Robert F. Cherry, Jr., *et al.*,	*	IN THE
Petitioners	*	COURT OF APPEALS
v.	*	OF MARYLAND
Mayor & City Council of Baltimore City,	*	September Term, 2020
Respondent	*	Petition Docket No. 271

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ANSWER TO PETITION FOR WRIT OF CERTIORARI

Respondent, the Mayor & City Council of Baltimore City ("the City"), by its undersigned counsel, submits this Answer to the Petition for Writ of Certiorari.

Introduction

Petitioners ask the Court to take the extraordinary step of granting bypass certiorari review in the hope that the Court ultimately will reverse myriad factual findings (including credibility determinations regarding expert witnesses) that the trial judge, the Hon. Julie R. Rubin, made after receiving seven days of testimony and 145 exhibits and which she expressed in the course of over 200 pages of decisions she issued in the case. Although they assert that this case presents an opportunity for the Court to resolve important public policy questions regarding municipal pension obligations, those questions cannot even be considered without wading through Judge Rubin's extensive findings based on detailed presentations from teams of actuaries on both sides. Along the way, Petitioners misconstrue the record and Judge Rubin's findings, and conveniently ignore all of her sound reasons for rejecting their evidence and their experts' opinions, which she found were not credible.

There is no reason for this Court to grant bypass review. The Court should let the normal appellate process take its course.

Factual Background

In the spring of 2010, the City faced the worst fiscal crisis in generations, brought on by the delayed effects of the worst economic downturn since the Great Depression coupled with the unexpected and extraordinary expense of dealing with record snowstorms. At the same time, the Fire & Police Employees Retirement System ("FPERS") Plan was becoming more and more actuarially unsound due to an increasingly volatile market and a dysfunctional means of providing benefit increases to retirees. The City's expected contributions to the Plan to combat these actuarial problems threatened to spiral out of control and well beyond the range of what the City could possibly afford.

The City already had closed a $120 million budget gap for FY2010 (in the spring of 2009) by implementing cuts that included rotating fire company closures; shifting to once-a-week trash and recycling collection; eliminating the 311 call center night shift; abolishing 523 city employee positions across agencies (excluding sworn police and fire positions); reducing hours at libraries; closing five recreation centers; turning two recreation centers over to the school system; and shortening hours at remaining recreation centers. Joint Stip., ¶ 31, E.54; E.4697; E.2770–71. Then, unforeseen State cuts and preliminary local revenue shortfalls resulted in an additional $60.2 million mid-year budget gap. Joint Stip., ¶ 31, E.54; E.2771. The City resolved this by making additional cuts that included unpaid furloughs for City employees (excluding line-of-duty public safety workers); agency budget reductions of $13 million; deferral of $2.3 million in pay-as-you-go capital

expenditures; and extension of the then two-year-old hiring freeze. *Id.*; *see also* E.4697–98; E.2771. Still, as local revenues continued to deteriorate and the City was hit with a series of historic snowstorms, the City was required to implement yet another round of agency cuts and to look to its reserves. Joint Stip., ¶ 31, E.54. In the end, the City endured three rounds of budget cuts during FY2010 and used approximately $30 million of its reserves to balance what was already a very lean budget. *Id.* The City, however, made its full recommended contribution, of more than $69 million, to the Plan. E.3745.

The City's mounting deficits in 2010 culminated in a $121 million budget gap for FY2011, Joint Stip., ¶ 32, E.54, which did not include an additional $64 million that would be needed if the City Council adopted the recommendation of actuaries to lower the assumed rate of return for the retirees' assets in the Plan. The budgeted $101 million contribution to the Plan for FY2011, already 270% greater than the City's contribution in FY2001, just ten years before, would balloon to $165 million if the actuarial recommendation was adopted. Joint Stip., ¶ 35; E.2542. Over the previous 20 years, the Plan's actuarial liabilities had increased by a staggering $2 billion, from $1.1 billion in FY1990 to $3.1 billion in FY2010, as the system matured, life expectancies increased, and benefits steadily improved. E.4656. Meanwhile, the unfunded portion of this liability had increased dramatically from $100 million (on an actuarial basis) in FY2005 to half a billion dollars in FY2009. *Id.*

To address the budget gap, the City enacted legislation creating approximately $50 million in new taxes and made $73 million in further cuts to City services. Joint Stip., ¶ 33, E.54. The FY2011 cuts included: the expansion of the furlough program; the elimination

of another 361 positions from the City workforce; the reduction of the employer share (and a corresponding increase of the employee share) of prescription drug costs; a $6.3 million reduction in transportation and crossing guard subsidies to the school system; the continuation of three rotating closures of fire stations; the reduction in maintenance and custodial services for City buildings; and reductions in park maintenance and horticulture expenses. E.4698; E.2771. Although the City ultimately maintained its FY2011 contribution to the Plan at $101 million, it could not keep pace with the increasing cost of the system, let alone the cost of enacting the legislative change required to address the unpredicted cost of the variable benefit, while still maintaining essential city services. Joint Stip., ¶ 35, E.55–56.

Under the former variable benefit regime, unique to the City of Baltimore, a benefit increase would be triggered on June 30 of a given year if, during the prior fiscal year, the earnings on the system's funds exceeded 7.5%. Art. 22, § 36A(c) (2009). In that event, all of the investment returns on the retirees' assets between 7.5% and 10%, and half of the returns on the retirees' assets in excess of 10%, would move from the system's four primary funds into two special funds, created by legislation, to pay for a benefit increase for retirees. § 36A(c)–(d).

To illustrate, in FY2005, the system's assets earned a return of 11.59%, or $175 million. Of that $175 million, approximately $50 million represented (1) all of the earnings between 7.5% and 10% and (2) half the earnings in excess of 10%. Of that $50 million, approximately $37 million was attributable to returns on the two funds that constituted the retirees' assets (as opposed to the returns on active members' assets). Joint Stip., ¶ 23, E.52–

53. Accordingly, $37 million was transferred from the system's primary funds and into the funds created for the purpose of funding the variable benefit. *Id.* Using those funds, the system purchased fixed-income instruments that provided each eligible retiree or beneficiary with a raise of 2.2%. *Id.*

Because the variable benefit depended on market performance, benefit increases were not assured in any given year. While the variable benefit generated the equivalent of a 3.0% annual increase from its inception in 1984 through 2009, it returned only 2.18% between 1990 and 2009 and only 1.42% between 2000 and 2009. *Id.*

Because of increasing market volatility during the 2000s, it became apparent that the variable benefit was having a negative impact on the system's viability. *See* Joint Stip., ¶ 25, E.52; E.2123–25. Simply put, the system was unable to offset the large investment losses in some years because many of the investment gains in good years were siphoned off to fund the variable benefit. E.3524, E.3530–32.

The combination of poor market performance in FY2008 and FY2009 and the partial rebound of the market in FY2010 provides a perfect illustration of the flaws in the variable benefit system that predated the passage of Ordinance 10-306. In the spring of 2010, the Plan's investment earnings exceeded 7.5% and, therefore, would have triggered a benefit increase notwithstanding the devastating losses just prior to FY2010. *See* E.3754; *see also* Joint Stip., ¶ 22, E.52. Thus, even though the market plummeted during FY2008 and FY2009 (without any negative impact on the benefits provided to retirees), and even though the gains posted in FY2010 represented only a fraction of what had been lost, the variable benefit would have been triggered because the gains appeared likely to exceed

7.5%. As a consequence, as much as $100 million would have been removed from the system's primary assets just when those funds were needed most. The variable benefit—a provision designed and intended to provide cost of living increases—threatened to undermine the Plan's ability to continue providing the basic benefit.

All relevant actors agreed in 2010 that the variable benefit was a key factor threatening the Plan's actuarial soundness. Even the public safety unions' actuary, Thomas Lowman, candidly recognized in testimony before the City Council on June 10, 2010 that the variable benefit needed to go: "You know, the Union knew that the Plan had troubles. The Union said, 'We don't want any variable, just scrap it.' We were the first one to say, you know, Just get rid of the whole thing.'" E.2848.

Mr. Lowman agreed with the Plan's actuary that if the City did not abolish the variable benefit, it needed to amend Article 22 and adopt a lower earnings assumption for post-retirement assets. *Id.* He also agreed that "the trend line"—*i.e.*, the increases in the City's annual contributions—"has to come down." E.2849. Mr. Lowman acknowledged that the City could not afford to fix the variable benefit by lowering the assumed rate of return: "[T]he cost recommended by the Board this year, recommended by the actuary, not put in the budget—probably for obvious reasons. $165 million; that's the true cost of the benefits if you don't do anything. **We know you can't afford that**." E.2851–52 (emphasis added).

Everyone agreed in 2010 that serious changes were necessary. As former Mayor Stephanie Rawlings Blake testified, the City tried its best to work with the public safety unions to broker a compromise. E.1637–39. But, as the City's public finance expert, Mr.

Nadol, explained at trial, the unions' June 2010 proposal "relied on actuarial adjustments that postponed and backloaded and gimmicked their way toward lower short-term costs with inevitable longer-term pressures, as opposed to taking action that would further address and preserve the integrity of the system." E.1784.

Ordinance 10-306 was enacted as a necessary measure to prevent cuts to core City services. The drafters of Ordinance 10-306 took care to maintain benefits for the retirees who most depended on them while at the same time safeguarding the future availability of benefits for active members within an annual contribution level the City could actually afford. In other words, Ordinance 10-306 included those changes minimally necessary to buttress the Plan's actuarial soundness and preserve the City's ability to provide essential services to its citizens. It modified the Plan in the following respects:

- it replaced the variable benefit (or post-retirement benefit increase) with a guaranteed, tiered cost-of-living adjustment ("COLA") and a new "minimum benefit," which guaranteed the surviving spouses of those with at least 20 years in the system an annual benefit of $16,000;
- it lengthened the service requirement from 20 to 25 years, matching the length of service the average public safety worker actually remained on the force (59% of members retired with at least 25 years of service and 28.2% served 30 years or more, E.4336–37), but only for members with less than 15 years in the system;
- it adjusted the average final compensation ("AFC") period, a base period used to calculate members' benefits, from 18 months to three years (resulting in about

a 2% difference in AFC for a typical Plan member, E.4338), but again, only for members with less than 15 years in the system;

- it increased employee contributions by one percent per year from 6.0 percent, as of July 1, 2009, to 10 percent as of July 1, 2013 (similar to what the public safety unions themselves had proposed); and
- it adjusted the interest-rate assumption for the funds holding the assets of active employees from 8.25 percent to 8.0 percent, to address market realities and the system's underfunded status.

The ordinance did not alter the basic benefit provided to members, and it had no effect on any variable benefit "raises" that already had been awarded.

Argument

A. This case and the questions presented in the Petition are not suitable for bypass certiorari review.

Petitioners attempt to paint their Petition as an opportunity for the Court to resolve high level policy questions regarding municipal finance and public pension obligations. But the questions Petitioners present for the Court's review and the argument they offer in support of bypass certiorari confirm that this case is a poor vehicle for the parties or the Court to engage in or resolve that policy debate, at least in its present form. Granting bypass certiorari review would require the Court to address all issues presented in Petitioners' and the City's pending cross-appeals, *see* Rule 8-131(b)(2), not just the broad public policy issues the Petitioners or the Court may believe are worthy of certiorari review. It would be a more efficient use of the Court's resources to let the normal appellate process take its

course so that the Court can select and consider more refined issues, if appropriate, after the Court of Special Appeals ("CSA") has completed its review.

The three questions Petitioners identify for the Court's review and their assignments of error illustrate this problem. The case Petitioners wish to present on appeal relates mainly to the retirees' damages and would require the Court to wade deeply into the factual details and expert analysis of actuarial science and municipal finance, which Judge Rubin resolved with the benefit of seven days of testimony and 145 admitted exhibits. The condensed version of that record—the joint record extract filed in the CSA—comprises 11 volumes. Judge Rubin devoted an extraordinary amount of time and attention to this case, as reflected in the over 200 pages of meticulous decisions she issued.

Petitioners are asking the Court on bypass review to examine and second-guess a host of Judge Rubin's factual findings, though there is no basis to do so. Among many other things, Judge Rubin found that the Petitioners' "damages theory is unsupported by historic fact and is unaccompanied by persuasive explanation why the court should go along with [certain] assumptions" on which it depends, and that Petitioners' theory "purports to place the prevailing Class members in a considerably better position than had the Plan not been modified," which would have resulted in a windfall. May 13, 2019 Mem. Op. ("Mem. Op.") at 142. These factual findings are subject to clear error review, *see, e.g.*, Rule 8-131(c), and they would have to be sustained on appeal if supported by "any competent material evidence" in the record, *see, e.g.*, *Figgins v. Cochrane*, 403 Md. 392, 409 (2008), which they certainly are. There is no clear error, and there is no reason for the Court to take the extraordinary step of granting bypass certiorari to perform a clear error review.

Moreover, as explained more fully below, several key aspects of Judge Rubin's findings are grounded in her determinations, as the finder of fact, that the Petitioners' experts were not credible or persuasive and the City's experts were credible and persuasive. *See* Mem. Op. at 139 ("For a constellation of reasons, the court does not find Plaintiffs' expert witnesses credible or persuasive on the issue of what assumptions, bases and projections should be applied to calculate damages of the Retired and Retirement-Eligible Sub-Class members."); *id.* at 142 ("The court finds that City expert witness Adam Reese was credible, persuasive, and helpful to the court on the issue of the appropriate assumptions, baes and projections to utilize in determining what damages, if any, the Retired and Retirement-Eligible Sub-Class members are entitled, both pre- and post-final judgment.").

There is no reason for the Court to take this case on bypass review when reversal would require the extraordinary step of second-guessing the credibility determinations Judge Rubin made as the fact-finder, which appellate courts do not do. "Of course, the credibility of the witnesses [is] a matter for the trial court, as fact finder, not the appellate court, to resolve." *State v. Raines*, 326 Md. 582, 590–91 (1992) (reversing CSA in pertinent part for "conducting its own independent credibility analysis and in rejecting the trial court's finding of facts"); *see also Tshiani v. Tshiani*, 436 Md. 255, 269 (2013) ("The credibility of witnesses is a determination left to the trier of fact, and, on appellate review of a bench trial, we give due regard to the opportunity of the trial court to judge the credibility of the witnesses.") (citation and internal quotation omitted).

There is no reason to deviate from the normal appellate process in this case.

B. The Petitioners present a distorted and even misleading view of their claims, the record, and Judge Rubin's decisions.

In attempting to convince the Court that Judge Rubin erred, particularly regarding the amount of damages awarded to the retirees, Petitioners present a misleading version of their claims and the record and ignore Judge Rubin's well-considered reasons for rejecting their evidence. Although Petitioners have insisted that Article 22 is an immutable contract the City cannot change, *see* Pet. at 4 (quoting Article 22 § 42), their damages theory relied on a series of expert opinions that rejected key provisions of Article 22 and actual past practice. Petitioners' damages calculations depended on the Court rewriting large parts of Article 22—changing the contract—to require, for example:

- that the City have made hundreds of millions of dollars more in contributions for years leading up to 2010 that the City Code never required it to make;
- that different actuarial assumptions—which would have required legislative changes by the City Council, and thus an amendment to the contract—be used to result in more retirees receiving damages; and
- that contributions associated with active employees and new hires be devoted to shoring up the variable benefit for the retirees, even though Petitioners had conceded before trial that new hires were subject to the Ordinance 10-306 Plan and could not benefit from the previous Plan's terms or benefits.

These erroneous premises infected Petitioners' damages model with respect to variable benefit increases that would have occurred between 2010 and 2020 as well as expected

variable benefit increases going forward into the future. Judge Rubin correctly declined to rewrite the law to accommodate Petitioners' actuaries' theories and idealizations.

1. Petitioners merge their damages theories to include separate underfunding claims that were time-barred or not supported by Article 22.

To arrive at what they believe is a compelling assertion of error, Petitioners were forced to merge their two distinct damages theories together. Petitioners actually brought two separate kinds of breach of contract claims: one count for breach of contract based on the changes to the Plan in Ordinance 10-306, and three other counts for breach of contract alleging that the Plan had been under-funded for several years prior to 2010, going back to at least 2002.

Petitioners' grossly inflated damages theory at trial depended heavily on recovering hundreds of millions of dollars that they claimed the City had failed to contribute to make up for stock market losses in these earlier years, starting with losses from the burst of the "tech bubble" in 2002. But Judge Rubin correctly found that any claims alleging under-funding for fiscal years 2007 and earlier were barred by Maryland's three-year statute of limitations. Mem. Op. at 117.

Judge Rubin found no breach based on allegations of under-funding in later budget years because the Plan did not require that the City "fully fund" the Plan in the way the Petitioners claimed. Mem. Op. at 123. Article 22 does not contain any "affirmative obligation to maintain the Plan in a fully funded state," and other provisions are "fundamentally at odds with such an obligation." *Id.* This includes a provision allowing for the possibility of a "pay-go" system, where the City's required annual contribution must be

"sufficient, when combined with the amount in the fund, to provide the pensions and other benefits payable out of the fund during the then-current year." *Id.* (quoting Article 22, § 36(d)(5)). Accordingly, Petitioners had no cognizable claim based on purported under-funding and these extra phantom contributions their actuaries presumed the City should have made were not properly part of their damages model. Petitioners offer no authority in their Petition suggesting Judge Rubin's interpretation of Article 22 was incorrect.

It bears noting that Petitioners' actuaries testified in direct contradiction to Captain Fugate, who served as president of the fire officers' union (Local 964) for fifteen years and as a member of the F&P Board from 1998 to 2010, and who testified at trial that the City in fact made its annual required contributions during that time, pursuant to the terms of the City Code. E.633; Art. 22 § 36(j)(5)–(10), (14).

Even if these claims had not been legally defective, which they were, Judge Rubin properly rejected the false premise that the City would have contributed hundreds of millions more in Plan contributions to recognize losses from the 2002 tech bubble burst, because "the notion that the City had even a fraction of that capacity is rather a whopper of a departure from reality." Mem. Op. at 140. This was not a matter of choice for the City.

2. Petitioners' damages theories also depended on the City Council changing actuarial assumptions prescribed in the City Code and the Court rejecting the Plan's actual past practices.

One of the key drivers of the City's annual contribution and the funding level of the Plan is the interest rate assumption for post-retirement assets, which the City Code prescribes as being 6.8%. Art. 22, § 30(9). All relevant actors agreed in their testimony that the only way to change this interest assumption is to amend the City Code through the

legislative process. *See, e.g.*, E.573 (Fugate); E.872 (England); E.1466 (Taneyhill); E.1545 (Reese). Nevertheless, in many of their calculations, Petitioners' actuaries used a 5% assumption, which the FPERS Board had voted to recommend, but which the City never adopted as law. Petitioners' actuaries acknowledged in their testimony that their calculations "assume[d] … that the City would have changed the law." E.872 (England); *see also* E.960–61 (Lowman). Petitioners' actuaries thus assumed that the contract terms were different, and more favorable to their clients, than they actually were.

Judge Rubin correctly found that Petitioners' assumption that the City Council would have voted to change the statute to alter the assumed post-retirement assets earning rate from 6.8% to 5% was "the basis for a significant portion of their determination of what the prevailing Class members would have received had the Variable Benefit remained in place," and that this was an assumption that "has the effect of materially inflating damages without basis in fact." Mem. Op. at 140.

Petitioners' model also ignored the FPERS Board's "well-documented, deliberate" practice of "not tethering the Variable Benefit conversion rate to the post-retirement interest rate given the reality of the bond market … and the importance of avoiding volatile investments for retirees' reserves." Mem. Op. at 140–41. Variable benefit increases were not guaranteed, and they were funded by investing available excess earnings in bond annuities. Because it was no longer possible to invest excess earnings in bonds that would return 6.8% per year, the FPERS Board had taken a more cautious approach in the 2000s by using a lower conversion factor to calculate increases, as Article 22 § 36A(e) allowed. Petitioners' actuaries rejected this practice and insisted on using a 6.8% conversion factor

despite their recognition that it carried more investment risk for the retirees and would require a different style of investment for retiree assets than the Plan had been using.

On top of this, Petitioners' actuarial model called for taking the phantom extra contributions they assumed the City would have made and attributing them solely to the retirees' reserves until those reserves were fully funded. Judge Rubin correctly found that this "wildly skews the amount of Variable Benefit in favor of Plaintiffs and does not reflect how Plan assets were actually accounted for among the pre-10-306 Plan funds; nor is it required by the Plan language." Mem. Op. at 140.

3. Petitioners continue to assume contributions from and for new hires would be available to inflate variable benefit increases.

Petitioners have long favored a variable benefit mechanism that eats up all available assets and earnings to facilitate a greater pension increase for retirees while leaving nothing available to fund future benefits for active employees when they retire, and Petitioners apparently still do. Pet. at 12 (objecting to having "another plan for active employees and new hires"). In addition to the enormous phantom contributions Petitioners wrongly assumed the City would have made to recognize pre-2010 losses, they also wrongly assumed that contributions related to active employees and new hires would be available to fund the variable benefit for retirees.

Favoring retirees at the expense of all other sub-classes exposes a conflict within the larger class of Petitioners. Moreover, Petitioners conceded before trial that new hires are properly subject to Ordinance 10-306:

> It is important to note that the Actives are a closed group. Police officers and firefighters hired after the effective date of

> 10-306 accepted employment with a different set of conditions than those hired before its enactment. … The City is free to chart a course for its future workers and, if they accept the plan created by 10-306, then that is the contract they have the right to expect under Section 42.

Pls.' Oct. 5, 2018 Pre-Trial Br. at 8 n.1. This concession is correct,[1] despite Petitioners' subsequent arguments and actuarial opinions to the contrary, and it means that contributions associated with new hires cannot be used to increase variable benefit increases for retirees.

4. Judge Rubin properly accepted the City's actuarial model as the best approximation of variable benefits based on the City Code and actual past practices before Ordinance 10-306.

Both sides presented at trial their views as to what pension increases a reconstructed variable benefit feature would have afforded between 2010 and the time of trial and going forward. While Petitioners' experts relied on their conception of a supposedly ideal version of the Plan that never actually existed, either in the City Code or in practice, Judge Rubin found that the City's damages model was based on the City Code and actual past practice, as the evidence showed they had existed. "The City's proposed damages bases and assumptions ensure, to the degree possible, the members of the Retired and Retirement-Eligible Sub-Classes will receive the Variable Benefits they would have received had the Plan not been modified. This is in accordance with controlling law [regarding contract damages]." Mem. Op. at 142–43. In fact, Judge Rubin applied the very same standard that Petitioners now say she ignored. *Compare* Pet. at 12 *with* Mem. Op. at 143 (both citing

[1] The omitted portion of the footnote may not be correct ("This is the essence of the *Quinn* concept of flexible legislation."), but it is immaterial to Petitioners' concession.

Beard v. S/E Joint Venture, 321 Md. 126, 133 (1990)). Judge Rubin correctly believed that adopting Petitioners' model would have resulted in a "windfall," which bedrock contract law does not permit. Mem. Op. at 142.

After correcting for Petitioners' actuaries' flawed funding assumptions and accounting for the fact that post-June 2010 hires would not be admitted to a reconstructed plan, the City's actuary, Adam Reese, concluded that funds supporting variable benefit payments for persons who had retired as of June 30, 2010 are expected to be exhausted, depending upon future investment performance, somewhere around FY2033. E.4535. As Mr. Reese testified, starting in FY2034, when benefit payments are expected to exceed the expected market value of assets, benefit payments would continue on, with the City funding them on a "pay as you go" basis, as allowed by Article 22, § 36(d)(5), but there would be no more assets to fund variable benefit payments. E.1510. Going forward from the present, the expected average annual variable benefit increases are less than 1%. E.4535–36. Adding new retirees to this mix only hastens the exhaustion of funds and lowers variable benefits more quickly, because "more people with more pensions [are] sharing … the same pool of assets." E.4537–39, figure 4; E.1514–16. Mr. Reese's model showed conclusively that most retirees have fared and are expected to fare better under Ordinance 10-306's guaranteed COLAs than under the previous variable benefit. E.4542.

Even if this were a proper case for bypass certiorari review, which it is not, the serious flaws in Petitioners' damages model confirm that Judge Rubin properly rejected it in favor of the City's model, which followed Article 22 and actual past practice. There is no error for this Court to correct with respect to damages, and the Petition should be denied.

C. Although extremely important to the parties and the public interest, the issues in this case are driven by unique circumstances that are not likely to be repeated.

This case is driven by the variable benefit mechanism, which the City believes may be unique in Maryland public pension law, as well as the dire circumstances the City faced in 2010. In the course of the trial in this matter in federal court, Judge Garbis described the variable benefit as "wacko," "totally irrational," and "extremely wacko." March 24, 2011 tr. at 158–59. The coincidence of such an unusual and actuarially unsustainable pension feature and such extreme budgetary circumstances is, hopefully, not soon to be repeated. As Judge Rubin found:

> The objectively verifiable and undisputed facts are that the City was in financial free fall; and—critically—even had the City not been in financial crisis, the Plan judged on its own merit was actuarially unsound and plainly unsustainable. Indeed, the basic benefit itself was in the crosshairs of the Variable Benefit. This was not theory subject to debate. This was reality. The Plan was unsound, unsustainable, and the City simply had to do something to turn it around.

Mem. Op. at 87.

This case is important, but it does not present the far-reaching public policy consequences Petitioners claim and any ruling by the Court may have limited application in future cases. These reasons weigh against granting bypass certiorari review.

D. Judge Rubin's conclusion that public pension contracts are subject to "reasonable" modification in certain circumstances is sound and consistent with Maryland law.[2]

This Court's decisions make clear that pension contracts are not immutable. To the contrary, "[t]he rights conferred by a pension plan are contractual in nature, although under certain circumstances they may be modified by the unilateral action of the employer." *See Quesenberry v. Washington Suburban Sanitary Comm'n*, 311 Md. 417, 423 (1988) (citing with approval *City of Frederick v. Quinn*, 35 Md. App. 626, 634 (1977)). In *Saxton v. Bd. of Trustees of Fire & Police Emp. Ret. Sys. of City of Baltimore*, 266 Md. 690, 694 (1972), the Court recognized that "[i]n all states municipal corporations may make reasonable modifications of a pension plan at any time before the happening of the defined contingencies[.]"

In *Quinn*, the Court of Special Appeals followed *Saxton* in determining that:

> The contractual or vested rights of the employee in Maryland are subject to a reserved legislative power to make reasonable modifications in the plan, or indeed to modify benefits if there is a simultaneous offsetting new benefit or liberalized qualifying condition. Each case where a changed plan is substituted must be analyzed on its record to determine whether the change was reasonably intended to preserve the integrity of the pension system by enhancing its actuarial soundness, as a reasonable change promoting a paramount interest of the State without serious detriment to the employee. In short, the employee must have available substantially the program he bargained for and any diminution thereof must be

[2] Judge Rubin correctly decided that the City was permitted under Maryland law to modify Article 22 as it did in Ordinance 10-306 with respect to the active employees. The City disagrees with Judge Rubin's determination that the City breached a contract with the retirees and retirement-eligible Plan members, which is the subject of the City's cross-appeal.

> balanced by other benefits or justified by countervailing equities for the public's welfare.

35 Md. App. at 630–31. Petitioners restrict *Quinn* to permitting only "modest" changes, Pet. at 3, even though the word "modest" appears nowhere in the opinion, and Petitioners believe that pension changes can be made only when the municipality is "confronting bankruptcy," Pet. at 14, which *Quinn* also does not require.[3]

No evidence supported Petitioners' speculation at trial that Ordinance 10-306 was driven by opportunism or some other improper motive. The evidence actually showed that, despite decades of rising benefits (for which the public safety unions had lobbied) and exponentially rising costs, the City met its responsibilities to the Plan, in accordance with Article 22, throughout the harsh decade preceding 2010, and that City officials did the best they could to overcome the dual crises they were dealt in the spring of 2010 of worsening budget deficits and an actuarially unsound pension plan that, for structural reasons, was spiraling out of control.

The City navigated this storm by making reasonable modifications "without serious detriment to the employee[s]." *Quinn*, 35 Md. App. at 631. The City was able to preserve

[3] Petitioners' continued reliance on *Harford County v. Town of Bel Air*, 348 Md. 363 (1998), is perplexing. *Harford County* did not overrule *Quinn* "sub silentio," as Petitioners once contended, and it principally concerns a county or municipality's lack of immunity in contract actions, which the City has never asserted as a defense. But, as alluded to in the Petition, the City does believe that pension contracts are different from other municipal obligations, as federal courts have explained. A contract for public employee compensation "is **not** one as to which one legislature can bind subsequent legislatures for work and services to be performed by [public employees] *in the future*." *Md. State Teachers Ass'n v. Hughes*, 594 F. Supp. 1353, 1362 (D. Md. 1984) (bold emphasis added; italics in original). Any contention to the contrary is, as Judge Miller said in *Hughes*, "preposterous." *Id.*

the basic benefit that Judge Rubin found the variable benefit was in danger of "cannibaliz[ing]." Mem. Op. at 89–90. The changes made in Ordinance 10-306 were remarkably similar to changes the public safety unions had proposed—including for example, increased member contributions, which their actuary said they were "the first one to suggest" E.2851—and even the unions agreed the City could not afford to continue to fund the Plan without change to the variable benefit mechanism. Judge Rubin correctly found the City acted well within the flexibility it is permitted under Maryland law, and Petitioners have presented no credible reason why this Court should grant review at this time, much less why Judge Rubin's decision should be reexamined or overturned.

Conclusion

For the foregoing reasons, the Court should deny bypass certiorari review.

Respectfully submitted,

Dated: October 5, 2020

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Statement as to Font and Word Count

The City states that the foregoing paper was prepared using Times New Roman 13 point font and contains 5,831 words (excluding the caption, signature block, this statement, and the certificate of service).[4]

[4] Maryland Rule 8-303 does not impose a word count limit on an answer to a petition for a writ of certiorari.

Certificate of Service

I HEREBY CERTIFY that on October 5, 2020, this Answer to Petition for Writ of Certiorari was filed and served via the Court's MDEC system on:

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