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 A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

This case asks whether States can provide statutory benefits to their citizens while preserving the flexibility to alter those benefits in the future. Specifically, this Court's review is needed to clarify whether Contracts Clause rights can arise from mere "expectations," even in the face of an express statutory right-to-amend provision.

Respondents do not dispute that there is genuine confusion among the lower courts on that important question. Rather, they claim that the Contracts Clause *should* have a different scope in different States. In particular, Respondents claim that contract formation under the Contracts Clause turns on state law. But this Court has made clear for more than a century that, under the Contracts Clause, the question whether a contract exists is a question of federal law.

Given the federal nature of this dispute, the decision below erred by declining to apply this Court's longstanding precedent that a statutory right-to-amend provision forecloses the creation of rights under the Contracts Clause.

Moreover, there is a widespread and entrenched split of authority among the lower courts on the effect of a right-to-amend provision. Although Respondents attempt to distinguish the cases on either side of the split, the fact remains that most lower courts hold that a right-to-amend provision is a categorical bar to Contracts Clause claims—whereas the North Carolina Supreme Court, the Minnesota Supreme Court, and the First Circuit do not.

Finally, Respondents are wrong that this Court lacks jurisdiction to decide this case. This Court's jurisdiction is secure under an established exception to the final judgment rule. Because later review of the question presented likely cannot be had, no matter the outcome of further state-court proceedings, review is appropriate now.

I. The Decision Below Erred on an Important Issue of Federal Constitutional Law.

Respondents' main substantive argument against review amounts to misdirection. They claim that, because contract formation is *generally* an issue of state law, the Contracts Clause claim at issue here hinges entirely on state law. Br. in Opp. 15. That claim is surprising. It has been black-letter law for over a century that contract formation under the Contracts Clause is decided under federal law.

This Court could not have been clearer on this point: "The question whether a contract was made is a federal question for purposes of Contracts Clause analysis." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992) (citing *Irving Trust Co. v. Day*, 314 U.S. 556, 561 (1942)). It is true that this Court "accord[s] respectful consideration and great weight to the views of the State's highest court" on the issue of contract formation. *Id.* (quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938)). But as this Court has repeatedly emphasized, "ultimately we are 'bound to decide for ourselves whether a contract was made'" when deciding Contracts Clause claims. *Id.* (quoting *Brand*, 303 at 100). None of this has been remotely in dispute for well over a century. The American Law Reports, for example, counts *twenty-nine* cases decided by this Court since 1891 in which it has held

that "Contracts Clause analysis . . . is a federal question." 40 A.L.R. Fed. 3d Art. 1, § 5.

Indeed, not even the Supreme Court of North Carolina shared Respondents' view that state courts can recognize federal Contracts Clause rights solely under state law. Like its earlier decisions in this area of the law, the state supreme court cited federal precedent extensively, and made clear that Contracts Clause claims are resolved under this Court's prevailing *U.S. Trust* test. Pet. App. 18a (citing *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 16 (1977)).[1] The same is true in the other lower courts that align with the decision below. *See Me. Ass'n of Retirees v. Bd. of Tr. of the Me. Pub. Emps. Ret. Sys.*, 758 F.3d 23, 29 (1st Cir. 2014) ("The question [of contract formation under the Contracts Clause] is one of federal, rather than state, law."); *Parella v. Ret. Bd. of R. I Emps.' Ret. Sys.*, 173 F.3d 46, 60 (1st Cir. 1999) (same); *Christensen v. Minneapolis Mun. Emps. Ret. Bd.*, 331 N.W.2d 740, 750-51 (Minn. 1983) (applying this Court's "three-part test" under *U.S. Trust*). Thus, although there is a conflict of authority on the question presented here—whether a right-to-amend provision forecloses Contracts Clause claims—the lower courts all agree that this issue is one of federal law.

As a result, nearly all of Respondents' arguments against this Court's review are based on a false premise: that contract formation under the Contracts Clause is a question of state law. Once that premise

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[1] *See also N.C. Ass'n of Educators v. State*, 786 S.E.2d 255, 262-66 (N.C. 2016) (recognizing this Court's Contracts Clause precedents as controlling); *Bailey v. State*, 500 S.E.2d 54, 59-67 (N.C. 1998) (same); *Faulkenbury v. Teachers' & State Emps.' Ret. Sys. of N.C.*, 483 S.E.2d 422, 427-28 (N.C. 1997) (same).

falls away, so does any claim that this case does not involve significant federal constitutional issues.

Most importantly, this Court's review is needed to clarify how States can provide statutory benefits to their citizens without giving rise to fixed contractual rights protected by the Contracts Clause. Specifically, this case squarely presents the question whether courts may disregard a legislature's explicit reservation of rights to amend a statutory benefit program, merely based on the "expectations" of statutory beneficiaries. *See* Pet. App. 35a.

As Petitioners explained in their petition, state legislatures have relied on such reservations to prevent statutes from being construed as contracts since this Court's landmark decision in the *Dartmouth College* case. Pet. 18-19 (citing *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819)). In the centuries since that decision, this Court has reaffirmed repeatedly that, where a legislature reserves "the power to alter, modify, or repeal" a statute, it may do so provided its action "falls within" its reserved power. *Miller v. New York*, 82 U.S. 478, 488-89 (1872); *see also Flemming v. Nestor*, 363 U.S. 603, 611 (1960).[2]

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[2] Respondents attempt to explain away *Flemming* and other modern precedents on the ground that those cases did not involve Contracts Clause claims. Br. in Opp. 26 n.13. That argument raises a distinction without a difference. As Petitioners explained, the Contracts Clause does not apply to the federal government—and so contract-based challenges to federal statutes have instead been rooted in the Fifth Amendment's Due Process Clause or Takings Clause. *See* Pet. 15. This Court has often applied the same principles to assess contract formation under both the Fifth Amendment and the Contracts Clause. *See*,

The overwhelming majority of lower courts have faithfully heeded that guidance. Pet. 11-15. Nevertheless, like the decision below, some lower courts have sought to bypass statutory reservations of rights by relying on a promissory estoppel theory of contract formation. Pet. 9-11. This is not academic. These decisions threaten the fiscal stability of state and local governments, by hamstringing their ability to engage in prudent financial planning. Pet. 23-25. They also risk harming the future beneficiaries of such programs, by making state legislatures reluctant to offer generous statutory benefits in the first place. Pet. 25-26.

For these reasons, the question whether courts can bypass statutory right-to-amend provisions—a time-honored way for legislatures to evince their intent that statutory benefits are non-contractual—is a significant federal question worthy of this Court's review.

II. The Decision Below Deepened a Widespread Split of Authority.

Review is also warranted because the decision below deepened a widespread split of authority on the question presented. As Petitioners previously explained, courts are divided on whether a Contracts Clause claim may proceed in the face of a right-to-amend clause. The North Carolina and Minnesota

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e.g., *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 472 (1985) (citing Contracts Clause precedent as governing contract formation under Due Process Clause); *see also United States v. Winstar Corp.*, 518 U.S. 839, 875-76 (1996) (plurality opinion) (recognizing that principle governing federal contract formation arose from Contracts Clause cases).

Supreme Courts have squarely held that such claims can proceed, and the First Circuit remains open to that possibility. Pet. 9-11. Meanwhile, five federal courts of appeals and five state supreme courts have held that that a right-to-amend provision categorically bars Contracts Clause claims. Pet. 11-15. This Court should resolve that continuing split.

Respondents try to downplay the split by distinguishing each case at the margins. *See* Br. in Opp. 18-26. But these minor differences cannot obscure the larger issue: In many jurisdictions, Contracts Clause claims cannot survive a statutory right-to-amend provision. But in others, mere "expectations" among beneficiaries can overcome the plain statutory text.

For example, the Minnesota Supreme Court's decision in *Christensen* squarely aligns with the decision below on the question presented. Respondents emphasize that *Christensen* turned on "promissory estoppel," rather than express "contract rights." Br. in Opp. 20-21. But the decision below similarly held that "expectational interests" could support a Contracts Clause claim. *See* Pet. App. 35a-36a. And likewise, both cases hold that certain "statutory disclaimers" do not preclude Contracts Clause claims, even if they differ on whether *some* disclaimers could conceivably have that effect.[3]

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[3] The decision below suggests that a legislature can foreclose Contracts Clause liability by "unambiguously disclaim[ing]" any intent to contract, even as it holds, contrary to this Court's precedents, that an unqualified right-to-amend clause does not

Compare Christensen, 331 N.W.2d at 748, *with* Pet. App. 21a n.5, 31a-32a. Thus, whatever their subtle differences, the cases are aligned where it counts.

So too on the other side of the split. In line with this Court's previous guidance, many courts across the country have held that right-to-amend clauses prevent contract formation under the Contracts Clause. Respondents' attempts to identify differences among these cases are again unavailing.

The Third, Fourth, Sixth, Eighth, and Eleventh circuits have all enforced statutory reservations of rights against Contracts Clause claims. *See Transp. Workers Union of Am. v. Se. Pa. Transp. Auth.*, 145 F.3d 619, 621 (3rd Cir. 1998) (no claim when authorizing statute stated plan could be "modified from time to time"); *City of Charleston v. Pub. Serv. Comm'n of W. Va.*, 57 F.3d 385, 391-92 (4th Cir. 1995) (no violation of rights "subject to state restriction"); *Frazier v. City of Chattanooga*, 841 F.3d 433, 436-37 (6th Cir. 2016) (reservation of right to "freely amend" plan prevented formation of "contractual right"); *Hawkeye Commodity Promotions, Inc., v. Vilsack*, 486 F.3d 430, 438 (8th Cir. 2007) (no violation where contract grants rights only "as may be allowed by law"); *Taylor v. City of Gadsden*, 767 F.3d 1124, 1134-

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qualify as such a disclaimer. *See* Pet. App. 33a-34a & n.7. *Christensen* "rejected" that possibility outright. 331 N.W.2d at 748 ("[S]tatutory disclaimers of . . . contract rights [that] do more than simply reserve the state's right to amend" cannot be used to hedge against "promissory estoppel."). But this bit of daylight actually strengthens the case for review. Legislatures need clear guidance as to what language, if any, they can use to prevent contract formation when creating statutory benefits.

36 (11th Cir. 2014) (statement that rate was "determined by statute and subject to change" foreclosed any "implied promise" not to raise the rate). That they have done so while addressing case-specific "legal and factual issues" is entirely unremarkable. *See* Br. in Opp. 22-23.

Five state supreme courts follow the same rule, albeit with some nuance. *See* Pet. 13-15. In attempting to show discord among these jurisdictions, Respondents repeat their mistaken claim that federal Contracts Clause rights ultimately hinge on state law. Br. in Opp. 26 (attributing outcomes to "inherent differences in [States'] respective laws of contracts"). But each of the cited state-court cases had good reason to discuss and analyze state law. As Petitioners acknowledged in their petition, two of these decisions arose under state constitutional provisions. *See* Pet. 13. In other cases, the court was required to construe a state statute, but only to determine the *scope* of a reservation of rights in its Contracts Clause analysis. *See, e.g.*, *Nat'l Ass'n of Gov't Emps. v. Commonwealth*, 646 N.E.2d 106, 108-10 (Mass. 1995). These cases therefore do not cast doubt on the principle that an unqualified right-to-amend provision bars formation of rights under the Contracts Clause.

In sum, there can be no serious dispute that the decision below deepened an existing split of authority on whether a right-to-amend provision forecloses statutory benefits from becoming contractual under the Contracts Clause. That important question warrants this Court's review.

III. An Exception to the Final Judgment Rule Applies Here.

Finally, Respondents seek to frustrate this Court's review by noting that the decision below did not finally adjudicate their claims. Br. in Opp. 12-13. That decision, however, is nonetheless jurisdictionally ripe for review because a well-recognized exception to the final judgment rule applies.

This Court takes a "pragmatic approach" to determining whether a state court's judgment is final for purposes of 28 U.S.C. § 1257. *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 722-23 n.28 (1974); *see Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975). As outlined in *Cox*, there are four circumstances in which a state court's determination of a federal issue constitutes a "final judgment or decree" notwithstanding "further proceedings in the lower state courts to come." *Cox*, 420 U.S. at 477-85.

The third *Cox* exception applies here. This exception applies when the federal issue has been conclusively resolved in the decision below, and where there are "further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. "[I]n these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." *Id.*

Here, the remaining issues for the trial court involve interwoven claims under the Contracts Clause and North Carolina state law. In particular,

Respondents' takings claim under the state constitution is predicated entirely on the existence of contract rights under the Contracts Clause. *See* Pet. App. 48a.

For this reason, no matter what happens in further state court proceedings, Petitioners could be blocked from seeking this Court's review. If Petitioners prevail in the lower court, the federal issue will become moot. Likewise, because Respondents' federal and state claims are overlapping, if Petitioners *lose* in the lower Court, there could be "adequate and independent state grounds" for the state court's decision, depriving this Court of jurisdiction. *See Michigan v. Long*, 463 U.S. 1032, 1039 (1983). Thus, "later review of the federal issue" in this case possibly "cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481. Given these circumstances, the decision below is ripe for this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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