No. 21-1565

In The
Supreme Court of the United States

STATE HEALTH PLAN FOR
TEACHERS AND STATE EMPLOYEES, et al.,

Petitioners,

v.

I. BEVERLY LAKE, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of North Carolina

BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a state's highest court, in interpreting that state's own contract law, hold that a right to amend contained in enabling legislation does not bar contractual rights under the Contract Clause for retirement compensation benefits, where such benefits have already vested through employment service under applicable law?

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INTRODUCTION

In their petition for certiorari (the "Petition"), the Petitioners request this Court to overrule long-standing state law as interpreted and set by a state supreme court pertaining to benefits being purely provided by that state to its own state employees. Furthermore, their requested appeal is not jurisdictionally ripe under 28 U.S.C. § 1257 because the underlying North Carolina Supreme Court Opinion (Pet. App. 1a–59a) (the "Opinion") is interlocutory and not a final judgment on any matter of federal law as there are issues of federal constitutional law still to be determined by the state trial court on remand. In addition, there are several purely state law claims that have not yet been finally determined such that a review of the current decision would not be dispositive as to the ultimate outcome of the case.

Contrary to the statements in the Petition, there is no split of authority on the limited issues of state law as determined by the North Carolina Supreme Court. The Opinion was based on North Carolina law and is not in conflict with the opinions of other courts on the same subject matter. The claimed split of authority issue forwarded by the Petitioners is illusory as the North Carolina Supreme Court agreed with the Petitioners' argument about the right to amend and the import of statutory language. Instead, the Petitioners ask this Court to reverse decades of established state and federal law to thereafter create a new federal common law rule that would effectively supplant state contract law and the rich diversity of such law as

established by the individual states. The piecemeal review advocated by Petitioners would only delay the outcome of a case that has been pending for over ten years with a Plaintiff Class that is largely elderly and may never see the resolution of the litigation. This Court should therefore deny the petition for certiorari.

STATEMENT OF THE CASE

Plaintiffs, including several former North Carolina state appellate judges and justices, teachers, police officers, and other state retirees, brought this suit on behalf of themselves and all other similarly situated North Carolina retirees in April 2012 alleging breach of contract, unconstitutional impairment of contract, unconstitutional violation of due process and the North Carolina Constitution's Law of the Land Clause, and requested a writ of mandamus or in the alternative injunctive relief, a declaratory judgment and a constructive trust/common fund. Pet. App. 89a–100a. The trial court certified a class that includes nearly all retired state employees who were eligible to enroll in the North Carolina State Health Plan. Pet. App. 87a–88a. The class includes over 222,000 retirees or their estates. Pet. App. 2a.

In September 2016, Plaintiffs moved for partial summary judgment and the Petitioners moved for summary judgment. Pet. App. 10a–12a, 88a. The trial court entered partial summary judgment for the Plaintiffs and denied Petitioners' motion. Pet. App. 96a. The

summary judgment order relied upon the North Carolina Supreme Court's prior rulings, and consistent with those precedents, the trial court found that the Plaintiff Class members had vested rights to unreduced premium-free retirement health insurance. Pet. App. 89a–96a.

Petitioners appealed the trial court's order to the North Carolina Court of Appeals. Pet. App. 60a–61a. The North Carolina Court of Appeals issued an opinion reversing the decision of the trial court and remanding for entry of summary judgment in favor of the Petitioners, primarily relying on purported distinctions between pension benefits, which had been long-held contractual in North Carolina, and the health insurance benefits at issue in the present case. Pet. App. 60a–84a.

The Plaintiffs filed a Petition for Discretionary Review and Writ of Certiorari with the North Carolina Supreme Court, which was granted. Pet. App. 16a. The North Carolina Supreme Court reversed, with the four-member majority holding that under applicable North Carolina law, the Plaintiffs had a contractual vested right to retirement health benefits. Pet. App. 1a–50a. Two other justices concurred in part and dissented in part, also concluding that the North Carolina Court of Appeals' decision should be reversed, but determining that there were disputed issues of material

fact as to whether a contractual obligation existed.[1] Pet. App. 51a–59a.

In reviewing the Contract Clause claim, the majority opinion applied this Court's three-part test set forth in *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 21–25 (1977). Pet. App. 18a–19a. This test calls for "ascertain[ing]: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." Pet. App. 18a.

In reaching its ultimate holding, the North Carolina Supreme Court applied a long line of its own prior decisions regarding the relationship between the State of North Carolina and its employees and retirees, specifically as to the contractual nature of retirement benefits for retired state employees. The cited precedents, stretching back decades, include *Simpson v. North Carolina Local Government Employees' Retirement System*, 363 S.E.2d 90 (N.C. Ct. App. 1987), *aff'd per curiam*, 372 S.E.2d 559 (N.C. 1988); *Faulkenbury v. Teachers' & State Employees' Retirement System of North Carolina*, 483 S.E.2d 422 (N.C. 1997); *Bailey v.*

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[1] In characterizing the decision, the Petitioners ignore these details, stating only that the North Carolina Supreme Court "reversed in a 4-2 decision." That decision, however, was unanimous in reversing the court of appeals' decision and in determining that the Petitioners were not entitled to judgment as a matter of law. The concurring justices agreed that the Petitioners were not entitled to summary judgment on the issue they now forward to this Court.

State, 500 S.E.2d 54 (N.C. 1998); and *North Carolina Association of Educators v. State* (*NCAE*), 786 S.E.2d 255 (N.C. 2016). Pet. App. 18a–31a. As summarized by the North Carolina Supreme Court, such cases make clear that "a state employee can prove the existence of a vested right in numerous ways" in North Carolina and "illustrate that the State may assume a contractual obligation to provide a benefit even if the statute creating the benefit 'did not itself create any vested contractual rights.'" Pet. App. 19a, 31a. The background analysis by the North Carolina Supreme Court regarding such applicable North Carolina law is instructive to the basis of the holding.

In *Simpson*, for example, the North Carolina Court of Appeals (as affirmed by the North Carolina Supreme Court) held that disability retirement benefits were contractual because they were "deferred compensation." *Simpson*, 363 S.E.2d at 94. The *Simpson* court notably rejected the State's argument that a right to amend provision barred the employees' claims. *Id*. at 92–95.

In *Faulkenbury*, the North Carolina Supreme Court again reviewed legislative changes reducing disability retirement payments. *Faulkenbury*, 483 S.E.2d at 426–27. The court held that although the statute *itself* did not indicate that the legislature intended "to offer the benefits as a part of contract," the benefit was nonetheless contractual:

> [W]hen the General Assembly enacted laws which provided for certain benefits to those

> persons who were to be employed by the state and local governments and who fulfilled certain conditions, this could reasonably be considered by those persons as offers by the state or local government to guarantee the benefits if those persons fulfilled the conditions. When they did so, the contract was formed.

Id. at 427. The *Faulkenbury* court further concluded that it was reasonable for a prospective employee to believe that the subject benefits were part of the compensation promised, notwithstanding a right to amend provision in the statute. *Id.*

In *Bailey*, a challenge to a state law capping the amount of retirement benefits exempt from state tax, the North Carolina Supreme Court noted that "[t]he basis of the contractual relationship determinations in these and related cases is the principle that where a party in entering an obligation *relies on the State*, he or she obtains vested rights that cannot be diminished by state action."[2] *Bailey*, 500 S.E.2d at 62 (emphasis added). "Based on this finding and the supporting evidence, [the *Bailey* court] concluded that 'in exchange for the inducement to and retention in employment, the State agreed to'" the exemption claimed by the plaintiffs, and that this was a "sufficient basis" for the court's holding that the claimed right was a term of

[2] As the North Carolina Supreme Court also noted, these contractual principles have been extended to cases protecting vested rights that were not created by statute. *Bailey*, 500 S.E.2d at 61–63; Pet. App. 25a.

state employees' contract with the State. Pet. App. 26a (citing *Bailey*, 500 S.E.2d at 65).

In *NCAE*, a case involving teacher tenure, the North Carolina Supreme Court discussed the prior North Carolina precedent and set forth at least three ways in which a contractual obligation might arise. *NCAE*, 786 S.E.2d at 262–64. The court in *NCAE* determined that a vested contractual right did not have to arise solely from a statute itself, but could arise in other ways, including under deferred compensation principles. *Id.* at 263–64. Relying on evidence in the record, the *NCAE* court ultimately held that contracts between the plaintiff teachers and their local school boards included the applicable law as an implied term. *Id.* at 264. ("[A]lthough the Career Status Law itself created no vested contractual rights, the contracts between the local school boards and teachers with approved career status included the Career Status Law as an implied term upon which the teachers relied.").

Applying that long line of North Carolina law to the facts in this case, the North Carolina Supreme Court first evaluated whether the "statute conferring [the] benefit [i.e., the "Establishing Act"[3]] is itself the source of the right." Pet. App. 31a. In accord with federal decisions and *NCAE*, the North Carolina Supreme Court noted that "[g]enerally, proving that the statute is itself the source of a right requires an employee to point to language in the statute plainly evincing the

[3] As used herein, the "Establishing Act" refers to the Establishing Act as defined in the Opinion. *See* Pet. App. 6a.

[legislature's] intent to undertake a contractual obligation." Pet. App. 31a. The court pointed to the undertaking language in the Establishing Act which stipulates that the State "will pay benefits *in accordance with the terms hereof*" but noted that the Establishing Act contains a right to amend clause "which expressly reserves to the General Assembly the authority to change the 'terms' of coverage." Pet. App. 32a (emphasis in Opinion). Therefore, the North Carolina Supreme Court held that the Establishing Act "does not expressly indicate an intent to create a contractual obligation" and "is not itself the source of the Retiree's contractual right." *Id*.

The North Carolina Supreme Court then turned to the deferred compensation principles applicable to state employees from *Simpson*, *Faulkenbury*, *Bailey*, and *NCAE*:

> But state employees can also prove the existence of a vested right by demonstrating that they reasonably relied upon the promise of benefits provided by a statute when entering into an employment contract with the State. . . . [I]f a statute provides benefits for which an employee only becomes eligible after certain conditions are met, then the employee's right to the benefit vests when he or she satisfies the relevant eligibility criteria.

Pet. App. 32a. The North Carolina Supreme Court held that the court of appeals erred in a number of ways, including ignoring that in North Carolina "vested rights can arise even in the absence of a statute

demonstrating the General Assembly's express intent to undertake a contractual obligation" and therefore can "arise from a source other than an express statutory provision." Pet. App. 33a. In this vein, the court further noted that the court of appeals wrongly disregarded evidence regarding the Petitioners' communications about the retirement health benefit and what employees reasonably understood regarding the benefit.[4] Pet. App. 33a–34a.

Instead, the North Carolina Supreme Court held that the undisputed evidence in this case established that "'[t]he [State] offered [the Retirees] certain premium-free health insurance benefits in their retirement if they worked for the State . . . for a requisite period of time' and that the 'promise' of this benefit was 'part of the overall compensation package' state employees reasonably expected to receive in return for their services." Pet. App. 34a. The court further

[4] The court below noted that had the State "unambiguously disclaimed any intent to provide any benefits that could be incorporated into the terms of a contract, the importance of the State's subsequent communications with employees might be diminished." Pet. App. 33a–34a. The court below was not however "presented with such a circumstance in this case." Pet. App. 34a. The North Carolina Supreme Court found it noteworthy that in *other benefit statutes* the North Carolina General Assembly had "enacted statutes containing right-to-amend provisions which explicitly and unmistakably stated that any benefits provided by statute would not be contractual in nature," but the General Assembly had not done so here. Pet. App. 34a n.7 ("The fact that the legislature chose *not* to include this kind of explicit clause in the right-to-amend provision at issue here is further support for the conclusion that the Retirees reasonably relied on the State's promise of retirement health insurance coverage.").

highlighted the undisputed evidence that the benefit "was communicated to prospective employees with the intent of inducing" employment, that the *State* also understood and recognized that it had an obligation to provide the benefit, and that the benefit was "an important component of state employees' acceptance" of employment or continued employment. Pet. App. 34a–35a, 38a. Evidence of a contract was found in press releases, benefit booklets, and training materials created by the Petitioners. Pet. App. 37a–38a. As the North Carolina Supreme Court stated, it was "not unreasonable for [the] employees to have taken the State at its word." Pet. App. 38a. There was thus evidence "sufficient to establish the legal proposition that a vested right arose from employees' reasonable 'expectational interests' and their reliance thereon." Pet. App. 35a. The court more specifically held that "[o]nce state employees met the applicable statutory eligibility requirements and became eligible to enroll in a noncontributory health insurance plan, their right vested to enroll in a plan offering equivalent or greater value to the one offered to them at the time the contract was formed." Pet. App. 38a–39a. Based on that analysis, the North Carolina Supreme Court reversed the court of appeals' determination that the Plaintiff Class had failed to prove the existence of a vested right subject to Contract Clause protection and noted that the statute does not serve as the sole basis for the contract. Pet. App. 32a, 39a.

The North Carolina Supreme Court then evaluated the second prong of *U.S. Trust* – substantial impairment.

While the court rejected "the State's argument that the existence of the right to amend provision in the Establishing Act automatically negates the Retirees' argument that the 2011 Act substantially impaired their vested rights," the court held that there were genuine issues of material fact as to this prong, remanding to the trial court. Pet. App. 39a–41a. Likewise, with respect to the third prong – whether the impairment was reasonable and necessary – the court provided some guiding principles for the trial court on remand but held that there are "genuine disputes about material facts which require further development at trial." Pet. App. 46a.

The court below lastly reviewed the Plaintiffs' claim under the North Carolina Constitution's "Law of the Land" Clause. That clause provides that "[n]o person shall be . . . in an manner deprived of his . . . property but by the law of the land." Pet. App. 48a, citing N.C. Const. Art. I, § 19. Because a "contractual right is a property right," and the Plaintiff Class has a vested right in retirement health insurance coverage, the North Carolina Supreme Court held that the court of appeals' decision granting summary judgment in favor of the Petitioners on the Law of the Land Clause claim should be reversed and remanded for resolution of issues thereto. Pet. App. 48a–49a.[5]

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[5] The Petitioners, in an attempt to anchor the Law of the Land claim to the Contract Clause claim, argue that "the court's resolution of Plaintiffs' claim under the North Carolina Constitution depended solely on its resolution of their federal Contract Clause claim." Pet. 8. This is not accurate. The North Carolina

The North Carolina Supreme Court ultimately remanded the case to the state trial court for further factual findings on several issues, including: (1) whether the impairment was substantial; (2) if the impairment is substantial, whether the impairment was reasonable and necessary; and (3) whether there has been a taking under the Law of the Land Clause of the North Carolina Constitution. Pet. App. 45a, 47a, 49a, 50a. The court noted that the issues on remand would involve a "factually complex assessment" and that such assessment would be "crucial" to determining the remaining issues under the Contract Clause. Pet. App. 45a.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. This Case is Not Jurisdictionally Ripe for Review under 28 U.S.C. § 1257

This case is not jurisdictionally ripe for review under 28 U.S.C. § 1257 and certiorari should be denied on that basis alone. A certiorari appeal from a state's highest court to this Court is predicated on there being a final judgment or decree from such state court. 28 U.S.C. § 1257(a). "Compliance with the provisions of § 1257 is an essential prerequisite to our deciding the merits of a case brought here under that section."

Supreme Court determined that the Plaintiffs had a vested right under North Carolina state law to the retirement health insurance benefit, and thus had a property right for purposes of a taking and therefore a colorable claim under the Law of the Land Clause. Pet. App. 48a–49a.

Johnson v. California, 541 U.S. 428, 431 (2004) (per curiam) (dismissing case for want of jurisdiction under § 1257). Further, "[a] petition for certiorari must demonstrate to this Court that it has jurisdiction to review the judgment."[6] *Id.*; *see also* S. Ct. R. 14.1(g). The Opinion contains no final judgment or decree. *See* Pet. App. 49a–50a. Instead, the North Carolina Supreme Court remanded this case for further proceedings including additional factual determinations on both federal and state law claims. The court's ruling does not effectively determine the entire outcome of this case on a ground of federal law. Instead, the North Carolina Supreme Court set forth specifically the additional future determinations that need to be made by the state trial court on the Contract Clause claim. Pet. App. 45a, 47a, 49a, 50a. Therefore, this case is not jurisdictionally ripe for review under § 1257 and the Petition should be denied.

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[6] The Petition also does not argue that this case falls within one of the *Cox* exceptions to § 1257(a), and due to the posture of this case, none of the exceptions would apply: (1) there is a high possibility of piecemeal review given that state law governs the formation of contracts and additional factual determinations must be made for the Contract Clause claim to be properly before the court; (2) there has not been a conclusive adjudication of rights and liabilities given the need for additional factual determinations; (3) later review of the federal issue (the Contract Clause claim) can still be had once such additional factual determinations are made; and (4) there is no concern of a serious erosion of federal policy given that the question presented revolves around an issue of state law. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477–85 (1975).

II. The Holding Below Was Based on State Law and Review at this Juncture Would Not be Dispositive and Would Otherwise be Inappropriate

A. Due to Existence of Independent State Law Claims, Review at this Juncture Would be Wasteful and Not Dispositive

This case involves a specific program of retirement health benefits. That retirement health benefit program is unique to certain North Carolina retired employees. The scope of this case and the North Carolina Supreme Court's opinion was not limited to the Contract Clause. The Contract Clause claim is but one out of several substantive claims for relief that remain pending and await further proceedings and additional factual determinations at the trial court, including claims for breach of contract, violation of the North Carolina Constitution, declaratory judgment, and for a constructive/resulting trust. Pet. App. 8a. Even if the Plaintiffs do not ultimately prevail on their Contract Clause claims on remand, they may still independently prevail on their state law claims, rendering a piecemeal determination now – of that single interlocutory federal claim – a wasteful and potentially moot endeavor. *See Johnson v. California*, 541 U.S. 428, 431–32 (2004) (dismissing case for lack of jurisdiction after certiorari had been granted, when it became apparent that further litigation remained in state court on nonfederal issues); *Florida v. Thomas*, 532 U.S. 774, 777–80 (2001) (decision of state's highest court is not final for purposes of review by this Court, if decision

remands case to trial court for further factfinding on an issue that could moot federal question); 22 Moore's Federal Practice – Civil § 406.03 (2022).

Further, North Carolina's Constitution can provide greater protections than the United States Constitution. It has been a long-held principle in our federal legal system that state constitutions can provide broader protections than their federal counterpart even when concerning parallel rights. *See*, *e.g.*, Brennan Jr., William J., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491, 495 (1977). Such an arrangement is a necessary and key component of the concept of federalism that underpins the basic constitutional order of the United States.

B. The Holding Below is Based on Long-Standing State Law

While Petitioners correctly note that this Court is not strictly bound by the North Carolina Supreme Court's finding of a contract under the Contract Clause, Petitioners fail to note that the determination of a contract under the Contract Clause is still derived from and determined by applicable state contract law. *See Appleby v. New York*, 271 U.S. 364, 379–80, 403 (1926) (applying New York state law to determination of contractual obligation under Contract Clause); *Kestler v. Bd. of Trustees of N.C. Local Gov. Employees Ret. Sys.*, 48 F.3d 800, 802–03 (4th Cir. 1995) ("[T]he issue of whether a contract right exists is governed by state law, while federal law governs a determination that a

contract has been impaired under the Contract Clause."). What constitutes a contract in one state may not constitute a binding contract in another based on differences in the states' laws, including for example, statute of frauds, canons of construction, forms of offer and acceptance, and state public policy. The Petitioners would have this Court ignore state law, and instead create a body of substantive federal common law that would supplant existing contract law across all fifty states.

As discussed above, the Opinion was based on long-standing North Carolina law pertaining to state employee retirement benefits. Pet. App. 8a–31a. North Carolina has for decades developed its own jurisprudence for handling public employment retirement benefits. The Opinion merely follows in that long line of cases. The Petitioners would have this Court undo decades of long-established state jurisprudence, which could have the effect of disturbing numerous existing retirement benefit programs as well as other employment benefits derived from the same state law precedents, such as teacher tenure, pension, and disability.

C. The Holding Below is Entitled to Great Deference as a Ruling on a Matter of State Law

Even though this Court retains ultimate review of any Contract Clause issue, this Court has consistently given a very high level of deference to decisions of a

state's highest court. If a matter of local policy is at issue, this Court has given great deference to the state court and disturbed the decision of a state's highest court where that decision is manifestly wrong or the result of oppression. *See*, *e.g.*, *Atl. C. L. R. Co. v. Phillips*, 332 U.S. 168, 170 (1947) ("[Y]et when we are dealing with a matter of local policy, like a system of taxation, we should be slow to depart from [the state court's] judgment, if there was no real oppression or manifest wrong in the result.").[7] The application of state employment benefits is a matter of local policy and concern,

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[7] As justification for such deference when considering the construction and import of state statutes, this Court stated:

> It is not for us to read such a local law with independent but innocent eyes, heedless of a construction placed upon it by the local court. . . . In seeking the meaning conveyed by a local enactment it must be viewed as part of the whole texture of local laws and of the economy to which they apply. The language draws to itself presuppositions not always articulated, and even what is expressed in words may carry meaning to insiders which is not within the sure discernment of those viewing the law from a distance. And so we are not prepared to say that the [state supreme court] was "manifestly wrong. . . ."

Atl. C. L. R. Co. v. Phillips, 332 U.S. at 170–71 (quoting *Hale v. State Board*, 302 U.S. 95, 101 (1937)). The Opinion makes clear that the finding of a contractual obligation is drawn not just from the limited sections of statutes cited by Petitioners, but as part of the whole system of retirement and employment benefits and based on prior state court rulings on the issue. Pet. App. 34a ("'promise' of this benefit was 'part of the overall compensation package' state employees reasonably expected to receive in return for their services").

and the Petitioners do not contend that the holding below is the result of oppression or manifestly wrong.[8]

D. Piecemeal Review at this Point Will Only Delay Further Adjudication and Materially Prejudice the Plaintiff Class

Given that this case is now in its tenth year of litigation, further piecemeal proceedings before this Court on an interlocutory and factually undetermined federal issue will only cause unnecessary delay, economic waste, and prejudice an already elderly and diminishing Plaintiff Class. *See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 123–24 (1945). The Petitioners' ultimate goal – to allow the legal termination of all retirement health benefits to the Plaintiff Class – would be devastating to hundreds of thousands of North Carolina retirees.

III. There is No Split of Authority Among the Federal Circuit Courts or Among the States' Highest Courts

There is no split of authority between federal circuits or among the states' highest courts on the currently interlocutory issue, as argued by the Petitioners.

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[8] In other cases, this Court has stated that it would not disturb a state's highest court's holding as to a contractual obligation unless it was "palpably erroneous." *Phelps v. Bd. of Educ.*, 300 U.S. 319, 322–23 (1937) (involving salary and tenure of teachers); *see also Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) ("[W]e accord respectful consideration and great weight to the views of the State's highest court.").

First, the Petitioners' alleged legal issue upon which the courts are divided is not the actual issue in the case. This Court has long acknowledged that protected contractual obligations under the Contract Clause include both statutory enactments that rise to the level of contracts and other more traditional forms of contract. *See*, *e.g.*, *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018) (Contract Clause impairment claim in the context of private, non-statutory contract between the parties). As stated elsewhere in this response, the North Carolina Supreme Court agreed with the Petitioners that the statute itself was not the contract – citing the right to amend clause and applicable law on the topic. *See* Pet. App. 31a–32a. Instead, the North Carolina Supreme Court held there was a contractual obligation not because of the statutory language, but because the benefits were considered contractual deferred compensation under long-standing state law. *See* Pet. App. 31a–32a ("Based on the uncontested facts, we agree with the State that the Establishing Act is not itself the source of the Retirees' contractual right"); *see also* Pet. App. 35a ("[The] undisputed facts are sufficient to establish the legal proposition that a vested right arose from employees' reasonable 'expectational interests' and their actions in reliance thereon."). Therefore, the 'circuit-split' asserted by the Petitioners is not an issue.

Second, notwithstanding the foregoing, there is no true split of authority among the courts on this issue. The North Carolina Supreme Court's opinion is clear that a contract exists under guiding North Carolina

law. The Petitioners have cited no split in authority for the premise that North Carolina public retirement benefits are considered deferred compensation and therefore contractual, or that a limited right to amend in a statute defeats such rights under North Carolina law.

While Petitioners cite no split of authority within the applicable state law, outside such state law, Petitioners cite various federal and out-of-state decisions. Apparent from a review of the cited cases is that resolution of the question presented by the Petitioners is necessarily dependent on the applicable state law and an application of that law to specific facts in each circumstance. *See generally U.S. Trust*, 431 U.S. at 18 n.14; *Appleby*, 271 U.S. at 379–80, 403. Because of this, no bright line rule appears nor is tenable.

In attempting to manufacture a split of authority, the Petitioners rely on a 1983 Minnesota case, *Christensen v. Minneapolis Mun. Emps. Ret. Bd.*, 331 N.W.2d 740 (Minn. 1983), and the "writings" of the First Circuit. Pet. 9–10. This attempt should fail. *Christensen*, applying Minnesota law, held that the benefits at issue there were not actually contractual, but that the pensions were subject to promissory estoppel under Minnesota law. *See Christensen*, 331 N.W.2d at 747–48 (stating promissory estoppel applies when "no contract exists" and there are "no 'contract rights'" present). Most notably though, there was not a right to amend at issue in *Christensen*. *See id.* In support of their "split of authority" argument, the Petitioners conflate a right to amend with a "disclaimer of contract rights,"

examples of which the *Christensen* court discussed in dicta to justify the approach that the court was taking (i.e., promissory estoppel versus traditional contract approach).[9] *Id*. at 748–49. The North Carolina Supreme Court in its opinion in this case does not cite or rely on the *Christensen* decision, and there is no "disclaimer of contract rights" or similar provision. *See* Pet. App. 34a n.7 (noting certain North Carolina statutes have such provisions but not the statute at issue here).

The references by the Petitioners to the First Circuit's "writings" are similarly misplaced. In those decisions, the First Circuit was merely restating a principle from this Court in *U.S. Trust* when evaluating whether the statute itself is treated as the contract. *See*, *e.g.*, *Parella v. Retirement Bd. of the R.I. Employees' Retirement Sys*., 173 F.3d 46, 61 (1st Cir. 1999) (citing *U.S. Trust*, 431 U.S. at 18 n.14) (noting "clear and unequivocal intent to contract can also be demonstrated by circumstances," which "by their nature, will vary from case to case"); *accord U.S. Trust*, 431 U.S. at 18 n.14 ("In general, a statute is *itself* treated as a contract when the language *and circumstances* evince a legislative intent to create private rights of a contractual nature enforceable against the State.") (emphasis added). Additionally, the North Carolina Supreme Court expressly held that the Establishing Act was

[9] There was not such a disclaimer of rights in the pension statute at issue in *Christensen*. *See Christensen*, 331 N.W.2d at 748 ("With respect to the fund involved here, the Minneapolis Municipal Employees Retirement Plan, the statutory scheme is similar to that for judges' pensions in that it does not contain a disclaimer of contract rights.").

"not itself the source of the Retirees' contractual right." Pet. App. 32a. Thus, neither *Christensen* nor the First Circuit writings referenced by the Petitioners evidence any sort of a split of authority, nor are they on all fours legally or factually with the case here.

The Petitioners cite three federal circuit court decisions to purportedly stand for the proposition in a Contract Clause analysis that a right to amend clause necessarily precludes the formation of contractual rights as to the subject matter of the statute that may be so amended. In looking closer at such cases, it is clear that the cases do not share common legal or factual issues with this case and do not align with the statement of law that Petitioners advance – i.e., that a statutory right to amend clause bars contract formation no matter the other circumstances. First, with respect to *Frazier v. City of Chattanooga*, 841 F.3d 433 (6th Cir. 2016), the Petitioners misconstrue that case and take quotes from that case out of context to fit their narrative. In *Frazier*, the right to amend provision was not dispositive (with the court reviewing whether the benefits at issue were "vested" and "accrued"), and the court reviewed specific state court precedent in reaching its decision. *Id*. at 436–38. The Petitioners' reliance on *Transport Workers Union of America v. Southeastern Pennsylvania Transportation Authority*, 145 F.3d 619 (3d Cir. 1998) is similarly misplaced. In that case, the amendment was prospective only, did not affect vested rights, and the court followed state law in determining that the relationship was contractual, with the amendment only being applied to

those not "fully vested." *Id*. at 621, 623, 624, 625 n.1 ("[T]here is no allegation in this case that employees whose benefits under the [p]lan have fully vested will be affected by the addition of a contribution requirement."). Similarly, *Taylor v. City of Gadsden*, 767 F.3d 1124 (11th Cir. 2014), also fails to demonstrate a split of authority. In *Taylor*, there was no statutory right to amend. *See id*. at 1134. Further, *Taylor* turned on numerous factors not germane to the issues raised by Petitioners, including: there was not a legislative act to bring the challenged action within the gamut of the Contract Clause; there was no evidence of a contract presented outside the statute itself; the plaintiffs had not satisfied all parts of the bargain as required under Alabama law; and, the case was expressly not about deferred compensation but rather "anticipated compensation" (and the challenged modification did not affect earned benefits). *See id.* at 1133, 1134, 1135.

Petitioners mention cases from the Fourth and Eighth Circuits as well, but acknowledge in their Petition that those cases do not involve right to amend clauses.[10] Pet. 12–13. Rather, the contracts at issue specifically qualified that the obligation was only to the

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[10] Petitioners' reliance on dicta in the concurring opinion in *Crosby v. City of Gastonia*, 635 F.3d 634, 645 (4th Cir. 2011), *cert. denied*, 565 U.S. 823 (2011), is inappropriate as there was no right to amend clause included in the benefit statutes at issue in that case and the Fourth Circuit made no actual ruling on whether there was or was not a contractual obligation, instead assuming that such an obligation existed. *See id*. 645 (finding that an express funding contingency clause barred a breach of contract claim).

extent permitted under applicable law.[11] *See Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 438 (8th Cir. 2007); *City of Charleston v. Pub. Serv. Comm'n of W. Va.*, 57 F.3d 385, 387, 393 (4th Cir. 1995).

Petitioners also cite certain state court cases as evidence of some split in authority. For various reasons discussed below those cases fail to demonstrate a split in authority and fail to align with the Petitioners' apparent position here. Petitioners first cite *Board of Trustees of the Policemen's & Firemen's Ret. Fund v. Cary*, 373 So. 2d 841 (Ala. 1979), but that case did not involve a statutory right to amend, actually held that certain rights there were contractual, and turned on considerations of purely Alabama state law. *See id.* at 842, 843. The Wisconsin case cited by Petitioners, *Wisconsin Professional Police Association, Inc. v. Lightbourn*, 627 N.W.2d 807 (Wis. 2001), also does not align with the import of a statutory right to amend as claimed by Petitioners. In that case, the court, based on Wisconsin statutes and case law, upheld right to amend language as to certain unaccrued benefits, but noted that such amendments were precluded from abrogating accrued benefits "which are 'due' for services rendered" (i.e., deferred compensation). *Id.* at 841, 856. The Wisconsin court stated that "[t]hese 'benefits accrued' for 'service rendered' are the essence of the

[11] One of these cases is also a lottery case. *See Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 435 (8th Cir. 2007). As this Court has long held, lotteries are not protected by the Contract Clause. *See id.* at 437 (citing *Stone v. Mississippi*, 101 U.S. 814, 821 (1879); *Douglas v. Kentucky*, 168 U.S. 488, 502 (1897)).

property right enjoyed by participants." *Id*. at 853. The Massachusetts case, *National Ass'n of Gov't Employees v. Commonwealth*, 646 N.E.2d 106 (Mass. 1995), was decided based on specific Massachusetts statutory and case law related to collective bargaining agreements, not some overarching general principle that Petitioners would advance that would supplant state law entirely. *See id.* at 110–11. *Washington Education Association v. Department of Retirement Systems*, 332 P.3d 439 (Wash. 2014), does not share the same legal considerations as the case at bar either. There, the statute included a disclaimer of any contractual rights, which is what the North Carolina Supreme Court found to be lacking in the present case (although it is present in other non-applicable statutes in North Carolina). *See id.* at 442. The Washington court found the right to amend applied there, based on the specific aspects of the benefit at issue and Washington state law.[12] *See id*. at 444–47. Petitioners last cite *Studier v. Mich. Pub. Sch. Emples. Ret. Bd.*, 698 N.W.2d 350 (Mich. 2005). *Studier* did not involve a right to amend clause, and therefore does not present a split of authority on the usage of such clauses as stated in the Petitioners' question presented. *See id*.

The state court cases referenced by Petitioners demonstrate that states have reached determinations

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[12] *Lightbourn*, *National Association*, and *Washington Education Association* were also all each resolved on the second prong (impairment), an issue not fully decided by the court below here. *See Lightbourn*, 627 N.W.2d at 856; *Washington Educators*, 332 P.3d at 444; and *National Association*, 646 N.E.2d at 110–11.

based on their own state law. However, advancing these decisions as evidence of a split of authority warranting review by this Court fundamentally confuses the source and import of the laws at issue in each. State courts, interpreting their own statutes in light of their own common laws of contracts, have reached different results, and even where state courts have found right to amend provisions bar certain claims, at least some of those courts have expressly recognized that certain other contractual rights survive such provisions, including fully vested rights such as benefits earned for prior services rendered. This does not, as Petitioners suggest, indicate that state courts are interpreting or applying some uniform body of contract law inconsistently. Rather, due to inherent differences in their respective laws of contracts, states have necessarily arrived at different determinations about whether, and to what degree, statutory right to amend language impacts the contractual nature of statutorily-afforded benefits.[13]

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[13] Petitioners also rely heavily on certain Social Security cases from this Court, including *Flemming v. Nestor*, 363 U.S. 603 (1960), and *Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986). Neither of those cases are Contract Clause cases. The social security system is a "form of social insurance" and "social welfare program" long held to provide non-contractual benefits, distinct from the deferred compensation at issue in this case and involves the sovereign power "to provide for the general welfare," a power not relevant to this case. *See Flemming*, 363 U.S. at 609, 611; *Bowen*, 477 U.S. at 55.

Petitioners also rely on *National R. Passenger Corp. v. Atchison, T. & S. F. R. Co.*, 470 U.S. 451 (1985), but that case was not a Contract Clause case, did not involve issues of deferred compensation,

IV. In its Current Posture, this Case Does Not Present an Exceptionally Important Question of Constitutional Law

The Petitioners lastly argue that this case presents an "exceptionally important" question of constitutional law. Pet. 23. While this case is certainly important to the parties thereto, because it is based on North Carolina state law as that pertains to a specific retirement benefit program, the issues raised herein are of little import in the federal context. As discussed in Sections I and II, *supra*, there are no overarching federal issues present in this case at this juncture, and the determination requested by Petitioners would be seemingly limited to North Carolina public employment retirement programs.[14]

Petitioners also specifically request this Court to provide advice for how they can avoid liability for retirement benefit programs. There are two problems with this request. First, this Court does not render advisory opinions and should therefore demur from the

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and (as relied on by Petitioners) dealt with the issue of whether the Rail Passenger Service Act of 1970 was itself a contract; whereas, in this case, the North Carolina Supreme Court specifically held that the statute was not itself the source of the contractual rights. *See Nat'l R.R.*, 470 U.S. at 454, 465–70.

[14] Unlike the circumstances in *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761 (2018), and *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015), where federal and nationwide issues pertaining to collective bargaining agreements subject to ERISA and the National Labor Relations Act are applicable, this case presents no such nationally or federally important legal issues. *See Reese*, 138 S. Ct. at 754; *M&G Polymers*, 574 U.S. at 432, 434.

Petitioners' invitation to render one here. *See Pope v. Atlantic Coast Line R.R.*, 345 U.S. 379, 381–82 (1953); and *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973) ("cases or controversies" requirement precludes federal courts from rendering advisory opinions). Second, to the extent the Petitioners need advice on how to structure future retirement benefit programs, the North Carolina Supreme Court provided guidance in its holding below in regards to a right to amend clause. *See*, *e.g.*, Pet. App. 34a.

Lastly, the Petitioners' dire financial predictions are exaggerated. While North Carolina has accrued an ongoing long-term liability for the provision of retirement benefits, such liability is not a present risk to the State's financial well-being. Petitioners concede the State has accumulated $2.6 billion in savings to provide the benefits at issue in this case. Pet. 24. In addition, as of June 2022, North Carolina had a budget surplus of over $6 billion – negating any prediction for the immediate collapse of the state budget. Vaughan, Dawn Baumgartner, *Done by July 1? Berger hopes NC House, Senate reach budget deal in days, exit soon after*, The Raleigh News & Observer (last accessed on June 8, 2022, 1:17 PM), https://www.newsobserver.com/news/politics-government/state-politics/article262268612.html.

CONCLUSION

This Court should deny the petition for certiorari.

Respectfully submitted,

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