No. _____

In the
Supreme Court of the United States

CONNECTICUT STATE POLICE UNION,
Petitioner,

v.

JAMES ROVELLA, COMMISSIONER OF DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC PROTECTION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In response to an increase in false and anonymous complaints made against state troopers, the petitioner, the Connecticut State Police Union ("CSPU"), negotiated in its collective bargaining agreement for the right to exempt from Connecticut's Freedom of Information Act ("FOIA") internal affairs investigations of state troopers with the disposition of "exonerated, unfounded or not sustained." In 2018, when the agreement was adopted, Connecticut law allowed the parties to negotiate over this term. General Statutes § 5-278(e) (Rev. 2019). In 2020, the legislature adopted Public Act 20-1, "An Act Concerning Police Accountability," which retroactively removed this provision of CSPU's collective bargaining agreement. The question presented in this appeal is:

Whether Connecticut Public Act 20-1, "An Act Concerning Police Accountability," violates the Contracts Clause, Article I, Section 10, of the United States Constitution because it retroactively eliminates a provision of the Connecticut State Police Union's collective bargaining agreement that had protected from public disclosure false or unsubstantiated allegations of misconduct made against state troopers.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court whose judgment is sought to be reviewed are:

Petitioner Connecticut State Police Union was the plaintiff and appellant below.

Respondent James Rovella, Commissioner of Department of Emergency Services and Public Protection, was the defendant and appellee below.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Connecticut State Police Union is a Connecticut non-stock corporation. No parent corporation or publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

The proceedings directly related to this case are:

(1) *Connecticut State Police Union v. Rovella*, No. 20-3530 (2d. Cir.). Judgment entered on June 2, 2022; and

(2) *Connecticut State Police Union v. Rovella*, No. 3:20-cv-1147-CSH (D. Conn.). Order denying preliminary injunction entered on October 13, 2020.

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PETITION FOR WRIT OF CERTIORARI

The Connecticut State Police Union ("CSPU") is the collective bargaining representative for all Connecticut state troopers. CSPU petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The Second Circuit's decision affirming the district court's decision is reported at 36 F.4th 54 (2d Cir. June 2, 2022). The district court's opinion denying the preliminary injunction is reported at 494 F.Supp. 3d 210 (D. Conn. Oct. 13, 2020). The district court's unpublished opinion denying the temporary restraining order is available at 2020 WL 7419648 (D. Conn. Aug. 20, 2020). These opinions and orders are appended to this petition.

JURISDICTION

The Second Circuit issued its opinion on June 2, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are: U.S. Const. Art I, § 10; Conn. Gen. Stat. § 5-278 (Rev. 2019); Conn. Gen. Stat. § 5-278 (Rev. 2021); Conn. Public Act 20-1.

STATEMENT OF THE CASE

This Court has not previously considered the constitutionality of a statute that impairs a public sector union's collective bargaining agreement. The Sixth and Seventh Circuits have held that, to survive Contracts Clause scrutiny, the government must show that the impairment of the collective bargaining agreement was clearly necessary and essential to meet a specified public purpose. *See Elliott v. Board of School Trustees*, 876 F.3d 926, 937-38, *cert. denied*, 138 S.Ct. 2624 (2017); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 325-27 (6th Cir. 1998). Conversely, the Second Circuit panel here applied a more lenient standard and concluded that impairment of CSPU's collective bargaining agreement was constitutional because it was a "reasonable response to the 'genuine crisis' in public confidence facing American cities and States in the weeks and months following the nationwide protests that [George] Floyd's murder spurred." *Connecticut State Police Union*, 36 F.4th at 67. The instant case presents this Court with the opportunity to resolve this circuit split and provide guidance on how to evaluate whether legislation that impairs a public sector union's collective bargaining agreement violates the Contracts Clause.

I. Background

In this case, the CSPU is seeking declaratory and injunctive relief from Connecticut Public Act 20-1, "An Act Concerning Police Accountability," which retroactively overrides provisions of CSPU's current

collective bargaining agreement ("CBA") and thereby violates the Contracts Clause, Article I, Section 10, of the United States Constitution.

The operative collective bargaining agreement between CSPU and the State of Connecticut grants CSPU's members the right to object to freedom of information ("FOI") requests that invade their privacy, and exempts from disclosure information contained in internal affairs investigations that result in a disposition of "exonerated, unfounded, or not sustained." CBA, Article 9, Section 2(c). These terms were specifically negotiated in the CBA in response to an increase in anonymous, false complaints that were being made against state troopers. The Connecticut General Assembly approved the CBA and these provisions in 2019. In June 2020, following a contested grievance proceeding that was filed in April 2020, the Connecticut Office of Labor Relations ordered the Department of Emergency Services and Public Protection ("DESPP")[1] to cease and desist from violating these provisions of the CBA.

Thereafter, the State sought to effectuate an end-run around the CBA by adding into the Police Accountability Act two sections which retroactively override Article 9 of the CBA. This lawsuit seeks to have Public Act 20-1 declared unconstitutional.

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[1] DESPP is the state agency that oversees the Division of State Police.

A. The Collective Bargaining Agreement

CSPU is the collective bargaining representative for all Connecticut State Police. CSPU represented state troopers in connection with negotiations for (1) the State Police [NP-1] Bargaining Unit Contract with the State of Connecticut for July 1, 2015 to June 30, 2018 (the "2015-2018 CBA"); and (2) the State Police [NP-1] Bargaining Unit Contract with the State of Connecticut for July 1, 2018 to June 30, 2022 (the "2018-2022 CBA" or "current CBA").[2] Verified Complaint, ¶¶ 15, 17.

Article 9 of both CBAs relates to, among other things, FOI requests for personnel files and internal affairs investigations. In the 2015-2018 CBA, Article 9, Section 2(c) provided:

> When an employee, after notification to him/her that a freedom of information request has been made concerning his/her file, objects to the release of that information on the basis of reasonable belief that the release would constitute an invasion of his/her privacy, the employee shall petition the Freedom of Information Commission for a stay on the release of said information, and the Department shall support the

[2] The 2018-2022 collective bargaining agreement remains in effect until a new collective bargaining agreement is agreed to and approved by the legislature.

> employee's petition and not release the information until the FOIC has made a final determination on the issue of whether said release would constitute an invasion of privacy.

Id. ¶ 16.

One of the issues of concern to CSPU during the negotiation of the current CBA was the increase in anonymous, false complaints about state troopers, because indiscriminate disclosure of such false allegations has the potential to unfairly jeopardize a trooper's reputation and livelihood. To address that concern, Article 9 of the current CBA differs from Article 9 of the 2015-2018 CBA in that it has a new, negotiated provision that specifically exempts such false or unfounded complaints that were subject to internal affairs investigations from being disclosed pursuant to a FOI request. Article 9, Section 2(c) now provides that:

> When an employee, after notification to him/her that a freedom of information request has been made concerning his/her file, objects to the release of that information on the basis of reasonable belief that the release would constitute an invasion of his/her privacy, the employee shall petition the Freedom of Information Commission for a stay on the release of said information, and the Department shall support the employee's petition and not release the information

> until the FOIC has made a final determination on the issue of whether said release would constitute an invasion of privacy. An employee's OPF [Official Personnel Folder] and internal affairs investigations with only a disposition of "Exonerated, Unfounded or Not Sustained" shall not be subject to the Connecticut Freedom of Information Act.

(Emphasis added.) Verified Complaint, ¶ 21 & Ex. 1.

The current CBA was the result of both negotiations between the State and CSPU and a binding arbitration on certain issues. In the end, both the tentative agreements between the State and CSPU and the arbitrator's decision were approved by the General Assembly. *Id.* ¶¶ 19-20. The current CBA is a contract between CSPU and the State, which remains in full force and effect until a new CBA is agreed to and adopted. *Id.* ¶ 23.

Notably, prior to the enactment of Public Act 20-1, the current CBA's requirement that "[a]n employee's OPF and internal affairs investigations with only a disposition of "Exonerated, Unfounded or Not Sustained" shall not be subject to the Connecticut Freedom of Information Act" became the subject of an April 2020 grievance and related adjudicative proceedings. The contested issues included, *inter alia*, whether the DESPP was engaging in policies and practices in violation of the CBA with respect to releasing this type of information. *Id.* ¶ 24. On June

10, 2020 a decision was issued by the Connecticut Office of Labor Relations declaring:

> "The Department shall cease and desist from releasing investigations that are Sustained, in whole or in part, without affording the subject Trooper an opportunity to object to FOI as the contract requires. Moreover, the Department shall cease and desist from seeking consent from Troopers to release investigations where the result is Exonerated, Unfounded, or Not Sustained as the contract does not allow release in those circumstances."

Id. ¶ 25, Ex. 6 to Reply in Support of Mot. for PI.

B. Public Act 20-1 And Its Retroactive Nullification Of Section 9 Of The Collective Bargaining Agreement

Sections 8 and 9 of Public Act 20-1, which became effective on July 31, 2020, expressly nullified Article 9, Section 2(c) of the current CBA. Prior to the Act, General Statutes § 5-278(e) provided that when there was a conflict between a collective bargaining agreement or arbitration award and a state statute, regulation, or special act, "the terms of such agreement or arbitration award shall prevail." Sections 8 and 9 of the Act create a carve-out to that provision specifically aimed at abrogating Article 9, Section 2(c) of the current CBA. Specifically, Sections 8 and 9 of the Act provides in relevant part:

Sec. 8. Subsection (e) of section 5-278 of the general statutes is repealed and the following is substituted in lieu thereof (Effective from passage):

(e) [Where] (1) Except as provided in subdivision (2) of this subsection, where there is a conflict between any agreement or arbitration award approved in accordance with the provisions of sections 5-270 to 5-280, inclusive, on matters appropriate to collective bargaining, as defined in said sections, and any general statute or special act, or regulations adopted by any state agency, the terms of such agreement or arbitration award shall prevail…

(2) For any agreement or arbitration award approved ***before***, on or after the effective date of this section, in accordance with the provisions of sections 5-270 to 5-280, inclusive, on matters appropriate to collective bargaining, as defined in said sections, where any provision in such agreement or award pertaining to the disclosure of disciplinary matters or alleged misconduct would prevent the disclosure of documents required to be disclosed under the provisions of the Freedom of Information Act, as defined in section 1-200, the provisions of the Freedom of

> Information Act shall prevail. The provisions of this subdivision shall not be construed to diminish a bargaining agent's access to information pursuant to state law.

* * *

> Sec. 9. (NEW) (*Effective from passage*) No collective bargaining agreement or arbitration award entered into ***before***, on or after the effective date of this section, by the state and any collective bargaining unit of the Division of State Police within the Department of Emergency Services and Public Protection may prohibit the disclosure of any disciplinary action based on a violation of the code of ethics contained in the personnel file of a sworn member of said division.

(Emphasis added).

Sections 8 and 9 of Public Act 20-1 endeavored to abolish Article 9, Section 2(c) of the current CBA by changing the procedure to be followed when a FOI request seeks information about an employee's OPF or internal affairs investigation(s) by:

> a. dispensing with the requirement that a Trooper be notified of a FOI request concerning his file so that he can have the opportunity to protect his privacy interest if he reasonably believes that the release of the information would constitute an invasion of his privacy; and

b. nullifying the mutually agreed-upon language that "an employee's OPF and internal affairs investigations with only a disposition of "Exonerated, Unfounded or Not Sustained" shall not be subject to the Connecticut Freedom of Information Act."

C. The Department Issues A Bulletin Declaring That It Will Breach The CBA Because Of Public Act 20-1

After the enactment of Public Act 20-1, and after the Connecticut Office of Labor Relation's decision ordering DESPP to comply with the current CBA, DESPP publicly declared that it would not abide by its obligations under the CBA. Specifically, on July 31, 2020, the State Police Training Academy issued a Training Bulletin which specified the actions that DESPP planned to take due to Public Act 20-1. Verified Complaint, ¶ 30. The Training Bulletin stated in relevant part that Public Act 20-1:

> Nullifies collective bargaining language and arbitration awards previously negotiated, regarding the disclosure of disciplinary action, including Internal Affairs investigations. The bill provides for the public disclosure of disciplinary matters or alleged misconduct (sustained, unsustained, exonerated, and unfounded IAs) under the Freedom of Information Act, which will be released with the appropriate redactions.

Ex. B to Verified Complaint. Thus, DESPP created and published an official policy document announcing its intention to immediately release information relating to false, anonymous complaints about CSPU's members that is expressly prohibited from disclosure under the current CBA. Moreover, there are pending FOI requests for personnel files and information about internal affairs investigations relating to the Union's members. Verified Complaint, ¶ 32.

II. Nature of the Proceedings

A. District Court Proceedings

On August 11, 2020, CSPU filed this action seeking: (1) a declaration that Sections 8 and 9 of the Act violate the Contracts Clause and (2) an injunction ordering the defendant to comply with his obligations under the current CBA. CSPU also filed an application for a temporary restraining order and motion for preliminary injunction to prevent the defendant from disseminating complaints and internal affairs investigations where the alleged misconduct was not sustained until the court adjudicated this case on the merits. On August 11, 2020, the district court declined to enter an immediate temporary restraining order and ordered expedited briefing on the issue. On August 20, 2020, after initial briefing, the district court issued an order denying the application for a temporary restraining order (without prejudice) and setting the motion for preliminary injunction for a hearing. On September 1, 2020, the court held a telephonic hearing on the motion for preliminary injunction. On October 13, 2020, the district court

issued an opinion denying the motion. CSPU filed an appeal to the Second Circuit on October 15, 2020.

B. Second Circuit Proceedings

Pursuant to Federal Rule of Appellate Procedure 8, CSPU filed a motion for injunction pending appeal on November 13, 2020.[3] A panel of the Second Circuit (*Carney, Nardini, Katzmann*, *J.*'s) heard argument on February 23, 2021. On February 25, 2021, the panel issued an order denying CSPU's motion. On March 4, 2021, CSPU filed a petition for an initial hearing *en banc* on its merits appeal and a motion for reconsideration/reconsideration *en banc* of the panel's February 25, 2021 order. On March 24, 2021, the Second Circuit issued an order denying CSPU's petition and motion.

On October 29, 2021, a panel of the Second Circuit (*Lohier, Lynch, Bianco, J.*'s) heard oral argument on the merits of CSPU's appeal. On June 2, 2022, the panel issued its decision affirming the district court. The panel first "assume[d] without deciding that the contractual impairment at issue here was substantial." 36 F.4th at 63. The panel next concluded that the impairment served the public purpose of "promoting greater transparency and accountability for law enforcement." *Id*. at 64. Finally, the panel concluded that the impairment was "reasonable and necessary" because "making it easier

[3] As required by FRAP 8, in order to obtain relief from the Second Circuit, on October 19, 2020, CSPU first filed a motion for injunction pending appeal in the district court. The district court denied the motion on November 10, 2020.

for the public to access police records was a reasonable response to the 'genuine crisis' in public confidence facing American cities and States in the weeks and months following the nationwide protests that [George] Floyd's murder spurred." *Id*. at 67.[4]

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[4] The emotion underlying the Second Circuit panel's opinion is understandable but appears to have clouded its legal analysis. The Court starts, in the second paragraph: "About a year after the Connecticut state legislature ratified the agreement, however, Connecticut found itself in the throes of a racial justice movement that began when George Floyd was killed by a white police officer in Minneapolis. In response to Floyd's murder and the nationwide protests that followed, Connecticut lawmakers passed a law that, among other things, nullified FOIA exemptions such as the one in the agreement here." *Connecticut State Police Union*, 36 F.4th at 58. Later in its opinion, the Court set forth at length the details of Floyd's death. *Id*. at 59.

This was a tragedy that should not have happened. Four Minneapolis police officers were convicted of crimes in connection with Floyd's death. The detailed description of this tragedy in Minneapolis, however, was not relevant to the question of whether the circumstances in Connecticut were such that it was necessary to immediately invalidate Connecticut state troopers' bargained for rights under a collective bargaining agreement. Moreover, that police officers may have become unfairly maligned by elected leaders in Connecticut in response to that tragedy means that the panel should have been more diligent in scrutinizing the alleged need for legislative impairment of CSPU's collective bargaining agreement and protecting the union's bargained for rights. *See Falbo v. United States*, 320 U.S. 549, 561 (1944) ("The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution.") (*Murphy, J.*, dissenting).

REASONS FOR GRANTING THE PETITION

> Of course, the framers knew how to impose more nuanced limits on state power. The very section of the Constitution where the Contracts Clause is found permits states to take otherwise unconstitutional action when "absolutely necessary," if "actually invaded," or "wit[h] the Consent of Congress." But in the Contracts Clause the framers were absolute. They took the view that treating 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 proved unpopular with some passing majority.

Sveen v. Melin, 138 S. Ct. 1815, 1826–27 (2018) (*Gorsuch, J.*, dissenting)).

I. THIS COURT SHOULD GRANT *CERTIORARI* AND ADDRESS WHETHER AND TO WHAT EXTENT THE CONTRACTS CLAUSE PROTECTS A PUBLIC SECTOR UNION'S COLLECTIVE BARGAINING AGREEMENT FROM LEGISLATIVE IMPAIRMENTS

The Contracts Clause states that "[n]o State shall … pass any … Law impairing the Obligation of

Contracts ….” U.S. Const. Art. I, § 10, cl. 1.[5] The underlying purpose of the Contracts Clause is to protect the expectations of persons who enter into contracts from the danger of subsequent legislation that has the effect of impairing the contract. *See United States Trust*, 431 U.S. 1, 17 (1977).

The panel set forth the three-question test to evaluate whether a statute violates the Contracts Clause:

> to determine whether a law violates the Contracts Clause, we ask (1) whether the contractual impairment is substantial, (2) whether the law serves “a legitimate public purpose such as remedying a general social or economic problem,” and (3) whether the means chosen to accomplish that purpose are reasonable and necessary.

Connecticut State Police Union, 36 F.4th at 563. This test comes from this Court’s decision in *United States Trust,* 431 U.S. at 25–26 (“As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose.”)

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[5] The full text of Article I, Section 10, clause 1 is as follows: “No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”

In *Melendez v. City of New York*, 16 F.4th 992 (2d Cir. 2021), another panel of the Second Circuit set forth the history of this Court's Contracts Clause jurisprudence. The *Melendez* panel observed that there has been confusion over the application of the third question to public and private contracts:

> The analytical standard articulated in *United States Trust* presents some challenges because "reasonableness" generally signifies a relaxed standard of judicial inquiry, by contrast to "necessity," which informs the most penetrating constitutional review. [ ] Also, some courts and scholars have criticized the idea of a less deferential standard of review for impairments of public contracts, as a matter of both practical application and constitutional grounding.[ ] We need not here enter into these debates. For purposes of this appeal, it suffices for us to recognize that the underlying purpose of the standard pronounced in *United States Trust* was to ensure the continued vitality of the Contracts Clause, there in the context of public contracts.

Melendez, 16 F.4th at 1027–28. As the dissenting judge in *Melendez* explained, the uncertainty with respect to the third question is whether the test is one of "strict scrutiny or substantial deference." *Id*. at 1070 (*Carney, J*., concurring and dissenting in part).

The *Melendez* majority and dissent disagreed about whether the more compelling standard should be applied to private contracts. But, they agreed that, when a *public* contract is at issue, the higher scrutiny standard should apply. As the *Melendez* dissent explained:

> Since the 1980s, the Supreme Court and our Court have articulated and applied a strongly deferential standard to legislation facing Contracts Clause challenges, particularly when—as here—the legislation does not involve public contracts or the government's financial self-interest. The Supreme Court has "repeatedly held that unless the State is itself a contracting party, courts should properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."[ ] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 505, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).
>
> ***
>
> On one end, the level of deference that is owed the legislative judgment in cases involving private contracts must be more deferential than so-called "less deference" scrutiny, which we apply when evaluating legislation that involves public contracts or is otherwise "self-serving" to the government's direct financial interest.

Melendez, 16 F.4th at 1048 (emphasis added; footnotes omitted.) (*Carney, J.*, concurring and dissenting in part).

In contrast to the *Melendez* panel's analysis,[6] the Second Circuit panel in the case *sub judice* determined that the more deferential standard applies to public contracts:

> What level of deference should courts apply where, as here, the State acts not self-servingly but in the public interest? To date we have provided only a few hints as to what the answer to that question might be. *See* [*Sullivan v. Nassau Cty. Fin. Auth.,* 959 F.3d 54, 65–67 (2d Cir. 2020)] (applying "less

[6] *Melendez* was decided the day before oral argument on the merits in this case. The panel allowed the parties to file supplemental briefs to address the applicability of *Melendez* to the instant case. The panel ultimately concluded that *Melendez*' analysis is only applicable when a private contract is at issue. *See Connecticut State Police Union*, 36 F.4th at 65 n.3 ("The CSPU, citing *Melendez*, argues that we must apply strict scrutiny in evaluating a law that impairs a public contract. *See* Appellant's Supplemental Br. 6. But *Melendez* said no such thing. To the contrary, in *Melendez* we strove to cabin our analysis to laws that impair private contracts rather than public ones. *See Melendez*, 16 F.4th at 1021 (declining to discuss a line of cases relating to public contracts since the law at issue in the case "act[ed] on private, not public, contracts"); *id.* at 1027–28 (declining to "enter into ... debates" regarding the appropriate standard of review for impairments of public contracts). *Melendez* therefore does not (and could not, without an in banc proceeding) alter the framework set forth in *Sullivan* and *Buffalo Teachers* to evaluate a law that impairs a public contract.")

> deference" scrutiny to the wage freeze in question because the plaintiffs had put forth sufficient evidence that the law might "be self-serving" and explaining that, when the state impairs a public contract, "less deference" applies where sufficient indicia of self-serving intent trumps a "presumption that a passed law is valid and done in the public interest"); [*Buffalo Teachers Federation v. Tobe*, 464 F.3d 362, 370 (2d Cir. 2006)] (distinguishing between cases where the state legislature shirks "its obligations as a matter of political expediency" and "genuinely act[s] for the public good," but assuming without deciding that "less deference" should apply because the wage freeze at issue would be "reasonable and necessary even under [that] standard" (quotation marks omitted)). We now hold that in the absence of "self-serving, privately motivated, action" on behalf of the State, courts may presume that the "passed law is valid and done in the public interest."

Connecticut State Police Union, 36 F.4th at 66.

The panel's analysis here is not only at odds with *Melendez*, it also creates a circuit split. In applying the three-question test for Contracts Clause violations to legislation impairing a public collective bargaining agreement, both the Sixth and Seventh Circuits have applied the more stringent test.

In *Elliott v. Board of School Trustees*, 876 F.3d 926, 937, *cert. denied*, 138 S.Ct. 2624 (2017), the State argued that "heightened scrutiny under *United States Trust* applies only when a State itself enters into a financial obligation and not when the State exercises its police power." The Seventh Circuit rejected the State's claim, explaining:

> When a State makes an express commitment to private businesses or individuals, reliance may be highly justified… The State therefore must have a substantial reason for breaking its own promise… When a State impairs its own contracts, the impairment must be "clearly necessary" or "essential," not merely convenient or expedient.

Elliott, 876 F.3d at 937–38.

In *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), the Sixth Circuit evaluated an Ohio statute that impaired a non-budgetary provision of a public collective bargaining agreement that allowed public employees to make political contributions through wage checkoffs. The Sixth Circuit expressly concluded that it could not "defer to the state's judgment that to effectuate [its public policy] goals the substantial impairment of existing contracts was necessary and reasonable." *Id*. at 325. "Something more than the showing made to survive rational basis scrutiny is required to justify such [a substantial impairment of a pre-existing contract]." *Id.* at 326. The court declared the statute

unconstitutional, observing that there was no reason the State could not wait until its contractual obligations expired to pursue its public policy goals:

> The state has been permitting checkoffs for quite some time. Throughout this time, it has been willing to tolerate or been unaware of the evils it now claims are associated with permitting public employees and their unions to utilize checkoffs for political causes. If the state has known of, but tolerated, these problem[s] throughout this time, it can tolerate them a bit longer until its contractual obligations expire. If the state's concern is the result of a recent epiphany, it has failed to persuade us that the newly discovered danger of checkoffs justifies the extreme solution of substantially impairing existing contracts. What is to prevent such epiphanies from serving as the basis for the state to abrogate any other contractual obligation it has undertaken? Certainly, the state is permitted to enact measures to deal with a newly discovered evil. But, the achievement of even a good goal (newly discovered) can normally wait until existing contracts expire.

Toledo Area, 154 F.3d at 326–27.

Conversely, here, because the Second Circuit panel applied a deferential standard, it merely accepted the State's contention that the Act needed to be immediately implemented because it was a "reasonable response" to the tragedy that occurred in Minneapolis, Minnesota and the public protests that ensued. The State presented no evidence in this case to show that immediate implementation of *this Act* was, in fact, *essential* to achieve the general public policy goal of police accountability. Specifically, the Second Circuit panel stated:

> As for necessity, the CSPU argues that the legislature could have waited to pass the FOIA provisions of the Act until after the expiration of the collective bargaining agreement in June 2022. *See* Appellant's Br. 30; Oral Arg. Tr. at 7:9–7:12. Again, we are not persuaded by this particular argument about timing, for in July 2020, when the Connecticut legislature met in special session, the protests in Connecticut and elsewhere made clear that it was finally time to address issues of police accountability. *See Rovella*, 494 F. Supp. 3d at 216–17 (Lamont proclamation convening special assembly). Under these circumstances and the resulting sense of urgency, waiting for two more years to make police records more accessible was not a viable alternative option.

Connecticut State Police Union, 36 F.4th at 67–68. This is inconsistent with the Seventh Circuit's recognition that, when a State impairs its own contract, the State must show that the impairment was "clearly necessary" or "essential." It is also contrary to the Sixth Circuit's recognition that the court must grapple with whether *immediate* implementation of the State's newly identified policy is actually essential to meet its goals.

The conflict between the Second Circuit's analysis here and the Sixth and Seventh Circuits' analyses in *Toledo Area* and *Elliott* creates confusion about how courts should evaluate whether a statute that impairs a public sector union's existing collective bargaining agreement violates the Contracts Clause. This Court should grant a *writ of certiorari* and clarify this area of the law.

CONCLUSION

This Court should grant the Petition for a *Writ of Certiorari*.

Respectfully submitted,

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