IN THE SUPREME COURT OF OHIO

CLEVELAND BOTANICAL GARDEN, *Plaintiff-Appellee/Cross-Appellant*, v. STACI K. WORTHINGTON DREWIEN, MATTHEW W. DREWIEN, EMILY VANDERBILT WADE, WILLIAM GARRETSON WADE, DONNA C. WADE, RANDALL HAND WADE, REBECCA FRENCH WADE COMSTOCK, RICHARD COMSTOCK, and F. DAVIS DASSORI, as Trustee of the Jeptha H. Wade Trust dated April 3, 1967, *Defendants-Appellants/Cross-Appellees*, and ANN RUTH WORTHINGTON, NATHALIE WORTHINGTON, IRENE WADE SEDGWICK BRIEDIS and EMILY LOVE WADE HUGHEY, *Intervening Third-Party Plaintiffs-Appellants/Cross-Appellees*.	Case No. 2020-0629 On Appeal from the Court of Appeals of Ohio, 8th Appellate District Cuyahoga County Case No. 108536 Court of Common Pleas, Cuyahoga County, Ohio Case Nos. CV-13-812284, CV-14-827728

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF DEFENDANTS-APPELLANTS/CROSS-APPELLEES

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STATEMENT OF FACTS

The *Amicus* adopts Defendant-Appellants'/Cross-Appellees' Statement of Facts.

SUMMARY OF ARGUMENT

In 1872, Jeptha Homer Wade donated 73 acres of land to the City of Cleveland, to be used as a public park, on the express condition that the park be kept "open at all times to the public." This Court subsequently held that the terms of that gift created an enforceable charitable trust—in other words, a contract. The City of Cleveland now argues that a later-enacted statute, the Marketable Title Act, has abrogated that contract. In doing so, the City seeks to retain the benefit of Wade's gift—land that he owned and gave for the public's use—while repudiating the contractual commitments that it made in exchange.

The brief for the Wade heirs persuasively demonstrates that the City's interpretation of the Marketable Title Act is incorrect. Indeed, the Act's ostensible purpose of protecting *bona fide* purchasers from unknown title infirmities makes no sense when applied to a restriction recorded in the relevant deed itself. The City cannot plausibly suggest that it is somehow surprised by the restrictions in the Wade Deed, when it accepted the land under those very conditions. But the Institute for Justice submits this brief to address an even more fundamental point: Even if the Act did, by its terms, purport to modify the terms of the Wade Deed in the way the City claims, such a modification would violate the Contract Clause of the United States Constitution.

The Contract Clause is one of the few specific restrictions on the power of state governments that was written into the original Constitution, prior to the Bill of Rights. It grew out of painful experience with the problems that arise when governments—even with the best of intentions—attempt to override prior contractual commitments. The post-Revolution period in America was a time of serious economic and financial distress, and state legislatures attempted to

ameliorate that distress by enacting debt relief. Such legislation, however, had the unfortunate effect of undermining credit markets and commerce. The Framers drafted the Contract Clause because they saw the pitfalls of legislative interference with existing contract rights; they understood that, if bargained-for exchanges can be overridden by the legislature, people will not enter into those kinds of beneficial agreements in the first place.

From ratification through the nineteenth century, the Contract Clause was by far the most important and frequently litigated federal restraint on the power of state governments. Much of the litigation during that period asked whether a contract existed or whether altering a contractual remedy impaired the obligation of a contract. There was never any question, however, that contractual obligations were to be held inviolate.

In the early twentieth century, the Supreme Court issued a number of decisions that narrowed the scope of the Contract Clause. But significantly, one of the few areas where the Contract Clause retains its original strength is in its application to government contracts. Here, the Supreme Court has made clear that the original understanding of the Contract Clause still holds sway in modern doctrine. Under controlling caselaw, there is therefore no question that the terms of the Wade Deed protecting the public's access to Wade Park remain in force, notwithstanding subsequent legislative action.

Moreover, notwithstanding the passage of time, the insights that motivated the adoption of the Contract Clause remain valid today. Protection for contracts remains essential to protect property rights: By retaining Wade's property without honoring its reciprocal commitments, the City is effectively taking the property without compensation. And protection for contracts also remains essential to encourage beneficial exchange: If governments can override conditions on gifts like the one at issue here, individuals will be less likely to make gifts of property in the future.

The City may be motivated by good intentions, but, under the Contract Clause, good intentions do not justify disregard for contract rights.

ARGUMENT

This brief will summarize the history of the Contract Clause: what it was intended to do, why the Framers considered it so important, and why it was so frequently litigated and vigorously enforced by the courts. Then, this brief will demonstrate that the Contract Clause retains its potency in at least one area: where the government is trying to undo its own contracts. Finally, this brief will show that the City's proposed application of the Marketable Title Act to the Wade Deed would violate the Contract Clause.

I. THE CONTRACT CLAUSE WAS LONG ONE OF THE MOST IMPORTANT PROVISIONS OF THE CONSTITUTION

A. The vindication of contractual rights was of crucial importance to the Framers.

The high standing accorded contractual rights by the Framers is expressed in Article I, section 10, of the Constitution, which provides: "No state shall . . . pass any . . . Law impairing the Obligation of Contracts."[1] Drawn from similar language in the Northwest Ordinance of 1787—

[1] The complete Section 10 provides:

> 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.
>
> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul [sic] of the Congress.
>
> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

enacted to govern territory in the Great Lakes region, including Ohio—the Contract Clause was adopted in response to direct experience with the negative effects arising from state interference with contractual arrangements during the post-Revolutionary Era. State lawmakers enacted a wide variety of debt-relief laws and revoked the corporate charter of the Bank of North America. While these laws were enacted with the objective of easing the consequences of economic instability, they actually exacerbated it by destroying credit markets.

In fact, the Philadelphia Convention was spurred in significant part by concern with such legislative tampering with existing agreements, as well as a corresponding conviction that the rights of property owners and contracting parties would be better protected under a new constitutional order replacing the Articles of Confederation. *See* James W. Ely, Jr., *The Contract Clause: A Constitutional History* 7–12 (2016). "Perhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights." Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 Wis. L. Rev. 1135, 1136; *see also* James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 42–58 (3d ed. 2008) (detailing the high value assigned to property rights by the Framers).

The Contract Clause responded to this prevailing concern that the state governments could not be trusted to respect economic rights.[2] As Justice Hugo L. Black later pointed out, the Contract Clause was "one of the few provisions [explicitly limiting states' powers] which the Framers deemed of sufficient importance to place in the original Constitution[.]" *City of El Paso v.*

[2] By its express terms, the Clause was binding only on the states and did not restrict congressional authority over contracts. In fact, the Bankruptcy Clause, by authorizing Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States," Art. I, § 8, provided Congress with explicit authority to abrogate contracts.

Simmons, 379 U.S. 497, 591, 85 S. Ct. 577, 13 L. Ed. 2d 446 (1965) (Black, J., dissenting). It bears emphasis that the Framers thought a ban on state impairment of existing contracts was so vital as to include it in the Constitution at the same time they were insisting that a bill of rights was unnecessary. *See The Federalist* No. 84 (Alexander Hamilton).

The Framers intended for the Contract Clause to serve as a bulwark against even seemingly benevolent legislative action. The Contract Clause was framed during a period of severe economic hardship, and it was enacted in direct response to efforts to ameliorate that suffering by cancelling debt obligations. As Justice George Sutherland explained:

> Following the Revolution, and prior to the adoption of the Constitution, the American people found themselves in a greatly impoverished condition. Their commerce had been well-nigh annihilated. They were not only without luxuries, but in great degree were destitute of the ordinary comforts and necessities of life . . . . The circulation of depreciated currency became common.

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 454–455, 54 S. Ct. 231, 78 L. Ed. 413 (1934) (Sutherland, J., dissenting). It was the judgment of the Framers that security of contracts was *particularly* essential in troubled times, for it was primarily in such times that people began to seek "legislative interference" with their contractual obligations. *Id.* at 455. It became increasingly clear that, however much the abrogation of contracts might help specific parties in the short term, the ultimate effect was the collapse of credit markets, such that "[b]onds of men whose ability to pay their debts was unquestionable could not be negotiated except at a discount of 30, 40, or 50 per cent." *Id.* And, as history had and has continued to demonstrate, a healthy economy cannot exist without a healthy credit market. More broadly, if individuals fear the government will abrogate contracts, they will prefer to hold onto their property rather than bargain it away as consideration—and, as a result, many mutually-beneficial exchanges will fail to occur.

During the debates over ratification of the Constitution, prominent members of the Convention explained that the Contract Clause was essential to encourage commerce and exchange. Alexander Hamilton, for example, argued that legislative interference with contracts would be a "probable source of hostility" between the states, encouraging retaliation and undercutting the goal of a commercially unified republic. *The Federalist* No. 7. And Charles Pinckney characterized Article I, section 10 as "the soul of the Constitution," insisting: "Henceforth, the citizens of the states may trade with each other without fear of tender-laws or laws impairing the nature of contracts." 4 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 333–336 (1836). Such stability of agreements was crucial in a growing market economy. As Roger Sherman and Oliver Ellsworth, Connecticut delegates to the Constitutional Convention, explained, the Convention believed the Contract Clause was "necessary as a security to commerce, in which the interests of foreigners, as well as the citizens of other states, may be affected." Ely, *The Contract Clause,* 14.

The Contract Clause was also justified in terms of individual rights. James Madison, for example, defended the Contract Clause in terms of fairness. Writing in *The Federalist*, he proclaimed that laws abridging contracts were "contrary to the first principles of the social compact, and to every principle of sound legislation," and characterized the Contract Clause as a "constitutional bulwark in favor of personal security and private rights." *The Federalist* No. 44 (James Madison). When government abrogates an agreement, the government effectively confiscates the consideration that was bargained away in the exchange.

Even some critics of the proposed constitution, known as Anti-Federalists, admitted the need for a ban on contractual impairments by the states. One acknowledged that the states had often acted irresponsibly regarding debtor-creditor relations. Another Anti-Federalist offered a

proposal: "It shall be left to every state to make and execute its own laws, except laws impairing contracts, which shall not be made at all." Ely, *The Contract Clause,* 17.

Subsequently, many states (including, eventually, Ohio) adopted a Contract Clause based on the federal model as they either revised or adopted their constitutions. *See*, *e.g.*, Ohio Const. art. II, § 28 ("The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts"). This development signaled broad acceptance of the constitutional norm protecting agreements from state interference.

B. The Contract Clause was frequently litigated and vigorously enforced by the courts.

Unsurprisingly, given its centrality to the Framers, the Contract Clause occupied a central place in early decisions applying the Constitution. In fact, the first federal court decision invalidating a state law was grounded on the Contract Clause. In *Champion and Dickason v. Casey* (1792), the U.S. Circuit Court for Rhode Island, including Chief Justice John Jay, struck down a Rhode Island debt-relief measure. *See* Ely, *The Contract Clause*, 22–27; *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 1 L. Ed. 391 (C.C.D. Pa. 1795) (Paterson, J.) (treating land grant as a contract which state could not later abrogate).

Chief Justice John Marshall recognized that the Contract Clause was intended to be a secure base for the protection of both private and public contracts against retroactive state infringement. Indeed, the Contract Clause was the centerpiece of Marshall Court jurisprudence and was applied in a series of landmark cases: *Fletcher v. Peck*, 10 U.S. (6 Crane) 87, 3 L. Ed .162 (1810) (state land grant was a contract within the purview of the Contract Clause, and an attempt to rescind the grant violated the Constitution); *New Jersey v. Wilson*, 11 U.S. 164, 3 L. Ed. 303 (1812) (state grant of tax immunity was a protected contract); *Trustees of Dartmouth College v.*

Woodward, 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819) (government-granted corporate charter was a constitutionally protected contract); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 4 L. Ed. 529 (1819) (state statute purporting to discharge prior debts was invalid under Contract Clause).

In these cases, Marshall established two cardinal principles—that the Contract Clause embraced both contracts by states and agreements between private parties, and that the reach of the Contract Clause was not confined to those controversies existing at the time of the framing. Indeed, he broadly observed: "The convention appears to have intended to establish a great principle, that contracts should be inviolate." *Id.* at 200. So high was Marshall's regard for the Contract Clause that he characterized Article I, section 10 as a "bill of rights for the people of each state." Ely, *The Contract Clause*, 30–58.

John Marshall also understood the adoption of the Contract Clause to be a response to deleterious state abuses which threatened commerce and credit. In 1827, Marshall linked the Clause with a desire to foster commercial transactions:

> The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as to not only impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith.

Ogden v. Saunders, 25 U.S. 213, 354–355, 6 L. Ed. 606 (1827) (Marshall, J., dissenting).

In the antebellum years after Marshall left the bench, the Court continued to vigorously enforce the Clause. For example, in the leading case of *Bronson v. Kinzie*, 42 U.S. 311, 11 L. Ed. 143 (1843), the Court invalidated Illinois debt relief measures which altered the remedies available

to a mortgagee to foreclose on property in default. The Court pointed out that these laws imposed new and onerous conditions on the mortgagee. More importantly, the Court endorsed the purpose behind adoption of the Contract Clause in sweeping language:

> It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the Constitution of the United States.

Id. at 318. *Bronson* guided subsequent decisions regarding debt-relief laws until the 1930s.

The same pattern of robust enforcement continued into the postbellum decades. In the aftermath of the Civil War many southern states, facing widespread devastation, enlarged the amount of homestead exemptions in order to shield property from the reach of creditors and sought to apply the increased exemptions retroactively to antecedent debts. The Supreme Court firmly insisted that such laws, as applied to prior obligations, ran afoul of the Contract Clause. Justice Noah Swayne explained: "No community can have any higher public interest than in the faithful performance of contracts and the honest administration of justice." *Edwards v. Kearzey*, 96 U.S. 595, 603, 24 L. Ed. 793 (1877). In reaching this conclusion the Court not only implicitly rejected financial hardship as a justification for abridging agreements, but also stressed the significance of contractual stability for society at large.

In the late nineteenth century the Court invoked the Contract Clause to uphold tax exemptions, to bar legislative schemes to repudiate municipal debts, and to prevent lawmakers from changing foreclosure procedures for preexisting mortgages. Ely, *The Contract Clause*, 135–141, 150–151, 167–171, 177–184. Prominent jurists celebrated the importance of the provision. Justice William Strong, speaking for the Court in *Murray v. Charleston*, proclaimed:

> There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is

> one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away.

96 U.S. 432, 448, 24 L. Ed. 760 (1877).

Even jurists who sometimes disputed the applicability of the Contract Clause in particular cases nonetheless went out of their way to express their respect for the provision. Justice Samuel F. Miller expressed this attitude in his dissent in *Washington University v. Rouse*:

> We are also free to admit that one of the most beneficial provisions of the Federal Constitution, intended to secure private rights, is the one which protects contracts from the invasion of State legislation. And that the manner in which this court has sustained the contracts of individuals has done much to restrain the State legislatures, when urged by the pressure of popular discontent under the sufferings of great financial disturbances, from unwise, as well as unjust legislation.

75 U.S. 439, 442, 19 L. Ed. 498 (1869) (Miller, J., dissenting).

Throughout the first hundred years of the Contract Clause, the U.S. Supreme Court's dedication to the inviolability of contracts was unwavering. The only difficult questions concerned whether certain kinds of legislative enactments could be regarded as contracts and whether modifying breach-of-contract remedies constituted an impermissible impairment. As the historian Charles A. Beard observed: "Contracts are to be safe, and whoever engages in a financial operation, public or private, may know that state legislatures cannot destroy overnight the rules by which the game is played." Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* 179 (1913). This was the state of the law in the late nineteenth century when Jeptha Wade donated Wade Park to the City of Cleveland. As this Court held not long afterwards, his gift contractually bound Cleveland to the terms of the trust that his gift established. *See Cleveland City Cable Ry. Co. v. Barriss*, 1 O.S.C.D. 333, 338 (1895), *aff'd*, 53 Ohio St. 645, 44 N.E. 1131 (June 11, 1895). Accordingly, the terms of his gift were accepted under the full protection of the Contract Clause against later alterations or impairments.

II. THE CONTRACT CLAUSE STILL PREVENTS GOVERNMENTS FROM UNDOING THEIR OWN CONTRACTS

In the twentieth century, the Supreme Court drastically circumscribed the Contract Clause's scope. In 1934, the Court announced that the Clause "must [not] be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 443, 54 S. Ct. 231, 78 L. Ed. 413 (1934). When contracts between private parties are at issue, the Court's modern test asks only whether the legislation causes a "substantial impairment" of contract rights, whether it serves a "legitimate public purpose," and whether it is "reasonable." *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412–413, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983). But there is one important exception to that rule: When the government seeks to undo its own contracts, the Court has held that the Clause has retained its original vitality.[3]

In *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977), the Supreme Court held that when a state is attempting to undo government contracts, rather than those of private parties, more searching review is required. *U.S. Trust Co.* concerned parallel 1974 New York and New Jersey statutes repealing a statutory covenant made by the two states that had previously limited the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation with non-rail revenues and reserves. *Id.* at 3. The statutory covenant had been made to assuage Port Authority bondholders' concerns about the Port Authority's takeover of a financially troubled passenger rail line. *Id.* at 9. The New Jersey Supreme

[3] Notably, the Ohio Constitution's own Contract Clause has not been narrowed in the same manner as the federal clause. In *Kiser v. Coleman*, this Court limited the retroactive application of an Ohio statute that limited the remedies available when a land purchaser defaulted on an installment contract. 28 Ohio St.3d 259, 263, 503 N.E.2d 753, 757 (1986). This Court did not engage in any interest balancing, instead observing that the statute at issue clearly changed the terms of existing contracts and was therefore invalid.

Court had found no Contract Clause violation, but the U.S. Supreme Court disagreed, holding that the retroactive repeal of the covenant constituted an unconstitutional impairment of a contractual obligation of the states. *Id.* at 21, 31–32. The Court noted that "[i]t has long been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties." *Id.* at 17 (citing *Fletcher*, 10 U.S. at 137–139; *Dartmouth College*, 17 U.S. at 518).

In effect, the Supreme Court in *U.S. Trust Co.* applied a strict scrutiny standard to laws impairing government contracts—the same standard that the Court applies in other areas of the law implicating favored individual rights or interests, and that requires that a law be narrowly tailored to serve a compelling governmental interest. *See, e.g.*, *Cleveland v. McCardle*, 139 Ohio St.3d 414, 2014-Ohio-2140, 12 N.E.3d 1164, ¶¶ 11–13 (describing levels of scrutiny in the context of First Amendment Free Speech protections); *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, ¶ 13 (describing levels of scrutiny in the context of the Equal Protection Clause of the Fourteenth Amendment). The Court announced a two-pronged test, holding that the statute could only be sustained under the Contract Clause if it was "both reasonable and necessary" to serve the government's interests. *U.S. Trust Co.*, 431 U.S. at 29. Analyzing the necessity prong, the Court asked first whether the impairment was "essential" and second whether there was "an alternative means of achieving" the state's goals. *Id.* at 30–31. The Court noted that "a State is not free to impose a drastic impairment when an evidence and more moderate course would serve its purposes equally well." *Id.* at 31. Then, turning to the reasonableness prong, the Court's analysis centered on foreseeability—asking whether the government's asserted need to impair its prior agreement would have been foreseeable at the time the agreement was made. *Id*

Applying that two-pronged test, the law at issue in *U.S. Trust Co.* could not be sustained. Because there were less drastic alternatives, the Court found that the state had failed to demonstrate that the repeal of the covenant was necessary. *Id.* And, because the need for mass transit, the deficits run by commuter railroads, and pressure to involve the Port Authority in mass transit were all present at the time of the 1962 covenant, the Court found that the problems addressed by the law had all been foreseeable. *Id.* at 31–32. It was not reasonable to impair a governmental contract retroactively to address issues that were foreseeable at the time the contract was formed. *Id.* The government was required to satisfy both the necessity and reasonableness prongs, but, in the end, it could satisfy neither. *Id.* at 32.

U.S. Trust Co. is the governing Supreme Court case addressing the impairment of government contracts under the Contract Clause, and the strict test it establishes makes clear that the Contract Clause retains its original strength in the government contract context. The protections enshrined by the Founders against governmental interference with existing contracts thus "remain[] a part of our written Constitution" and should be zealously guarded by the courts. *Id.* at 16. The Contract Clause established the secure, predictable legal environment in which Jeptha Wade entrusted Wade Park to the City of Cleveland, and it continues to protect that gift today.

III. THE CONTRACT CLAUSE BARS ABROGATION OF THE WADE DEED.

As the foregoing makes clear, the terms of the Wade Deed are not susceptible to alteration by the government, whether through action of the Ohio legislature or the City's inaction. The City, however, has disregarded the Wade Deed and allowed the Botanical Garden to violate its express terms. That disregard for the Wade Deed cannot be squared with the Contract Clause.

Fencing off a portion of the park and charging visitors meets neither the necessity nor reasonableness requirements of the *U.S. Trust Co.* test. Regarding the necessity prong, there is an

obvious alternative to the current approach: make the land the Botanical Garden sits on freely accessible to the public, as in fact the Botanical Garden did for years and is required to do under the terms of its own lease agreement. As the *U.S. Trust Co.* Court noted, "[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised." *Id.* at 26. Raising money or avoiding expenditures, whether directly or through a private entity leasing the land, does not satisfy the high bar necessary for the government to violate the terms of a contract under the Constitution.

Allowing the Botanical Garden to ignore the Wade Deed's provisions also fails *U.S. Trust Co.*'s reasonableness prong. As explained above, the test for reasonableness focuses primarily on whether the considerations triggering the contractual impairment were foreseeable at the time the contract was made. Here, the answer is clear: The possibility of a private entity closing off part of the park was not unforeseeable when the City accepted the terms of the Wade Deed. To the contrary, that kind of restriction is precisely what the original contract was designed to prevent. Significantly, *both* the necessity and reasonableness prongs would have to be met for the City to allow the Botanical Garden to violate the Wade Deed. Because *neither* prong is met, the City's disregard for the Wade Deed's provisions violates the Contract Clause.

Nor can the City satisfy the *U.S. Trust Co.* test by framing the inquiry in terms of the interests served by the Marketable Title Act. Even if the Botanical Garden was able to meet the reasonableness prong of the *U.S. Trust Co.* test by showing that, at the time Wade Park was entrusted to the City, the need to facilitate the clear transfer of property was unforeseeable (which is highly unlikely), it cannot meet the necessity prong. Far less drastic options exist to ensure that the government can keep track of and manage reversionary interests in property that it has been given; the City does not need to extinguish reversionary interests in deed instruments to

accomplish that simple task. Here, the alternative is simple: The City and the Botanical Garden could read the reversionary right explicitly established by the Wade Deed and comply with the Deed's provisions. Moreover, the interests served by the Marketable Title Act are particularly inapposite when applied to public land like the Wade Oval, as the City has no need for "marketable" title to lands that are held in trust for the public as a whole.

If at some point the City determines that the terms of the deed have become truly unworkable, it has other options. The City could attempt to gain the consent of the Wade heirs to change the deed. Although they did not consent to an alteration this time, there is no reason to think they would be unpersuadable if a truly unforeseeable and serious situation arose; to the contrary, in undertaking this litigation, they have demonstrated that they have the public interest at heart. Moreover, as a last resort, the City could also condemn the property for public use and pay its fair market value. Of course, doing so would require an expenditure of resources, but avoiding payment of just compensation is not a valid reason to abrogate a contract. In a sense, the City has already currently taken a portion of Wade Park—both from the people of Cleveland and from the Wade heirs who hold a reversionary interest—and given it to the Botanical Garden. Yet the City has not paid for what it has taken.

It is no answer to say that the Botanical Garden, in some sense, serves the public interest. Even when government aims to serve the public interest, it cannot take private rights without payment of just compensation. *See Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 39. And that is as true of contract rights as it is other forms of property: In *U.S. Trust Co.*, the Supreme Court refused to "engage in a utilitarian comparison of public benefit and private loss," holding that the private welfare of the Port Authority's creditors was protected against the state's impairment, even if the state was acting to promote the public good. 431 U.S.

at 29. So long as the City retains Wade Park under the terms of the Wade Deed, those terms remain binding on the City under the Contract Clause.

Ultimately, this case presents precisely the type of government action that the Contract Clause was designed to prevent. When Cleveland accepted Wade Park from Jeptha Wade, it accepted it subject to the terms and conditions of the Wade Deed. And Jeptha Wade relied on the inviolability of that contract when making the gift. If government could invalidate such agreements whenever it wanted to, then future donors would likely be less generous, as they would be unable to trust that their wishes will be honored. Jeptha Wade wanted this generous gift to be freely accessible to the people of the City. Now, the City wants to allow a private entity to close off portions of Wade Park unless the public is willing to pay. As centuries of history and precedent clearly establish, the Contract Clause prohibits this.

CONCLUSION

The Contract Clause was one of the central provisions of the Constitution, and it remained so for well over one hundred years before it was strictly limited by the U.S. Supreme Court. Even today, however, the Contract Clause retains its original vitality when the government seeks to invalidate its own agreements. For that reason, even if the City were right that the Marketable Title Act somehow overrode the Wade Deed, the Wade Deed would nonetheless remaining binding and enforceable in this case.

Dated this 3rd day of February, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing **Brief of *Amicus Curiae* Institute for Justice in Support of Defendants-Appellants/Cross-Appellees** was served via electronic mail on February 3, 2021, on the following:

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