

This first factor is most easily seen in the example of a municipality. It has been settled law since the nineteenth century that an action exercising a state's powers to tax, to exercise its police authority, or to engage in other inherently legislative activities remains legislative regardless of whether a state delegates that action to a municipality or to some other entity. *See St. Paul Gaslight Co. v. City of St. Paul*, 181 U.S. 142, 148, 21 S. Ct. 575, 45 L. Ed. 788 (1901) ("It is no longer open to question that 'a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law ... that it may properly be considered as a law, within the meaning of the [Contracts Clause].'" (quoting *New Orleans Waterworks Co.*, 125 U.S. at 31)). That is why, when a municipality, or

some other subdivision of a state, passes an ordinance that requires the exercise of the taxing or police powers to be effective, that ordinance is a "law" within the meaning of the Contracts Clause. *See, e.g., United States v. City of New Orleans*, 98 U.S. 381, 392-93, 25 L. Ed. 225 (1878) (discussing the power to tax). And it is not, by itself, determinative that the state delegated that power to a municipality or other entity in a statute enacted before the parties entered into the relevant contract.

The second factor directly touches the case before us. For in NIFA we deal with a paradigmatic example of the recent phenomenon of state-created oversight or emergency management authorities that operate under broad mandates. According to one commentator, at least nineteen states have passed these types of laws, which give emergency powers to an independent oversight authority like NIFA. *See* Comment, Rodney W. Harrell, *The Contract Clause of the Constitution and the Need for "Pass Any ... Law" Rehabilitation in the Age of Delegation*, 22 Geo. Mason L. Rev. 1317, 1327 & n.78 (2015). Because these authorities are designed to take action in potentially dire situations, their statutory authority is usually expansive. A Michigan emergency manager statute, for example, gave that authority numerous powers, including the ability to "adopt or amend ordinances" or "to reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement ... [as] a legitimate exercise of the state's sovereign powers ... if the emergency manager and the state treasurer determine that [certain] conditions are satisfied." *Welch v. Brown*, 551 F. App'x 804, 809 (6th Cir. 2014) (quoting

Mich. Comp. Laws § 141.1519(1)(k)). Not surprisingly, the Sixth Circuit held that actions taken by an emergency manager under this statute were legislative "because [the emergency manager statute] explicitly contemplates that the Emergency Manager's orders will carry the force of the state's sovereign powers." *Id.* at 809-10.

The NIFA Act does not grant NIFA powers nearly as expansive as Michigan's emergency manager statute, which essentially allowed the emergency manager to act in place of a town's mayor and city council. *See id.* But it does have similarities. Most importantly, both acts allow the oversight authority not only to breach a previously made employment contract to which a state entity is a party, but to use the state's powers to *invalidate* portions of those contracts, thereby negating any state law breach of contract remedy. And the federal Circuit Courts, as well as the Supreme Court, have consistently viewed this distinction—between breach and the removal of any remedy for a breach—as a line delineating whether a Contracts Clause claim might lie. *See, e.g., E & E Hauling, Inc. v. Forest Preserve Dist. of Du Page Cty., Ill.*, 613 F.2d 675, 679-80 (7th Cir. 1980) (citing *Hays v. Port of Seattle*, 251 U.S. 233, 237, 40 S. Ct. 125, 64 L. Ed. 243 (1920) and *St. Paul Gaslight Co.*, 181 U.S. at 142).

It is plain that either the NIFA Act itself or NIFA's decision, under that Act, to impose a wage freeze implicates the Contracts Clause.[2] But which of the two

2. Of course, the fact that an action implicates the Contracts Clause does not—as we will explain soon enough—mean that it violates the Clause.

is it? The NIFA Act authorized the impairment, but it did not actually impair any of the plaintiffs' contracts. Indeed, the NIFA Act predates each of the contracts at issue. Conversely, NIFA's decision to impose a wage freeze did impair earlier made contracts, because that decision both breached the plaintiffs' contracts and negated the plaintiffs' state-law remedy. But that action could be characterized as no more than the administration of the NIFA Act, thereby making it a non-legislative action that does not implicate the Clause. Alternately, it can be deemed an action taken under a grant of delegated legislative authority that is so broad that the action amounts to something like the passage of an ordinance by a municipality.

Because we can uphold NIFA's actions on other grounds, we need not, and hence, do not, decide on which side of the line NIFA's wage freeze decision falls. And, assuming *arguendo* that NIFA's decision implicates the Contracts Clause, we hold that summary judgment for the defendants-appellees was nevertheless proper, concluding that NIFA's decision was reasonable and necessary to achieve the legitimate public goal of rescuing the County's finances.

B. Substantial Impairment and Legitimate Public Purpose

Assuming then that the wage freeze implicates the Contracts Clause, we now examine whether it violates that Clause. The Contracts Clause, as applied to governmental contracts, incorporates two differing imperatives.

Buffalo Teachers, 464 F.3d at 367-68. The first is that the government, like private parties, is bound by its contracts and may not use its governmental powers to impair these contracts materially. The second is that the state may not contract away its power to govern in the public interest. A government contract that induces a sword company to produce plowshares cannot be abrogated by an otherwise valid statute simply because the government later discovers that a knife company can make cheaper plowshares. On the other hand, a clause in that contract that says the state will forego war cannot keep the government from declaring war when the national security demands it.

To determine which of these is occurring, we must examine: "(1) [whether] the contractual impairment [is] substantial and, if so, (2) [whether] the law serve[s] a legitimate public purpose such as remedying a general social or economic problem and, if such purpose is demonstrated, (3) [whether] the means chosen to accomplish this purpose [are] reasonable and necessary." *Buffalo Teachers*, 464 F.3d at 368 (citing *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411-13, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983)).

If the impairment is insubstantial, or the law is a reasonable and necessary means to remedy a legitimate public purpose, the Contracts Clause is not violated. What constitutes substantial impairment and public purpose were addressed directly in *Buffalo Teachers*, which presented a situation nearly identical to ours, and which, therefore, both binds and guides our analysis.

Appendix A

a) Substantial Impairment

The substantiality of an impairment depends upon "the extent to which reasonable expectations under the contract have been disrupted." *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 993 (2d Cir. 1997). And the reasonableness of expectations depends, in part, on whether legislative action was foreseeable, and this, in turn, is affected by whether the relevant party operates in a heavily regulated industry. *See id.* (citing *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38, 60 S. Ct. 792, 84 L. Ed. 1061 (1940)).

In *Buffalo Teachers*, we said that "[c]ontract provisions that set forth the levels at which union employees are to be compensated are the most important elements of a labor contract. The promise to pay a sum certain constitutes not only the primary inducement for employees to enter into a labor contract, but also the central provision upon which it can be said they reasonably rely." 464 F.3d at 368. In other words, wage levels are a crucial component of labor contracts and are likely to create reasonable expectations.

The defendants argue, however, that in the instant case the County raised the possibility of a NIFA-mandated wage freeze during the arbitration proceedings that led to some of the plaintiffs' contracts. And hence, they assert, the wages settled on could not have created reasonable expectations. This argument is unavailing.

As an initial matter, we note that the possibility of a wage freeze was raised only during the police unions'

contract negotiations, and so could not affect the Contracts Clause analysis for the CSEA plaintiffs. But even as to the police unions, the context of the statements belies any possibility that those statements made a wage freeze something the police unions should be held reasonably to expect.

Putting aside contract law's general distaste for extrinsic evidence, *see CNH Indus. N.V. v. Reese*, 138 S. Ct. 761, 765, 200 L. Ed. 2d 1 (2018), the County's statements suggesting that a wage freeze might occur were made during an adversarial proceeding before arbitrators. And there is nothing in the record to suggest that either the unions or the arbitrators adjudicating that proceeding adopted the County's view that a NIFA-imposed wage freeze was imminent or likely. Indeed, the arbitrators almost certainly rejected the County's view. They awarded the unions wage increases that extended over the life of the contracts, and New York law requires that, in collective bargaining proceedings, arbitrators consider "the financial ability of the public employer to pay." N.Y. Civ. Serv. L. § 209(4)(c)(v)(b).

Moreover, the arbitrators' apparent rejection of the County's argument that a wage freeze was forthcoming seems eminently reasonable. The County had no power to impose a wage freeze itself. That power belonged exclusively to NIFA. And NIFA, at the time of the arbitration, had given no indication that a wage freeze was forthcoming. Moreover, it had never previously imposed a wage freeze, even in 2000 when the NIFA Act was passed and the County's finances were at their nadir.

We decline to say that any statements discussed during contract negotiations, despite not being incorporated into the contract, suffice to upset the otherwise reasonable expectations of the contracting parties. And so we adhere to our holding in *Buffalo Teachers* that a substantial impairment exists when a law changes "the levels at which union employees are to be compensated." *Buffalo Teachers*, 464 F.3d at 368.

b) Public Purpose

Our holding in *Buffalo Teachers*, however, also makes clear that NIFA acted with a legitimate public purpose in the case before us when it chose to freeze the plaintiffs' wages. NIFA acted in order to alleviate what it viewed as a fiscal crisis in the County, and this is a legitimate public purpose with respect to the Contracts Clause. *Buffalo Teachers*, 464 F.3d at 368.

The plaintiffs argue that this was a "paper crisis" caused by NIFA's requirement that the County use GAAP for its 2011 budget. But the plaintiffs' have presented no evidence to undermine NIFA's findings that the County's 2011 proposed budget would likely lead to a $50 million deficit even without the switch to GAAP, and that the 2011 budget already included other draconian measures to solve the County's fiscal problems—like layoffs and unpaid furloughs. It is thus clear that NIFA did not impose the wage freeze "for the mere advantage of particular individuals." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445, 54 S. Ct. 231, 78 L. Ed. 413 (1934). Instead, NIFA froze the plaintiffs' wages "for the protection of a basic interest of society." *Id.*

The key to all this—we repeat—is to determine whether the state in breaching a contract is acting like a private party who reneges to get out of a bad deal, or is governing, which justifies its impairing the plaintiffs' contracts in the public interest. It was with this in mind that in *Buffalo Teachers* we developed and applied a "less deference" standard. It is to that standard, and what it entails, that we now turn.

C. Reasonableness and Necessity

Under the *Buffalo Teachers* "less deference" standard, we look first to whether the contract impaired is public or private. If—like the one before us—it is public, we ask whether there is "some indicia" that the state impaired the contract out of its own self-interest. *Buffalo Teachers*, 464 F.3d at 369-70. If so, then "less deference" scrutiny applies and "it must be shown that the state 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.'" *Id.* at 370 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 30-31, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977)). These factors amount to a requirement that the state acted both reasonably and out of necessity.

In other words, when the state impairs a public contract the presumption that a passed law is valid and done in the public interest does not immediately apply. Instead, we must examine the record for indicia of self-

serving, privately motivated, action. And if sufficient evidence of those indicia exists, "less deference" is given, and the reasonableness and necessity of the government's actions must be shown.

This raises the question of who bears each of these burdens. We conclude that the burden of putting forth sufficient evidence to show that "less deference" scrutiny should apply lies with the plaintiffs, and that the plaintiffs have met that burden here. We, however, take no position on whether the plaintiffs or the government bears the burden of proving the reasonableness and necessity of the government's contract-impairing actions. This question was not squarely addressed in *Buffalo Teachers* and has split the other Courts of Appeal that have addressed the issue. *Compare United Auto., Aerospace, Agr. Implement Workers of Am. Int'l Union v. Fortuño*, 633 F.3d 37, 43 (1st Cir. 2011) (placing this burden on the plaintiffs), *with Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 323 (6th Cir. 1998) (placing this burden on the government defendants), *and Nevada Employees Assoc., Inc. v. Keating*, 903 F.2d 1223, 1228 (9th Cir. 1990) (same). We hold today that even assuming *arguendo* that the burden is on the government, the defendants here have successfully borne it.

a) What Plaintiffs Must Show for "Less Deference" Scrutiny to Apply

As we stated in *Buffalo Teachers*, determining whether to apply "less deference" scrutiny requires "focusing on whether the contract-impairing law is self-

serving." 464 F.3d at 370. If there are *some indicia* that the contract impairment is merely "the government [reneging] on its obligations—altering the contract for its own benefit," then "less deference" scrutiny is needed. Guido Calabresi, *Retroactivity: Paramount Powers & Contractual Changes*, 71 Yale L. J. 1191, 1200-01 (1962).

Thus, "less deference" scrutiny applies only when the plaintiff has put forward some evidence tending to show that the government has engaged in reneging instead of "genuinely acting for the public good." *Buffalo Teachers*, 464 F.3d at 370 (citing *Blaisdell*, 290 U.S. at 445); *cf. United States v. Armstrong*, 517 U.S. 456, 468-70, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996) (requiring "some evidence tending to show the existence" of discriminatory selective prosecution before a defendant is entitled to receive discovery on that defense).

Reneging is, at its core, about impairments imposed to benefit the state financially, or as a matter of political expediency. Therefore, evidence showing indicia of reneging may take many forms. One of these could be evidence that the contractual impairment was chosen when other politically unpopular alternatives were available. *See, e.g., Association of Surrogates & Supreme Court Reporters v. New York*, 940 F.2d 766, 773 (2d Cir. 1991).

Similarly, a plaintiff might show that the state may have reneged through evidence that the law took aim at a narrow class of individuals when its purported goals could be served equally by spreading the necessary sacrifice

throughout a broader, and perhaps more politically powerful, base. *See, e.g., Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978) (noting that the change to pension plans in that case "was leveled, not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees"); *Condell v. Bress*, 983 F.2d 415, 419 (2d Cir. 1993) ("We agree that the number of people involved [in the contractual impairment] is one factor to be considered on the issue of 'reasonable and necessary' ...."); *Surrogates*, 940 F.2d at 773 ("[B]y placing the costs of improvements to the court system on the few shoulders of judiciary employees instead of the many shoulders of the citizens of the state, they ruffle only a few feathers and fight the 'exploding drug crisis' without raising taxes or cutting other governmental programs.").

Finally, indicia of reneging may be shown through evidence that the contractual impairment is a response to a well-known, long-standing, problem, as opposed to a change in circumstances. *See, e.g., U.S. Trust Co.*, 431 U.S. at 31-32 (holding a contractual impairment unreasonable in part because for "over a half century" "the need for mass transportation in the New York metropolitan area was not a new development, and the likelihood that publicly owned commuter railroads would produce substantial deficits was well known").

Applying this standard to the case before us, we conclude that the plaintiff unions have put forward

sufficient evidence of potential reneging to require the application of "less deference" scrutiny to NIFA's wage-freeze decision. The wage freeze potentially benefited the state of New York financially, as New York had previously shown itself willing to bail out the County in other contexts. *See* No. 18-1587, Joint App'x 52. Indeed, one of the purposes of NIFA is to provide oversight that will avoid another bailout. *Id.* at 52-53. And there is some evidence that the County pushed for the wage freeze because alternative savings proposals were unpopular in the news media. *See* No. 18-1634, Joint App'x 1514, 1606-07 (describing an abandoned Memorandum of Agreement between CSEA and the County). While this latter action was taken by the County, and not NIFA, NIFA's wage-freeze decision was predicated in part on County Executive Mangano's request that it impose a wage freeze.

The plaintiffs having met their burden of showing some evidence that this law may be self-serving, we apply "less deference" scrutiny to the wage freeze decision before us. And we must, therefore, examine whether the requirements of reasonableness and necessity have been met.

b) The Wage Freeze Was Reasonable and Necessary

Applying "less deferential" scrutiny to NIFA's wage-freeze decision, we conclude that the wage freeze was a reasonable and necessary response to the County's fiscal crisis. While the plaintiffs maintain that the County's fiscal crisis existed only on paper—caused by the NIFA-mandated switch to GAAP—they have provided

no response to the fact that the County faced a GAAP-calculated 2011 budget deficit of $176 million, and even under non-GAAP accounting measures the County faced a $49 million deficit. Significantly, the NIFA Act states that NIFA "shall impose a control period" when it determines that the County would incur "a major operating funds deficit of one percent," or $27 million in 2011. NIFA Act § 3669(1). Moreover, the NIFA Act states that this one percent deficit is to be calculated "in accordance with generally accepted accounting principles," *i.e.*, GAAP. *Id.* We therefore find that NIFA was responding to a real, as opposed to paper, fiscal crisis.

i. Reasonableness

Given that NIFA was responding to a genuine crisis, numerous factors underscore the reasonableness of the 2011 wage freeze. First, while the plaintiffs often conflate the two defendant government entities involved—the County and NIFA—it is important to recognize that NIFA is an independent body, subject to some control, not by the County, but by the state of New York. And it is NIFA, not the County, which imposed the wage freeze.

Significantly, many of the alternative proposals that the plaintiffs suggest—reinstating previously planned or repealed taxes, raising fines and fees, etc.—were solely under the County's purview and outside of NIFA's control. And the plaintiffs-appellants do not argue, let alone proffer evidence, that, for purposes of the wage freeze decision, we should view NIFA and the County as one and the same, or that the County otherwise undermined

NIFA's independence. We therefore deem it appropriate to evaluate the relevant alternatives from the perspective of what NIFA had the power to accomplish, as opposed to what the County might perhaps have been able to do.

From this perspective, the wage freeze was clearly reasonable. It was prospective and "d[id] not affect past salary due for labor already rendered." *Buffalo Teachers*, 464 F.3d at 372. It lasted for one year only, and so was of limited duration. *See Blaisdell*, 290 U.S. at 447 (noting that the temporary nature of an impairment suggested its reasonableness).

It also came on the heels of, and simultaneously with, the imposition by the County of drastic cuts to the County's labor force. Before the wage freeze went into effect, the County had reduced employee headcount by 400 through an early retirement program. And in its 2011 budget, the County proposed to cut an additional 213 positions through layoffs and department closures, as well as to require 13 days of unpaid furlough for County employees.

These were, of course, County actions. But NIFA recognized that without a temporary wage freeze, the County would have to take further steps along these lines, and those steps represented "a more drastic alternative" than the temporary wage freeze. No. 18-1606, Joint App'x 286-87. After reviewing the County's proposed 2011 budget, NIFA reasonably concluded that the broader public interest would be served by obtaining savings from a wage freeze instead of through what appeared to be the County's only other remaining options: draconic additional cuts to the County's labor force or unpaid furloughs.

While the plaintiff police unions had protection from layoffs, much of the County's workforce did not. Any layoffs were therefore almost certain to be concentrated among non-police personnel. As NIFA recognized, the County's broader workforce was thus likely to prefer preserving jobs and avoiding unpaid leave to receiving an incremental wage increase. And the County's residents would also benefit because layoffs and furloughs would lead to a decrease in services, while a wage freeze would not. Under the circumstances, NIFA's decision was eminently reasonable.

ii. Necessity

Many of these reasons also support a finding that the wage freeze was necessary. NIFA had no other discernible options to improve the County's fiscal state. As we previously noted, NIFA had no power to force the County to raise taxes. And there is no evidence to suggest that the state—NIFA's superior—was in a position to raise taxes either. To the extent the state's financial health is mentioned in the record, the evidence suggests that it too was in a financial crunch. (Indeed, the governor in 2011 planned to freeze *state employees*' wages!) Additionally, "even if the state could have raised its taxes, [there was no reason to believe] any monies so raised would flow to [the County]." *Buffalo Teachers*, 464 F.3d at 372.

While the plaintiffs-appellants argue that NIFA should have commissioned a report auditing the County's finances prior to imposing the wage freeze, we do not see why NIFA should have delayed taking action until this

was done. And, in fact, shortly after imposing the wage freeze, NIFA commissioned just such a report (the Grant Thornton Report), though it had no power to force the County to take any of the report's suggestions.

The plaintiffs' argument that NIFA should have refinanced its debt at lower interest rates prior to the wage freeze is similarly unavailing. Waiting to refinance actually allowed NIFA to achieve greater savings.

Time has, moreover, proven NIFA's belief about the necessity of the wage freeze to have been correct. Even after the Grant Thornton Report, the 2011 wage freeze, increasing fines and fees, and a 1,000-headcount reduction in County employees since 2010, the County was unable to put forward a balanced budget. The County's multi-year financial plan, set to begin in fiscal year 2012, did not purport to achieve balance until 2015.

* * *

In view of these facts, we readily conclude that NIFA's actions in imposing the 2011 wage freeze were both reasonable and necessary and comfortably meet the standard of "less deference" scrutiny. *See Buffalo Teachers*, 464 F.3d at 372. In reaching this conclusion, we emphasize that "[w]hether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned." *Blaisdell*, 290 U.S. at 447-48. Our job is simply to determine whether the wage freeze was imposed in order to renege on a contract (to get out of a bad deal) or as a governmental action intended to serve the public good, as the government saw it.

Appendix A

CONCLUSION

We **AFFIRM** the District Court's April 27, 2018 judgment granting summary judgment to the defendants-appellees as well as the District Court's August 8, 2018 decision denying reconsideration of that summary judgment decision.

Appendix A

MICHAEL H. PARK, *Circuit Judge*, concurring in part and concurring in the judgment:

I concur in the judgment and join in Sections B(b) and C(b) of the Court's opinion, which are all that is necessary to decide this case. I write separately to note that most of the discussion in the other sections is dicta. That is because (1) we assume without deciding that NIFA's action was legislative rather than administrative, Maj. Op. at 17, and (2) it does not matter what level of deference should be given to Defendants because the wage freeze was clearly reasonable and necessary, *id.* at 30. At bottom, our holding today is a straightforward application of *Buffalo Teachers Federation v. Tobe*, 464 F.3d 362 (2d Cir. 2006), which recognized that no analysis of "levels of deference" is needed when a wage freeze is reasonable and necessary. *See id.* at 370 ("For the purposes of this appeal, we need not resolve what level of deference to apply. Instead, we will assume that the lower level of deference applies because . . . the wage freeze is reasonable and necessary even under the less deferential standard."). The majority's musings, then, about the hallmarks of legislative versus administrative action, Maj. Op. at 12-17; the types of evidence that might show government self-interest, *id.* at 23-26; and the meaning of "less deference," *id.* at 22-23, are all dicta and unnecessary. Thus, I respectfully decline to join those sections of the majority's opinion.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED AUGUST 8, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

11-CV-1614(JS)(GRB)

JAMES CARVER, AS PRESIDENT OF THE NASSAU COUNTY POLICE BENEVOLENT ASSOCIATION, GARY LEARNED, AS PRESIDENT OF THE SUPERIOR OFFICERS ASSOCIATION OF NASSAU COUNTY, AND THOMAS R. WILLDIGG, AS PRESIDENT OF THE NASSAU COUNTY POLICE DEPARTMENT DETECTIVES' ASSOCIATION, INC.,

Plaintiffs,

- against -

NASSAU COUNTY INTERIM FINANCE AUTHORITY, RONALD A. STACK, LEONARD D. STEINMAN, ROBERT A. WILD, CHRISTOPHER P. WRIGHT, GEORGE J. MARLIN, THOMAS W. STOKES, IN THEIR OFFICIAL CAPACITIES AS DIRECTORS/MEMBERS OF THE NASSAU COUNTY INTERIM FINANCE AUTHORITY; EDWARD MANGANO, IN HIS OFFICIAL CAPACITY AS COUNTY EXECUTIVE OF NASSAU COUNTY; COUNTY OF NASSAU; AND GEORGE MARAGOS, IN HIS OFFICIAL CAPACITY AS NASSAU COUNTY COMPTROLLER,

Defendants.

Appendix B

11-CV-1900(JS)(GRB)

JERRY LARICCHIUTA, AS LOCAL PRESIDENT OF CSEA NASSAU COUNTY LOCAL 830; DANNY DONOHUE, AS PRESIDENT OF THE CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCMA, AFL-CIO; AND CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Plaintiffs,

-against-

NASSAU COUNTY INTERIM FINANCE AUTHORITY; RONALD A. STACK, AS CHAIRMAN AND DIRECTOR OF THE NASSAU COUNTY INTERIM FINANCE AUTHORITY; GEORGE J. MARLIN, LEONARD D. STEINMAN, THOMAS W. STOKES, ROBERT A. WILD AND CHRISTOPHER P. WRIGHT, AS DIRECTORS OF THE NASSAU COUNTY INTERIM FINANCE AUTHORITY; EDWARD MANGANO, IN HIS OFFICIAL CAPACITY AS COUNTY EXECUTIVE OF NASSAU COUNTY; AND GEORGE MARAGOS, IN HIS OFFICIAL CAPACITY AS NASSAU COUNTY COMPTROLLER; AND THE COUNTY OF NASSAU,

Defendants.

Appendix B

11-CV-2743(JS)(GRB)

BRIAN SULLIVAN,[1] AS PRESIDENT OF THE NASSAU COUNTY SHERIFF'S CORRECTION OFFICERS BENEVOLENT ASSOCIATION, INC., AND NASSAU COUNTY SHERIFF'S CORRECTION OFFICERS BENEVOLENT ASSOCIATION, INC.,

Plaintiffs,

-against-

NASSAU COUNTY INTERIM FINANCE AUTHORITY; RONALD A. STACK, AS CHAIRMAN AND DIRECTOR OF THE NASSAU COUNTY INTERIM FINANCE AUTHORITY; GEORGE J. MARLIN, LEONARD D. STEINMAN, THOMAS W. STOKES, ROBERT A. WILD AND CHRISTOPHER P. WRIGHT, AS DIRECTORS OF THE NASSAU COUNTY INTERIM FINANCE AUTHORITY; EDWARD MANGANO, IN HIS OFFICIAL CAPACITY AS COUNTY EXECUTIVE OF NASSAU COUNTY; AND GEORGE MARAGOS, IN HIS OFFICIAL CAPACITY AS NASSAU COUNTY COMPTROLLER; AND THE COUNTY OF NASSAU,

Defendants.

1. John Jaronczyk no longer holds the office of President of the union and Plaintiffs in this case ask that the caption be amended to reflect the name of the new President, Brian Sullivan. That request is GRANTED.

Appendix B

MEMORANDUM AND ORDER

SEYBERT, District Judge:

On April 26, 2018, this Court granted Defendants' motions for summary judgment and denied Plaintiffs' motions for summary judgment. Presently before the Court are motions for reconsideration filed by Plaintiffs in each case. For the reasons set forth below, those motions are DENIED.

BACKGROUND

The Court assumes familiarity with the facts and procedural history of these cases, which are set forth in detail in the Court's April 26, 2018 Order (the "April 2018 Order"). *See Carver* action, Docket Entry 132; *Donohue* action, Docket Entry 75; *Sullivan* action, Docket Entry 89. In brief, the Court ruled that a wage freeze ordered by Defendant Nassau County Interim Finance Authority ("NIFA") was an administrative act, not legislative, and thus was not a law within the meaning of the Contracts Clause of the United States Constitution.

Plaintiffs in all three cases have moved for reconsideration of the April 2018 Order. Defendants oppose the motions.[2] There is significant overlap in the arguments presented by all Plaintiffs. Their arguments

2. The NIFA Defendants did not submit their own papers in opposition, but submitted a letter indicating that they join with the arguments made by the County Defendants in their papers.

can be distilled to the following contentions: (1) the Court misapplied or misinterpreted the case *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362 (2d Cir. 2006); (2) the Court erroneously found that NIFA's action did not constitute a law within the meaning of the Contracts Clause; (3) the Court's decision removed the only avenue for constitutional review of a state action; and (4) there was an intervening change of controlling law.

DISCUSSION

I. Legal Standards

"A motion for reconsideration should only be granted when the [movant] identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013) (internal quotation marks and citation omitted). A motion for reconsideration is appropriate when the moving party believes that the Court overlooked important "'matters or controlling decisions'" that would have influenced the prior decision. *Shamis v. Ambassador Factors Corp.*, 187 F.R.D. 148, 151 (S.D.N.Y. 1999) (*quoting* Local Civil Rule 6.3).

The standard for granting reconsideration is "strict" and generally will be denied "'unless the moving party can point to controlling decisions or data that the court overlooked--matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.'" *Meyer v. Kalanick*, 185 F. Supp. 3d 448, 451-52 (S.D.N.Y.

2016) (*quoting Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)). Reconsideration is not, however, a proper tool to repackage arguments and issues already considered by the Court in deciding the original motion. *United States v. Gross*, No. 98-CR-0159, 2002 U.S. Dist. LEXIS 28159, 2002 WL 32096592, at *4 (E.D.N.Y. Dec. 5, 2002) ("A party may not use a motion to reconsider as an opportunity to reargue the same points raised previously."). Nor is it proper to raise new arguments and issues. *Lehmuller v. Inc. Vill. of Sag Harbor*, 982 F. Supp. 132, 135 (E.D.N.Y. 1997) (collecting cases).

II. The Pending Motions

Upon review of Plaintiffs' submissions, the Court finds that they have failed to meet their burden. The first three arguments concern the Court's interpretation of *Buffalo Teachers'*, the finding that NIFA acted administratively, and the availability of court review. All these issues were raised previously and addressed by the Court in the April 2018 Order. Plaintiffs are attempting to rehash the same arguments that this Court decided previously, or focus on points they belatedly feel that they may not have emphasized sufficiently in an attempt to support arguments already rejected. They have not raised any arguments warranting reconsideration of those determinations.

Plaintiffs' final argument concerns the impact of a recent case by the New York Court of Appeals that was decided after briefing in these three cases was completed, but before the April 2018 Order was issued. *See In re*

World Trade Ctr. Lower Manhattan Disaster Site Litig., 30 N.Y.3d 377, 89 N.E.3d 1227, 67 N.Y.S.3d 547 (2017). Although Plaintiffs did not seek to supplement their briefing when this decision was issued, they now argue that this case presents an intervening change in controlling law that mandates a different result in these cases. The Court disagrees.

In the *World Trade Center* case, the New York Court of Appeals addressed a question certified by the Second Circuit--whether a public benefit corporation should be treated like the State for purposes of the capacity to challenge the constitutionality of a state statute. *World Trade Center*, 30 N.Y.3d at 383. This issue is not present here, and thus the holding on the issue does not represent an intervening change in controlling law affecting the cases before this Court. The language in the *World Trade Center* case cited by Plaintiffs is the court's general discussion of the nature of public corporations and derives from earlier sources. *See id.* at 387-90. As Defendants note, the Plaintiffs previously cited that language in its earlier submissions. Accordingly, reliance on the *World Trade Center* decision is simply another attempt to repackage arguments from the prior, unsuccessful motions.

CONCLUSION

For the foregoing reasons, the following motions for reconsideration are DENIED: *Carver* action, Docket Entry 135; *Donohue* action, Docket Entry 77; *Sullivan* action, Docket Entry 91.

Appendix B

In case number 11-CV-2743, the Clerk of the Court is directed to amend the caption to replace John Jaronczyk with Brian Sullivan as outlined in footnote 1.

SO ORDERED

/s/ JOANNA SEYBERT
JOANNA SEYBERT, U.S.D.J.

Dated: August 8, 2018
Central Islip, New York

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED APRIL 26, 2018

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

11-CV-1614(JS)(GRB); 11-CV-1900(JS)(GRB); 11-CV-2743(JS)(GRB)

JAMES CARVER, AS PRESIDENT OF THE NASSAU COUNTY POLICE BENEVOLENT ASSOCIATION, GARY LEARNED, AS PRESIDENT OF THE SUPERIOR OFFICERS ASSOCIATION OF NASSAU COUNTY, AND THOMAS R. WILLDIGG, AS PRESIDENT OF THE NASSAU COUNTY POLICE DEPARTMENT DETECTIVES' ASSOCIATION, INC.,

Plaintiffs,

-against-

NASSAU COUNTY INTERIM FINANCE AUTHORITY, RONALD A. STACK, LEONARD D. STEINMAN, ROBERT A. WILD, CHRISTOPHER P. WRIGHT, GEORGE J. MARLIN, THOMAS W. STOKES, IN THEIR OFFICIAL CAPACITIES AS DIRECTORS/ MEMBERS OF THE NASSAU COUNTY INTERIM FINANCE AUTHORITY; EDWARD MANGANO, IN HIS OFFICIAL CAPACITY AS COUNTY EXECUTIVE OF NASSAU COUNTY; COUNTY OF NASSAU, AND GEORGE

Appendix C

MARAGOS, IN HIS OFFICIAL CAPACITY AS NASSAU COUNTY COMPTROLLER,

Defendants.

DANNY DONOHUE, AS PRESIDENT OF THE CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCMA, AFL-CIO, JERRY LARICCHIUTA, AS LOCAL PRESIDENT OF CSEA NASSAU COUNTY LOCAL 830, AND CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Plaintiffs,

-against-

NASSAU COUNTY INTERIM FINANCE AUTHORITY; RONALD A. STACK, AS CHAIRMAN AND DIRECTOR OF THE NASSAU COUNTY INTERIM FINANCE AUTHORITY; GEORGE J. MARLIN, LEONARD D. STEINMAN, THOMAS W. STOKES, ROBERT A. WILD AND CHRISTOPHER P. WRIGHT, AS DIRECTORS OF THE NASSAU COUNTY INTERIM FINANCE AUTHORITY; EDWARD MANGANO, IN HIS OFFICIAL CAPACITY AS COUNTY EXECUTIVE OF NASSAU COUNTY; AND GEORGE MARAGOS, IN HIS OFFICIAL CAPACITY AS NASSAU COUNTY COMPTROLLER, AND COUNTY OF NASSAU,

Defendants.

Appendix C

JOHN JARONCZYK, AS PRESIDENT OF THE NASSAU COUNTY SHERIFF'S CORRECTION OFFICERS BENEVOLENT ASSOCIATION, INC., AND NASSAU COUNTY SHERIFF'S CORRECTION OFFICERS BENEVLOENT ASSOCIATION, INC.,

Plaintiffs,

-against-

NASSAU COUNTY INTERIM FINANCE AUTHORITY; RONALD A. STACK, AS CHAIRMAN AND DIRECTOR OF THE NASSAU COUNTY INTERIM FINANCE AUTHORITY; GEORGE J. MARLIN, LEONARD D. STEINMAN, THOMAS W. STOKES, ROBERT A. WILD AND CHRISTOPHER P. WRIGHT, AS DIRECTORS OF THE NASSAU COUNTY INTERIM FINANCE AUTHORITY; EDWARD MANGANO, IN HIS OFFICIAL CAPACITY AS COUNTY EXECUTIVE OF NASSAU COUNTY; AND GEORGE MARAGOS, IN HIS OFFICIAL CAPACITY AS NASSAU COUNTY COMPTROLLER, AND THE COUNTY OF NASSAU,

Defendants.

April 26, 2018, Decided;
April 26, 2018, Filed

Appendix C

MEMORANDUM AND ORDER

SEYBERT, District Judge[1]:

The Plaintiffs in these cases are several employees' unions.[2] They commenced these cases against Nassau County Interim Finance Authority ("NIFA") and its Directors Ronald A. Stack, Leonard D. Steinman, Robert A. Wild, Christopher P. Wright, George J. Marlin, Thomas W. Stokes (collectively, the "NIFA Defendants") and Nassau County, County Executive Edward Mangano, and County Controller George Maragos (collectively, the "County Defendants") alleging that a wage freeze ordered by NIFA impaired collective bargaining agreements and/or interest arbitration awards in violation of the Contracts Clause of the United States Constitution. Currently before the Court are motions for summary judgment brought by Plaintiffs, and cross-motions for summary judgment brought by the NIFA Defendants and the County Defendants in each action. For the reasons set forth below,

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1. These matters were re-assigned to the undersigned effective April 9, 2018.

2. The Plaintiffs in 11-CV-1614 (the "*Carver*" case) are the Nassau County Police Benevolent Association ("PBA"), the Superior Officers Association of Nassau County ("SOA"), the Nassau County Police Department Detectives' Association, Inc. ("DAI"), and their Presidents (collectively the "PBA Plaintiffs"). The Plaintiffs in 11-CV-1900 (the "*Donohue*" case) are Civil Service Employees' Association units and their Presidents (collectively, the "CSEA Plaintiffs"). The Plaintiffs in 11-CV-2743 (the "*Jaronczyk*" case) are the Nassau County Sheriff's Correction Officers Benevolent Association ("COBA") and its President (collectively, the "COBA Plaintiffs").

Plaintiffs' motions are denied, and the Defendants' cross-motions are granted.

BACKGROUND

I. Factual History

The facts are taken from the parties' Rule 56.1 Statements and supporting documents, and are undisputed unless stated otherwise.

A. The Parties

The individual plaintiffs in all three cases are named in their capacities as presidents or former presidents of their respective unions. The Plaintiff unions are each recognized as the exclusive bargaining representative for that organization: the PBA represents the County's uniformed police officers; the SOA represents the superior officers of the County police departments; the DAI represents detectives employed by the County; the CSEA represents County employees; and COBA[3] represents corrections officers and investigators at the County.

NIFA is a corporate governmental agency and instrumentality of New York State that was created in 2000 by passage of the Nassau County Interim Finance

3. The name of the union in the *Jaronczyk* case is listed as COBA for some unspecified time period and also as the Nassau County Sheriff's Officers Association ("SHOA"). The parties seem to use the COBA and SHOA labels interchangeably. The Court will use COBA to refer to these plaintiffs.

Authority Act ("NIFA Act"). The individual NIFA defendants are named in their official capacities as Directors of NIFA. Beginning January 1, 2010, Defendant Mangano was the County Executive for Nassau County, and Defendant Maragos was the County Comptroller.

B. Passage of the NIFA Act

In the face of the County's dire fiscal condition, the state legislature in June 2000 passed the NIFA Act, which was intended to assist the County to become fiscally stable and to reform its financial practices. N.Y. Pub. Auth. Law § 3650 *et seq.* Through NIFA, the State provided over $105 million in bailout funds, and NIFA issued over $2 billion in bonds for the County's benefit. In return, the County's finances are subjected to oversight until the debt is retired.

The NIFA Act established three periods of oversight: an initial interim finance period, followed by a monitoring and review period, and under certain conditions, a control period. NIFA is authorized to impose a control period at any time that enumerated events occurred or "a substantial likelihood and imminence of such occurrence" existed. N.Y. Pub. Auth. Law § 3669(1). One such enumerated event is that the County "shall have incurred a major operating funds deficit of one percent or more in the aggregate results of operations of such funds during its fiscal year assuming all revenues and expenditures are reported in accordance with generally accepted accounting principles." *Id.* NIFA terminates a control period "when it determines that none of the conditions which would permit the authority to impose a

control period exist." *Id.* One of the authorities granted to NIFA during a control period is the power to declare a fiscal crisis and impose a wage freeze upon a finding that such a freeze "is essential to the adoption or maintenance of a county budget or a financial plan." *Id.*

The initial interim period of oversight ended in 2008. NIFA began monitoring and review in 2009.

C. Agreements and Interest Arbitration Awards

The Plaintiff unions have entered into various collective bargaining agreements ("CBAs") with the County throughout the years. The agreements discussed below are those relevant to the issues in this case.

The CSEA and the County have been parties to numerous CBAs, including one with a term of January 1, 2003 to December 31, 2007. The parties had difficulty negotiating a successor agreement and ultimately agreed to interest arbitration to resolve their issue. On December 11, 2008, the interest arbitration panel issued an award covering the period of January 1, 2008 to December 31, 2015 (the "CSEA Award"). In 2009 and 2010, the County and the CSEA entered into supplemental agreements providing for voluntary separation incentives, payroll lags, and retirement incentives.

The County's agreements with the three police unions, the PBA, DAI, and COBA, also went before interest arbitration panels. Each of these unions also agreed to re-open its contracts and extend the term in exchange for

union concessions. As to the PBA, an interest arbitration panel issued an award in 2007 for the term of January 1, 2007 to December 31, 2012, which was then extended by agreement through December 31, 2015. An interest arbitration panel in 2008 issued an award regarding the County's agreement with the DAI covering the period of January 1, 2007 to December 31, 2012, which was subsequently extended through December 31, 2015. In 2009, an interest arbitration panel issued a contract for SOA covering the years 2008 through 2013, and that term was also extended through December 31, 2015 by subsequent agreement in 2009.

COBA and the County were parties to a CBA dated in March 2008 that covered the period from January 1, 2005 through December 31, 2012. A second agreement expired on December 31, 2015. Both agreements included, *inter alia*, wage increases, longevity payments, and increment wage increases.

D. New County Administration

Mangano, who ran for office on an anti-tax platform, became County Executive on January 1, 2010. On his first day in office, Mangano authorized the repeal of the Home Energy Fuel Tax, a tax on residential energy use. That tax produced revenue of approximately $20 million in 2010, and had projected annual revenue of $40 million in subsequent years. The County notes that the loss of revenue from the repeal may have been offset by other gains such as an increase in sales tax revenue. Also upon Mangano's inauguration, the County did not move forward

with a planned cigarette tax and did not implement a scheduled property tax increase.

In September 2010, the County presented a multi-year financial plan. In September 2010, NIFA issued a Preliminary Staff Review of the Proposed Multi-Year Financial Plan Fiscal 2011-2014 for its Directors. (*Donohue*, Declaration of Aaron E. Kaplan ("Kaplan Decl."), Ex. 14 ("Review"), Docket Entry 65-6.) The Review expressed concerns regarding the County's proposed plan, noting that it "relies on significant State approvals, numerous revenue actions, passage of ordinances by the County Legislature, extraordinary levels of unacceptable borrowing for operating expenses, and most importantly labor concessions that have not been secured. Each of these factors must be viewed as having a high degree of risk." (*Id.*, Overview at 1.) The Review, noting that the County Legislature was still deliberating and labor negotiations continued, ultimately recommended that the Directors postpone commenting on the proposed budget until more conclusive information was available. (*Id.*, Conclusion at 8.)

NIFA also established two changes to how it analyzed the County's fiscal health. Prior to September 2010, NIFA had allowed the County to use budgetary accounting procedures that were not in accordance with Generally Accepted Accounting Procedure ("GAAP"). In September 2010, NIFA changed to the GAAP method with the result that some revenues were reclassified to not count as revenues, leading to an increase in budget deficits. The County maintained that this created a "paper deficit" and

that its traditional budget making process was acceptable. Furthermore, NIFA had also previously permitted the County to borrow money to pay property tax certiorari judgments to residents. In 2010, NIFA prohibited this practice, resulting in an increase to the deficit.

On October 30, 2010, the County Legislature passed the FY 2011 budget including items previously found to be at risk by NIFA. Documents submitted show that during the fall of 2010 until January 2011, exchanges took place between the County and NIFA regarding the latter's concerns about the FY 2011 budget and the possibility that the County faced a one-percent deficit in major operating funds. The County and NIFA discussed refinancing and restructuring the County's debt, but no action was taken. At a NIFA meeting on December 30, 2010, NIFA allowed the County an additional month to submit materials to it addressing the deficit. Over the next month, the County provided information, and the CSEA agreed to a restructured salary schedule and other cost-savings measures.

E. NIFA's Declaration of a Control Period

On January 26, 2011, NIFA issued Resolution No. 11 entitled "Declaration of a Control Period upon Finding Likelihood and Imminence of a Deficit of More Than One Percent in the County's Fiscal Year 2011 Budget." (Kaplan Decl., Ex. 36.) In the attached Determination, NIFA expressly stated that it was invoking its statutory authority to impose a control period "upon its determination at any time . . . that there exists a substantial likelihood and

imminence of . . . a major operating funds deficit of one percent or more in the aggregate results of operations of such funds during its fiscal year . . . ." (*Id.*, Determination at 5 (quoting N.Y. PUBL. AUTH. LAW § 3669(1)).) Resolution No. 11 directed the County to submit a new plan for FY 2011 by February 15, 2011. NIFA did not declare a fiscal emergency at this time.

On January 31, 2011, the County commenced a proceeding in New York State Supreme Court challenging NIFA's decision to impose a control period, arguing that NIFA lacked the authority to make that decision and alternatively, that the decision was inappropriate and unwarranted. On March 11, 2011, the state court denied the County's motion for a preliminary injunction, finding that NIFA had the authority to declare a control period. *Cty. of Nassau v. NIFA*, 33 Misc. 3d 227, 920 N.Y.S.2d 873 (Sup. Ct. 2011). The County's claim that NIFA's decision was arbitrary and capricious was not decided, and the court converted NIFA's motion to dismiss that claim to a motion for summary judgment and set a briefing schedule.

Soon after the decision denying a preliminary injunction was issued, the County asked NIFA to exercise its statutory authority to impose a wage freeze with respect to County employees, including the Union member Plaintiffs. On March 22, 2011, Mangano sent NIFA a revised plan for FY 2011 which also included the request for a wage freeze. On March 24, 2011, NIFA found that the revised plan did not present a balanced budget. Among other decisions, NIFA determined that a wage freeze was essential to the County's adoption and maintenance of a

budget for FY 2011. (NIFA Resolution No. 11-303, Kaplan Decl. Ex. 39.) NIFA went on to declare a fiscal crisis in the County and impose a wage freeze. (NIFA Resolution No. 11-304, Kaplan Decl. Ex. 39.) Resolution 11 304 ordered that "all increases in salary or wages of employees of the County, which will take effect after the date of this order pursuant to collective bargaining agreements, other analogous contracts, or interest arbitration awards, now in existence or hereafter entered into, requiring such salary increases as of any date thereafter are suspended." (*Id.*) It further suspended increased payments for holiday and vacation differentials, shift differentials, and step-ups. The duration of the wage freeze was for one year.[4]

On March 29, 2011, the County announced it was abandoning its state court proceeding against NIFA. The Plaintiffs commenced these actions shortly thereafter, arguing that there were other options, including raising taxes and cost-savings measures, that were available to the County and that defendants should have pursued those other options before implementing a wage freeze against the unionized workers.

II. Procedural History

The *Carver* case was filed on April 1, 2011, and the *Donohue* and *Jaronczyk* cases followed on April 18, 2011 and June 7, 2011, respectively. Plaintiffs in all three cases asserted a claim under the contracts clause of the United

4. On March 22, 2012, NIFA determined that the fiscal crisis still existed and continued the wage freeze for another year.

States Constitution. In addition, Plaintiffs in *Donohue* and *Jaronczyk* asserted a due process claim arising when their property rights were affected without notice or an opportunity to be heard in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. The *Donohue* and *Jaronczyk* complaints also included state law claims of violations of New York Public Authorities Law § 3669(3)(b) and of Article 5, § 7 of the New York State Constitution.[5]

The cases as originally commenced also contained a claim that NIFA's authority to impose a wage freeze was limited to the interim finance period. By Memorandum and Order dated February 14, 2013, District Judge Leonard D. Wexler granted summary judgment for Plaintiffs in the *Carver* action on the lone ground that NIFA's imposition of the wage freeze exceeded its authority under the NIFA Act. *Carver v. NIFA*, 923 F. Supp. 2d 423 (E.D.N.Y. 2013). The federal contracts clause claim was not addressed. The *Donohue* and *Jaronczyk* cases and motion practice were held in abeyance pending a decision on the appeal of the *Carver* decision.

On appeal, the Second Circuit vacated Judge Wexler's decision, determining that the case presented an unresolved question of state law that was more properly addressed by the state court. *Carver v. NIFA*, 730 F.3d 150 (2d Cir. 2013). It remanded the case with directions to

5. In light of the state court ruling, Plaintiffs in *Donohue* and *Jaronczyk* requested, with defendants' consent, that their original complaints be considered the operative pleadings. That request was granted. (*See* Minute Order of Feb. 14, 2017.)

dismiss the state law claim, but retain jurisdiction over the federal claim. On remand, Judge Wexler stayed the federal action pending completion of state court proceedings commenced in Nassau County. *See Carver*, 11-CV-1614, Docket Entry 105.

All the Plaintiffs commenced actions in state court regarding NIFA's wage freeze authority. The New York State Supreme Court determined that NIFA had the statutory authority to impose the wage freezes during a control period, and the Appellate Division affirmed that determination. *See Carver v. NIFA*, 142 A.D.3d 1003, 1008, 38 N.Y.S.3d 197 (App. Div. 2d Dep't), *leave to appeal denied*, 28 N.Y.3d 911, 69 N.E.3d 1022, 47 N.Y.S. 2d 226 (2016) (Table). The state cases having concluded, the parties in all three cases requested that the federal actions be reopened and the federal constitutional claim resolved. In light of the passage of time and intervening decisions, Judge Wexler directed that the motions and cross-motions be re-briefed. Those re-filed motions are currently before the Court.

The briefing is entirely focused upon Plaintiffs' claims of violations of the contracts clause in which they argue that the wage freeze acted to impair agreements between the unions and Nassau County. The lone federal cause of action remaining in the *Carver* action is the contracts clause claim as it appears that the state claims were resolved in the state court action. On April 12, 2018, the Plaintiffs in *Donohue* and *Jaronczyk* were directed to advise the Court as to whether they intended to pursue any claims from their original complaints in addition to

the contracts clause claims. Counsel in both cases have advised the Court that the sole claim remaining is the contracts clause claim, and that they do not intend to pursue any other claim. (*See Donohue*, Docket Entry 74; *Jaronczyk*, Docket Entry 88.)

DISCUSSION

I. Legal Standards

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 106 L. Ed. 2d 202 (1986). In determining a motion for summary judgment, the court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences favor of that party, and to eschew credibility assessments." *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 122 (2d Cir. 2004). After the moving party has met its burden, the opposing party "'must do more than simply show that there is some metaphysical doubt as to the material facts. . . . [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial.'" *Caldarola v. Calabrese*, 298 F.3d 156, 160 (2d Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

II. Contracts Clause Claims

The contracts clause provides, in pertinent part, that "no state shall . . . pass any . . . Law impairing the Obligation of Contracts. . ." U.S. CONST., ART. I, § 10, cl. 1. Although the language appears mandatory and absolute, courts have acknowledged that some impairment is Constitutionally-permissible. *See, e.g., Condell v. Bress*, 983 F.2d 415, 417 (2d Cir. 1993). The state may, in an exercise of its police power, abridge a contract when that impairment is "reasonable and necessary to serve an important public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977). To determine whether a law impermissibly impairs a contract, a court considers whether the impairment is substantial, whether the law serves a legitimate public purpose, and if so, "are the means chosen to accomplish this purpose reasonable and necessary." *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006).

It is clear, however, that the contracts clause "prohibits the impairment by the state of *existing* contracts" but does not apply to contracts created after the allegedly-offensive law was enacted. *Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109, 124 (2d Cir. 2004) (emphasis in original); *see also Kinney v. Conn. Judicial Dep't*, 974 F.2d 313, 315 (2d Cir. 1992) ("of course, the offending statute necessarily must be enacted after the contract in question has come into effect"). The sequence of the timing of the union contracts and the legislation raises a threshold question in this case. The NIFA Act was passed by the state legislature in June 2000, the agreements and/or interest arbitration awards affected by the wage freeze were entered into on

various dates between 2007 and 2010, and NIFA declared a fiscal crisis and imposed a wage freeze on March 24, 2011. Defendants argue that the relevant offending statute was the NIFA Act and thus there is no contracts claim as to the subsequent agreements; Plaintiffs argue that the wage freeze decision was the "law" and that the impaired agreements were entered into prior to that ruling. The Court must first determine whether the legislative act from which Plaintiffs' claims arise was the passage of the NIFA Act by the state legislature or the imposition of the wage freeze by NIFA.

A. The NIFA Act and Formation of NIFA

In June 2000, the New York State legislature created NIFA "in response to the growing financial crisis facing Nassau County." *Carver*, 730 F.3d 150, 152 (2d Cir. 2013); *see* NIFA Act, N.Y. Pub. Auth. Law § 3650 *et seq.* NIFA was created as a "corporate governmental agency and instrumentality of the state constituting a public benefit corporation." N.Y. Pub. Auth. Law § 3652 (1). A public benefit corporation "is a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof." N.Y. Gen. Constr. Law § 66. The NIFA Act indicated that "the creation of the authority and the carrying out of its corporate purposes are in all respects for the benefit of the people of the state of New York and are public purposes." N.Y. Pub. Auth. Law § 3661.

The NIFA Act authorizes NIFA to impose a "control period" in the event of various occurrences including

a major operating funds deficit. N.Y. Pub. Auth. Law § 3669. During a control period, NIFA is authorized to declare a fiscal crisis, and thereafter, a wage freeze. Specifically, NIFA "shall be empowered to order that all increases in salary or wages of employees of the county and employees of covered organizations which will take effect after the date of the order pursuant to collective bargaining agreements, other analogous contracts or interest arbitration awards, now in existence or hereafter entered into, requiring such salary increases as of any date thereafter are suspended." N.Y. Pub. Auth. Law § 3669.

B. Analysis of NIFA's wage freeze

The contracts clause's prohibition "is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals." *New Orleans Water-Works Co. v. La. Sugar Refining Co.*, 125 U.S. 18, 30, 8 S. Ct. 741, 31 L. Ed. 2d 607 (1888). "Any enactment, such as a by-law or ordinance of a municipal corporation, to which a state gives the force of law, is a statute of the state within the meaning of the Contract Clause." *Montauk Bus Co. v. Utica City Sch. Dist.*, 30 F. Supp. 2d 313, 319 (N.D.N.Y. 1998) (citing *New Orleans Water-Works*, 125 U.S. at 31). Thus, the Court must determine whether NIFA was acting legislatively or administratively when it imposed the wage freeze.

There is nothing in the record to indicate that NIFA is itself a legislative body. *See Schulz v. Kellner*, No.

07-CV-0943, 2011 U.S. Dist. LEXIS 73088, 2011 WL 2669456, at *9 (N.D.N.Y. July 7, 2011) (no contracts clause claim because Defendant-Commissioners of NY Board of Elections "are not legislative bodies and therefore are not proper parties in an action pursuant to the Contracts Clause"). Further, the imposition of the wage freeze does not appear to be a legislative act. NIFA did not hold hearings, promulgate a law or ordinance, or create new legal standards when it acted. *See generally Matter of Alca Indus. v. Delaney*, 92 N.Y.2d 775, 778, 709 N.E.2d 97, 686 N.Y.S.2d 356 (1999) (distinguishing decisions based on individual circumstances from creation of a rule that "implement[s] a standard or procedure that directs what action should be taken regardless of individual circumstances"). Instead, it exercised statutory authority given to it by the state legislature under the NIFA Act. Put in other words, the State exercised its authority in passing the NIFA Act, and NIFA's imposition of the wage freeze was not a separate legislative action, but only an application of previously created law. As such, NIFA's actions are administrative in nature. *See, e.g., Waltz v. Bd. of Ed. of Hoosick Falls Cent. Sch. Dist.*, No. 12-CV-0507, 2013 U.S. Dist. LEXIS 129089, 2013 WL 4811958, at *8 (N.D.N.Y. Sept. 10, 2013) (school board act approving CBA after a vote not a legislative act under the contracts clause); *Chaffer v. Bd. of Ed. of City Sch. Dist.*, 229 F. Supp. 2d 185, 191 (E.D.N.Y. 2002) (school board's decision to terminate an employment contract not a legislative act); *Jamaica Ash & Rubbish Removal Co. v. Ferguson*, 85 F. Supp. 2d 174, 183-84 (E.D.N.Y. 2000) (act taken by Trade Waste Commission was "nothing more than an administrative act, carried out by a commission authorized and created by New York City law").

Appendix C

In declaring a fiscal crisis and imposing the wage freeze, NIFA did not create a "new rule," but merely exercised authority delegated to it by the legislature in 2000. Such an exercise does not fall within the contract clause's prohibition. *See Tocci Bros., Inc. v. City of N.Y.*, No. 00-CV-0206, 2000 U.S. Dist. LEXIS 10948, 2000 WL 1134367, at *9 (E.D.N.Y. Aug. 3, 2000) (administrative acts taken pursuant to legislative authority do not implicate the contracts clause or else "every administrative action would become subject to the Contracts Clause, a result clearly prohibited by controlling precedent."); *W. 95 Hous. Corp. v. N.Y. City Dep't of Hous. Pres. & Dev.*, No. 01-CV-1345, 2001 U.S. Dist. LEXIS 7784, 2001 WL 664628, at *8 (S.D.N.Y. June 12, 2001), *aff'd*, 31 F. App'x 19 (2d Cir. 2002) (City agency's interpretation of regulations was not an act of legislation and thus could not form the basis of a contract clause claim); *Jamaica Ash*, 85 F. Supp. 2d at 183 (granting of license by a commission bore "none of the hallmarks of a legislative act; it was an application of the law, not the creation of a law"). The NIFA Act itself acknowledges that the state legislature was conferring NIFA with specific powers by stating that NIFA would perform "an essential governmental function in the *exercise of the powers* conferred upon it by this title," not the creation of such powers. N.Y. Pub. Auth. Law § 3661 (emphasis supplied). The wage freeze authority is one of those powers expressly granted by the state. *See also Carver*, 142 A.D.3d at 1008 ("the legislature clearly and unequivocally conferred wage freeze authority upon NIFA during control periods").

Appendix C

The Buffalo Teachers case addressed a similar situation regarding the actions of a state-created fiscal board. There, the state legislature, to address a severe fiscal crisis in the city of Buffalo, passed the Buffalo Fiscal Stability Authority Act (the "BFSA Act"), which created the Buffalo Fiscal Authority ("BFA") and gave it various authority including, *inter alia*, the power to impose a wage and/or hiring freeze. *Buffalo Teachers*, 464 F.3d at 366. Within months of its establishment, the BFA imposed a wage freeze. Unlike the cases currently before this Court, however, the BFA's wage freeze impacted union contracts that had been negotiated and executed *before* the state legislature had passed the legislation that created the BFA. As the contracts at issue existed before both the BFSA Act and the wage freeze by the BFA, the Second Circuit was not called upon to directly address whether the BFA's wage freeze was a separate legislative act. In dicta, however, the Second Circuit clearly treated the BFSA Act as the legislation that impaired the pre-existing contracts--"[t]he New York legislature had a legitimate public purpose in passing the [BFSA] Act and its wage freeze power." *Id.* at 368. Another court addressing the BFA's actions was more direct about the administrative nature of that board's acts. *See Foley v. Masiello*, 38 A.D.3d 1201, 833 N.Y.S.2d 342 (4th Dep't 2007). Although the basis of the motion in that case was application of the appropriate statute of limitations, the court clearly stated that the BFA's "action in imposing the wage freeze was administrative rather than legislative given its individualized application, limited duration, and informal adoption, i.e., resolution by the governing body." *Id.* at 1202 (internal quotation and citations omitted).

NIFA was exercising authority granted to it by the state legislature. This exercise was administrative, not legislative, and thus cannot form the basis of a contracts clause claim. As the NIFA Act, the enabling statute, was passed into law prior to the affected union contracts, there can be no contracts claim on that basis either.[6] Accordingly, defendants' motions for summary judgment are granted, and all Plaintiffs' cross-motions are denied.

CONCLUSION

The cases and pending motions are resolved as follows:

- 11-CV-1614 *Carver* action: Plaintiffs' motion, Docket Entry 116, is DENIED; Defendants' cross-motions, Docket Entries 114 and 115, are GRANTED.

- 11-CV-1900 *Donohue* action: Plaintiffs' motion, Docket Entry 65, is DENIED; Defendants' cross-motions, Docket Entries 66 and 69, are GRANTED.

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6. Plaintiffs argue that a ruling that the contracts clause does not apply would leave them without a remedy. The wage freeze power was expressly authorized by NIFA Act. Plaintiffs could have commenced an Article 78 proceeding in state court to determine whether the exercise of that authority by NIFA in 2011 was reasonable. As Plaintiffs do not apparently challenge the constitutionality of the NIFA Act but rather only its application to its members, they had the option to challenge the wage freeze in an article 78 proceeding, which "is generally the proper vehicle to determine whether a statute, ordinance, or regulation has been applied in an unconstitutional manner." *Kovarsky v. Hous. & Dev. Admin. of City of N.Y.*, 31 N.Y.2d 184, 191, 286 N.E. 2d 882, 335 N.Y.S.2d 383 (1972).

- 11-CV-2743 *Jaronczyk* action: Plaintiffs' motion, Docket Entry 75, is DENIED; Defendants' cross-motions, Docket Entries 79 and 80, are GRANTED.

In each case, the Clerk of the Court is directed to enter judgment in favor of Defendants and against Plaintiffs and to mark the case closed.

SO ORDERED

/S/ JOANNA SEYBERT
JOANNA SEYBERT, U.S.D.J.

Dated: April 26, 2018
Central Islip, New York

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 29, 2020

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 18-1587(L), 18-1606(Con), 18-1634(Con).

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of May, two thousand twenty,

Before: Guido Calabresi,
Raymond J. Lohier, Jr.,
Michael H. Park,
Circuit Judges.

BRIAN SULLIVAN, AS PRESIDENT OF THE NASSAU COUNTY SHERIFF'S CORRECTION OFFICERS BENEVOLENT ASSOCIATION, NASSAU COUNTY SHERIFF'S CORRECTION OFFICERS BENEVOLENT ASSOCIATION, JAMES CARVER, AS PRESIDENT OF THE NASSAU COUNTY POLICE BENEVOLENT ASSOCIATION, GARY LEARNED, AS PRESIDENT OF THE SUPERIOR OFFICERS ASSOCIATION OF NASSAU COUNTY, THOMAS R. WILLDIGG, AS PRESIDENT OF THE NASSAU COUNTY POLICE DEPARTMENT DETECTIVES' ASSOCIATION, INC., JERRY LARICCHIUTA, AS LOCAL

Appendix D

PRESIDENT OF CSEA NASSAU COUNTY LOCAL 830, DANNY DONOHUE, AS PRESIDENT OF THE CIVIL SERVICE EMPLOYEES ASSOCIATION, INC. LOCAL 1000, AFSCME, AFL-CIO, CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 1000 AFSCME, AFL-CIO,

Plaintiffs-Appellants,

v.

NASSAU COUNTY INTERIM FINANCE AUTHORITY, RONALD A. STACK, AS CHAIRMAN AND DIRECTOR OF THE NASSAU COUNTY INTERIM FINANCE AUTHORITY, GEORGE J. MARLIN, LEONARD D. STEINMAN, THOMAS W. STOKES, ROBERT A. WILD, CHRISTOPHER P. WRIGHT, AS DIRECTORS OF THE NASSAU COUNTY INTERIM FINANCE AUTHORITY, EDWARD MANGANO, IN HIS OFFICIAL CAPACITY AS COUNTY EXECUTIVE OF NASSAU COUNTY, GEORGE MARAGOS, IN HIS OFFICIAL CAPACITY AS NASSAU COUNTY COMPTROLLER,

Defendants-Appellees.

ORDER

Appellants having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court