No. 17-1650

In the Supreme Court of the United States

TOWN OF KEARNY,

Petitioner,

v.

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Since 1848, this Court has held that the power of eminent domain is an essential attribute of sovereignty and that use of eminent domain power does not violate the Contract Clause of the United States Constitution.

The question presented is whether the Court should abandon precedent and apply to eminent domain the balancing test on legislative action set forth in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977).

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Respondent New Jersey Sports and Exposition Authority ("NJSEA") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by the Town of Kearny ("Kearny").

INTRODUCTION

This Court's decisions "leave no doubt that the right of government to exercise its power of eminent domain upon just compensation for a public purpose" is an essential sovereign function that cannot be contracted away. *Contributors to Pa. Hosp. v. City of Philadelphia*, 245 U.S. 20, 23-24 (1917). NJSEA exercised its power of eminent domain to condemn Kearny's property on which the Keegan Landfill is located. NJSEA operated the Keegan Landfill pursuant to a lease agreement between Kearny and NJSEA (the "Lease"), which, by its terms, was to expire on June 30, 2016. NJSEA attempted to negotiate an extension of the Lease with Kearny to continue the operations of the landfill until January 1, 2020. When those negotiations failed, NJSEA determined that continued operation of the Keegan Landfill was in the public interest and condemnation was, therefore, necessary to continue landfill operations and ensure sufficient funds for post-closure activities.

NJSEA's exercise of eminent domain presents no issues under the Contract Clause of the United States Constitution. The law is clear that no contract can prevent the use of eminent domain, and the Petition presents no argument to justify a change in the law. Instead, the Petition relies on and misinterprets *United*

States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977), a case that did not involve the use of the eminent domain power.

Kearny's petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

NJSEA is the zoning and planning agency for the Hackensack Meadowlands District, the 30.4 square-mile area along the Hackensack River that covers fourteen municipalities in Bergen and Hudson Counties. App. 21a.

NJSEA is charged with protecting the environment and providing for solid waste management within the Hackensack Meadowlands District. App. 31a. Pursuant to *N.J.S.A.* 5:10A-29, *N.J.S.A.* 5:10-5(m), and *N.J.S.A.* 13:17-6(g), NJSEA is authorized to acquire any real property within its jurisdiction if it finds it necessary or convenient to do so for any of its authorized purposes in accordance with the New Jersey Eminent Domain Act of 1971. App. 3a. As part of NJSEA's mission, one of its authorized purposes is to "provide solid waste disposal and recycling facilities for the treatment of solid waste." *N.J.S.A.* 5:10A-7(k); App. 3a-4a.

NJSEA used its eminent domain authority to acquire the land that Kearny owned, which contained a portion of the Keegan Landfill. The Keegan Landfill ("Keegan") consists of approximately 110 acres located northeast of Bergen Avenue in Kearny. App. 4a. Landfill operations at Keegan began in or around the

1950s and continued until 1972, at which point it was closed without the owners/operators constructing any environmental controls, a leachate collection system or containment wall, or undertaking proper remediation. App. 4a; 23a-24a. As a result, millions of gallons of contaminated leachate were dumped directly into the wetlands, which caused considerable and visible pollution to the Kearny Freshwater Marsh and its surrounding ecosystems, triggering underground fires. App. 4a.

In 2005, Kearny and NJSEA entered into the Lease to reopen Keegan as a landfill to raise money to properly remediate its damage to the environment. App. 4a; 24a. NJSEA then spent over $25 million to, among other things, construct a leachate collection system and containment wall around the landfill, acquire adjacent land, build two sewage pump stations to move the leachate to a proper facility, and relocate Frank's Creek to keep leachate from entering this tidal creek and neighboring wetlands. App. 25a; 43a.

On December 18, 2008, NJSEA reopened Keegan under a New Jersey Department of Environmental Protection ("NJDEP") Temporary Certificate of Authority to Operate and began operating Keegan pursuant to the Lease shortly thereafter. App. 24a.

As early as 2014, NJSEA determined that the operation of Keegan should continue past the termination date of the Lease, as it "served a vital public function that was in the public interest." App. 12a; *see also* App. 8a. The Superior Court of New Jersey found that the proofs submitted by NJSEA demonstrated that "closure [of Keegan] at this time would have drastic and deleterious effects on the surrounding communities and their taxpayers for at least four separate reasons[.]" App. 40a.

Thereafter NJSEA commenced negotiations to extend the Lease with Kearny. App. 8a. The parties discussed financial terms and exchanged drafts of a new lease. App. 8a; 43a. The negotiations broke down, in part because Kearny rejected any obligation to fund post-closure activities for Keegan, estimated to cost $30 million. NJSEA will now take the primary lead to perform and pay for post-closure at Keegan. App. 44a-45a.

In February 2016, Kearny served NJSEA with a Notice to Quit/Demand for Possession and Compliance with Lease Obligations. App. 9a. One month later, NJSEA adopted Resolution 2016-10 authorizing the use of eminent domain to acquire Kearny's property needed to continue operating Keegan. App. 9a. By letter dated May 3, 2016, NJSEA offered to purchase the landfill property from Kearny for the appraised fair market value of the fee simple interest in Keegan. App. 4a; 21a. Kearny rejected the offer two weeks later, and, on May 19, 2016, NJSEA initiated condemnation proceedings. App. 9a.

B. PROCEDURAL HISTORY

On May 19, 2016, NJSEA filed a Verified Complaint, Order to Show Cause, Declaration of Taking, and Order for Deposit with the trial court. App. 9a. On May 24, 2016, the court entered the Order to Show Cause and Order for Deposit. App. 9a. In lieu of an answer, Kearny filed a Motion for Summary Judgment, which NJSEA opposed. App. 9a. Thereafter, the trial court entered two orders: one denying Kearny's motion for summary judgment and one authorizing the condemnation and the appointment of commissioners to determine valuation. App. 9a.

On July 29, 2016, Kearny filed a notice of appeal with the Appellate Division. App. 10a. Kearny then filed motions for a stay pending appeal first in the trial court and later in the Superior Court of New Jersey, Appellate Division, and then in the New Jersey Supreme Court. The New Jersey courts denied all of these motions for a stay. App. 10a. On November 20, 2017, the Appellate Division issued its decision and opinion affirming the trial court's order, holding both that NJSEA did not violate the Contract Clause because it was authorized to condemn Keegan and that eminent domain is an essential attribute of state sovereignty that cannot be contracted away. App. 10a-12a. Kearny then filed a Notice of Petition for Certification to the Supreme Court of New Jersey, which was denied by order dated March 9, 2018. App. 50a-51a.

REASONS FOR DENYING THE PETITION

There is no split in the case law regarding the inapplicability of the Contract Clause to the exercise of eminent domain. This Court's precedents all agree that the power of eminent domain is an essential attribute of sovereignty that cannot be contracted away. And, the case law consistently applies this rule when, as in this case, the contract at issue is a lease.

Petitioner presents no justification for this Court to review and reverse this long-established rule. Petitioner's sole basis to justify its Petition is the legally erroneous argument that this Court should apply to eminent domain the balancing of interest test that this Court used to evaluate a Contract Clause challenge to a statute in *United States Trust Co.*, 431 U.S. 1.

I. The Petition Should Be Denied Because a State Entity's Power to Exercise Eminent Domain Consistent With the Contract Clause Is Clear and Well-Settled.

A. A State Cannot Contract Away Its Power of Eminent Domain.

This Court has consistently held that certain reserved powers, including a state's eminent domain power, are an inherent part of sovereignty and cannot be contracted away. This doctrine dates back to 1848, when this Court held that "the right of eminent domain in government in no wise interferes with the inviolability of contracts" and that in fact, "[e]very contract is made in subordination" to the power of eminent domain. *West River Bridge Co. v. Dix*, 47 U.S. 507, 532 (1848).

The Court reaffirmed this doctrine decades later in *Contributors*, making clear that eminent domain is a reserved power and is thus unaffected by the Contract Clause. 245 U.S. 20. In *Contributors*, the hospital had a contract that prohibited the opening of any street on the hospital's property without the hospital's consent. *Id.* at 21-22. The City of Philadelphia later exercised its powers of eminent domain specifically to open a street. *Id.* This Court upheld the exercise of eminent domain against the Contract Clause challenge in holding that "the States cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority . . . [as] to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties." *Id.* at 23. The Court explained that "the previous decisions of this court leave no doubt that the right of the government to exercise its power of eminent domain upon just compensation for a public purpose comes within this general doctrine." *Id.* at 23-24 (citing *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837); *West River*, 47 U.S. 507; *Long Island Water-Supply Co. v. City of Brooklyn*, 166 U.S. 685 (1897); *Offield v. New York, New Haven & Hartford R.R. Co.*, 203 U.S. 372 (1906); *City of Cincinnati v. Louisville & Nashville R.R. Co.*, 223 U.S. 390 (1912)).

United States Trust Co., 431 U.S. 1, also recognizes that the exercise of eminent domain is not restricted by the Contract Clause. "[T]he Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty," and, historically, "the police power and the power of eminent domain were among those that could not be 'contracted away[.]'" *Id.* at 23-24 & n.21 (citing *West River*, 47 U.S. 507, and *Contributors*, 245 U.S. at 23-24).

Later decisions cite *United States Trust Co.* as establishing that eminent domain is not subject to the Contract Clause. *See United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996) (stating that "the reserved powers doctrine . . . holds that a state government may not contract away 'an essential attribute of its sovereignty.'" (citing *United States Trust Co.*, 431 U.S. at 23)); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 243 n.6 (1984) ("[T]he Contract Clause has never been thought to protect against the exercise of the power of eminent domain." (citing *United States Trust Co.*, 431 U.S. at 19 & n.16)); *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, 712 F.3d 761, 773 (2d Cir. 2013) ("The 'reserved powers' doctrine holds that 'a state government may not contract away "an essential attribute of its sovereignty"'. . . [s]overeign powers include, for example, the police power and the power of eminent domain." (citing *United States Trust Co.*, 431 U.S. at 23-24)).

B. The Reserved Powers Doctrine Applies to Leases.

The doctrine that the power of eminent domain is such an essential sovereign power that it cannot be contracted away has also been applied to leases, both when the condemnor was the lessor and the lessee. For example, in *City of Glendale v. Superior Court*, 18 Cal. App. 4th 1768 (Cal. Ct. App. 1993), the City leased certain of its property for a term of twenty years to a private party to operate a restaurant. *Id.* at 1773. The lease contained a provision allowing the City to unilaterally terminate the lease, but only after ten years. *Id.* After only five years elapsed, the City exercised its power of eminent domain to terminate the lease and use the property to construct a public building. *Id.* at 1773-74.

Relying on *Contributors* and *United States Trust Co.*, the court held that the exercise of eminent domain, despite the language in the contract, did not violate the Contract Clause. *Id.* at 1778-80; *see also Lundell v. Coop Power Ass'n*, 707 N.W. 2d. 376, 381-82 (Minn. 2006) (a governmental entity's exercise of its power of eminent domain instead of continuing negotiations for an amendment to the lease providing for a rent increase did not violate the Contract Clause); *Eckles v. State*, 760 P.2d 846, 859 (Or. 1988) ("If the state agreed to lease a parcel of land and then chose to condemn the lessee's interest under the lease, neither Article I, section 21, nor the federal contracts clause would prohibit the state from doing so[.]").

C. The Balancing Test Set Forth in *United States Trust Co.* Is Plainly Inapplicable to Respondent's Exercise of Its Eminent Domain Power.

United States Trust Co. did not involve the use of eminent domain; instead, the Court was considering whether a statute related to the states' taxing and spending power was in violation of the Contract Clause. 431 U.S. at 23-26. "The instant case involves a financial obligation and thus as a threshold matter may not be said automatically to fall within the reserved powers that cannot be contracted away." *Id.* at 24-25. Not so here where eminent domain *is* a reserved power that cannot be contracted away. Accordingly, the balancing of interest test from *United States Trust Co.* has never been applied – indeed is irrelevant – to the eminent domain context. There is simply no authority to support Kearny's position.

CONCLUSION

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

Respectfully submitted,

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