

STATE OF RHODE ISLAND

SUPREME COURT

RHODE ISLAND COUNCIL 94, AFSCME, AFL-CIO;
NATIONAL EDUCATION ASSOCIATION RHODE ISLAND
RHODE ISLAND FEDERATION OF TEACHERS AND
HEALTH PROFESSIONALS; RHODE ISLAND
BROTHERHOOD OF CORRECTIONAL OFFICERS;
INTERNATIONAL FEDERATION OF PROFESSIONAL AND
TECHNICAL ENGINEERS LOCAL 400; NATIONAL
ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL 79;
RHODE ISLAND EMPLOYMENT SECURITY ALLIANCE,
LOCAL 401; and RHODE ISLAND ALLIANCE OF SOCIAL
SERVICE EMPLOYEES, LOCAL 580,

S.U. 11-330
(C.A. No. PC10-2859)

Plaintiffs,

v.

LINCOLN CHAFEE, in his capacity as Governor of the State
of Rhode Island; GINA RAIMONDO, in her capacity as General
Treasurer of the State of Rhode Island; and THE EMPLOYEES'
RETIREMENT SYSTEM OF THE STATE OF RHODE
ISLAND, by and through the RHODE ISLAND RETIREMENT
BOARD, by and through GINA RAIMONDO, in her capacity as
Chair of the Retirement Board, and FRANK J. KARPINSKI,
in his capacity as Secretary of the Retirement Board,

Defendants.

**GOVERNOR LINCOLN CHAFEE, GENERAL TREASURER AND CHAIR OF THE
RETIREMENT BOARD GINA RAIMONDO, SECRETARY OF THE RETIREMENT
BOARD FRANK J. KARPINSKI AND THE EMPLOYEES' RETIREMENT SYSTEM
OF THE STATE OF RHODE ISLAND REPLY MEMORANDUM
IN FURTHER SUPPORT OF THEIR MOTION FOR EXPEDITED REVIEW**

Defendants/Petitioners Lincoln Chafee, in his capacity as Governor of the State of Rhode
Island; Gina Raimondo, in her capacity as General Treasurer of the State of Rhode Island, the
Employees' Retirement System of the State of Rhode Island, by and through the Rhode Island
Retirement Board, by and through Gina Raimondo, in her capacity as Chair of the Retirement
Board and Frank J. Karpinski, in his capacity as Secretary of the Retirement Board

("Defendants")¹ submit this reply memorandum in further support of their Motion for Expedited Review, which seeks expedited treatment of Defendants' Petition for Issuance of a Writ of Certiorari and expedited review of the Superior Court's September 30, 2011 Order and September 13, 2011 Decision.

The economic issues that plague the State of Rhode Island and the Employees' Retirement System of the State of Rhode Island are immediate, unprecedented and vexing. The State has a \$9.4 billion unfunded pension liability.² In 2009 and 2010, the General Assembly made initial strides toward reducing the figure. Through the underlying litigation, Plaintiffs have challenged the 2009 and 2010 legislation, which was aimed at reducing the state's unfunded pension liability. In the interim, the Governor and the General Treasurer have developed further proposals and additional ways to reduce the unfunded pension liability. It is anticipated that additional legislation will be introduced in an effort to address this mounting problem.

Plaintiffs concede that the issues raised in Defendants' Petition for Issuance of a Writ of Certiorari are "extraordinarily important issues," but argue that this Court should not decide them at this time for several reasons. Plaintiffs' Opp. Mem. at 10. Defendants address each of those reasons in turn.

First, Plaintiffs suggest that by asking this Court to decide the issue raised in Defendants' Petition for Issuance of a Writ of Certiorari, Defendants are, in essence, asking this Court "to

¹ The Superior Court's decision from which Defendants file this Petition for Writ of Certiorari is captioned *Rhode Island Council 94, et al. v. Donald L. Carcieri, et al.*, C.A. No. PC 10-2859. At the time the Complaint was filed, Donald Carcieri was Governor and Frank Caprio was General Treasurer and Chairman of the Retirement Board. Following the elections on November 2, 2010, Lincoln Chafee was elected Governor and Gina Raimondo was elected General Treasurer. Both were sworn in on January 4, 2011. On October 7, 2011, this Court granted Defendants' Motion to Substitute Governor Chafee for Governor Carcieri and General Treasurer Gina Raimondo for General Treasurer Frank Caprio.

² This amount represents the estimated unfunded liability for state and municipal pensions.

step prematurely into the maelstrom of a legislative process currently enveloping the other two independent branches of government – the General Assembly and the Executive.” Plaintiffs’ Opp. Memo. at 4. Plaintiffs are wrong. The issue that this Court is called upon to decide is real, important and not premature; and it is a pure legal question – not a political one.

In 2009 and 2010 the General Assembly enacted changes to the pension statutes, which resulted in this litigation, through which Plaintiffs, state employees who have not retired and who are not eligible to retire, challenged the constitutionality of the legislative amendments.³ The threshold issue in this case and the issue presented by Defendants’ Petition for Issuance of a Writ of Certiorari is whether Rhode Island’s general pension statute creates a contract with participants.

If this Court declines to decide the single legal issue presented by Defendants’ Petition for Issuance of a Writ of Certiorari at this juncture, the parties will have no other option but to proceed in the Superior Court with costly discovery and motion practice until such time as a judgment with requisite finality has entered so that Defendants may appeal to this Court.⁴

³ The Plaintiffs in this case are state employees who have not retired and who are not eligible to retire. Importantly, Defendants did not, as Plaintiffs suggest, concede that retirees have a contractual relationship with the state. *See* Plaintiffs’ Opp. Mem. at 9 n.9. In fact, Defendants made it clear during the hearing on their Motion for Summary Judgment that they were not suggesting that there was a contractual relationship between retirees and the state. Defendants’ counsel expressly stated: “I was not suggesting, and I want to make sure the record is clear on that, that there would be a Contract Clause violation if benefits were changed after someone retired. I specifically said that that’s not an issue we’re dealing with.” Exhibit A, July 18, 2011 Tr. at 44. “I just want to make sure, I am not suggesting the legislature couldn’t do that if it chose to do so, it’s just not an issue that’s before the Court or that we’ve briefed.” *Id.* at 45.

⁴ Plaintiffs note that the parties entered into a Scheduling Order in an effort to reduce the expenditure of resources. Plaintiffs’ Opp. Mem. at 3. While this is true, that Scheduling Order will have little effect in reducing the expenditure of resources unless this Court decides at this juncture whether the Superior Court erred in ruling, with respect to the threshold legal issue, that the state’s general pension legislation creates a contract with participants. That determination, if made in favor of the Defendants, will eliminate any need for further action in the Superior Court, save for entry of final judgment. As Plaintiffs concede, if this Court concludes there is no

Plaintiffs have conceded (and the Superior Court acknowledged) that there are no facts in dispute with respect to the legal issue presented by the present Petition.

In addition, any legislation that may be passed by the General Assembly in the interim, may be the subject of a challenge by the Plaintiffs⁵ or some other persons. The threshold issue presented by any subsequent challenges likely will be the same as the issue raised by Defendants' Petition for Issuance of a Writ of Certiorari – whether Rhode Island's general pension statute creates a contract with participants. Clear guidance from this Court at this juncture will conserve judicial (and the parties') resources and, in the event that this Court holds, as Defendants argue, that the general pension statute does not create a contractual right, such holding may avert challenges to future legislation or, at a minimum, limit future challenges to whether the legislation at issue impairs any alleged contract and if so, whether the statute has a legitimate reason for impairing such a contract and whether that legitimate purpose justifies the impairment.

This Court's "duty [is] to determine the law, not to make the law." *State v. Lead Industries, Ass'n*, 951 A.2d 428 (R.I. 2008) (citing *City of Pawtucket v. Sundlun*, 662 A.2d 40, 57 (R.I. 1995)). In recognition of the role of *stare decisis* – "one of the most basic norms in our legal system" – this Court's decision on the issue presented by Defendants' Petition for Issuance of a Writ of Certiorari – whether Rhode Island's general pension statute creates a contract – its decision will have precedential effect on future challenges to legislation aimed at reducing the

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contract right, the Superior Court need not decide whether the legislation has impaired that contract, whether the state has a legitimate reason for impairing the contract and whether the legitimate purpose justifies the impairment of the contract. Plaintiffs' Opp. Mem. at 7-8.

⁵ It is doubtful that Plaintiffs would have standing, however, to represent retirees as they are not members of the Plaintiffs' unions.

state's unfunded pension liability. *See Air Distrib. Corp. v. Airpro Mech. Co.*, 973 A.2d 537, 541 n.6 (R.I. 2009).

Plaintiffs next argue that even if clear guidance from this Court is needed, this Court should not decide the issue presented by this case, but, rather Defendants should seek an advisory opinion from this Court pursuant to article 10, section 3 of the Rhode Island Constitution ("The judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly."). However, it has been this Court's "practice over the years to refrain from rendering advisory opinions" when the issue presented by the request is an issue that is pending in the Superior Court. *Opinion to the House of Representatives*, 433 A.2d 944 (R.I. 1981) (declining to issue an advisory opinion when "the questions asked are involved in pending litigation"); *Opinion to the House of Representatives*, 88 R.I. 396, 398-99, 149 A.2d 343, 344 (R.I. 1959) (declining to issue an advisory opinion when "the basic questions, if not all the subsidiary ones, propounded by the honorable house of representatives were directly or indirectly involved in litigation . . . pending in the superior court."). As this Court has recognized, "grave difficulties could follow if [it] were to give a purely advisory opinion upon [an issue] only to be confronted later with the necessity of deciding the same question after a hearing, upon review or otherwise, in the litigated case." *Opinion to the House of Representatives*, 88 R.I. 396, 399-400, 149 A.2d 343, 345 (R.I. 1959). Indeed, "[i]n such event, the defendant conceivably might have some ground to complain that his legal and constitutional rights have been unnecessarily prejudiced by our having reached a considered opinion, even though only advisory, upon a material question of law which we knew to have been involved in his [case], without first having afforded him a full hearing." *Id.* at 400; 149 A.2d at 345.

This Court also has recognized that an advisory opinion would not resolve the issue pending before the Superior Court. “[A]n advisory opinion would not constitute a decision of this court, would not finally determine the question, and would have no binding effect upon any person whose legal rights might be involved.” *Id.* at 400; 149 A.2d at 345. On the other hand, however, “a final decision and determination of the question would result if it were properly brought before [this Court] in a litigated case.” *Id.* at 400; 149 A.2d at 345.

For these reasons, this Court, like courts of other states with similar constitutional provisions that provide for advisory opinions, has refrained from issuing advisory opinions when the question presented is the same issue that is involved directly or indirectly in pending litigation. *Id.* at 398-99, 149 A.2d at 344.

Finally, in their opposition memorandum, Plaintiffs suggest that by granting Defendants’ motion for expedited review, this Court would create “the appearance of an unseemly rush to decision” and would “undermine confidence in these proceedings.” Plaintiffs’ Opp. Mem. at 9. Plaintiffs’ suggestion is ill-founded. This Court has when appropriate expedited its review of appeals and petitions for writ of certiorari when the circumstances warranted such expedited review.⁶ Defendants are not, as Plaintiffs suggest, seeking an “‘instant’ decision.” Plaintiffs’ Opp. Mem. at 6. Rather, Defendants request that this Court expedite its review and treatment of their Petition for Issuance of a Writ of Certiorari and, in the event that this Court decides to

⁶ In *State v. Lead Industries, Ass’n*, this Court reviewed the longest trial in Rhode Island’s history, which spanned four months and resulted in nineteen written decisions, through a number of appeals filed by plaintiffs and defendants, and rendered its 81-page decision less than two months after it heard oral arguments. *See State v. Lead Industries, Ass’n*, 951 A.2d 428 (R.I. July 1, 2008) (Oral arguments were heard on May 15, 2008, less than two months before the Court’s July 1, 2008 decision). The Court’s alacrity in rendering its decision and putting an end to the litigation that had begun almost a decade before did not create “the appearance of an unseemly rush to decision” or “undermine confidence in [the] proceedings.” *See* Plaintiffs’ Opp. Mem. at 9. Nor would an expedited decision in this case.

entertain Defendants' Petition, provide clear guidance on the issue of whether the general pension statute creates a contract.

CONCLUSION

For the foregoing reasons and for those set forth in Defendants' Motion for Expedited Review, Defendants respectfully request that this Court expedite its review and treatment of Defendants' Petition for Issuance of a Writ of Certiorari.

PETITIONERS

By their attorneys,



JOHN A. TARANTINO (#2586)

jtarantino@apslaw.com

PATRICIA K. ROCHA (#2793)

procha@apslaw.com

NICOLE J. (DULUDE) BENJAMIN (#7540)

nbenjamin@apslaw.com

ADLER POLLOCK & SHEEHAN P.C.

One Citizens Plaza, 8th Floor

Providence, RI 02903-1345

Tel: (401) 274-7200

Fax: (401) 351-4607

Dated: October 19, 2011

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2011, I did send a true copy of the within Reply Memorandum by **first class mail** to:

Attorneys for Plaintiffs:

Lynette Labinger, Esq.
Roney & Labinger LLP
344 Wickenden Street
Providence, RI 02903
labinger@ronney-labinger.com

Of Counsel:

Gerard P. Cobleigh, Esq.
Cobleigh & Giacobbe
70 Jefferson Boulevard
Warwick, RI 02888
gcobleigh@aol.com

Carly B. Iafrate, Esq.
129 Dyer Street
Providence, RI 02903
ciafrate@verizon.net

Vincent P. Santaniello, Esq.
Deputy Executive Director
NEA Rhode Island
99 Bald Hill Road
Cranston, RI 02920
vsantaniello@nea.org

Frederic A. Marzilli, Esq.
Frederic A. Marzilli Law Offices
685 Warren Avenue
East Providence, RI 02914
marzillilaw@yahoo.com

Marc B. Gursky, Esq.
Elizabeth A. Wiens, Esq.
Gursky Law Associates
420 Scrabbletown Road, Suite C
North Kingstown, RI 02852
mgursky@rilaborlaw.com

Thomas Landry, Esq.
78 Wilde Willow Drive
Holden, MA 01520
trlandry@juno.com

Gary T. Gentile, Esq.
General Counsel
NAGE – International Brotherhood of Police
Officers
15 Messenger Drive, Suite #2
Warwick, RI 02888-1001
ggentile@nage.org

John J. Harrington, Esq.
Haronian, Bramley & Harrington
875 Centerville Road, Bldg. 2, Unit 4B6
Warwick, RI 02886
jjharrington@hbhlaw.net

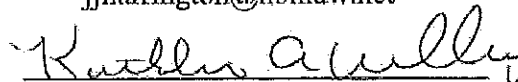


EXHIBIT A

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc.

SUPERIOR COURT

RHODE ISLAND COUNCIL, 94, et al)	
)	
VS.)	CASE NO: PC/2010-2859
)	
DONALD CARCIERI, in his capacity)	
as Governor of the State of)	
Rhode Island, et al)	

HEARD BEFORE THE HONORABLE JUSTICE SARAH TAFT-CARTER

ON MONDAY, JULY 18, 2011

MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

LYNETTE LABINGER, ESQUIRE.....FOR THE PLAINTIFFS

JOHN TARANFINO, ESQUIRE and
 PATRICIA ROCHA, ESQUIRE.....FOR THE DEFENDANTS

MARY M. GUGLIETTI, RPR
 CERTIFIED COURT REPORTER

1 complete our discovery and prove our case.

2 I don't believe that the Rhode Island Supreme Court
3 would shut the door, as the State urges you to do, on any
4 analysis whatsoever unless and until the individual has
5 either retired or possibly is eligible to retire. I
6 think that that is far too late in the process to suggest
7 that that's the first moment that Contract Clause
8 analysis and Takings Clause analysis should start.

9 And unless there are some questions, I would like to
10 rest on my brief.

11 THE COURT: Thank you.

12 MR. TARANTINO: Your Honor, may I just briefly
13 address a few things?

14 THE COURT: Yes.

15 MR. TARANTINO: Your Honor, very briefly, I just
16 wanted to make sure the record was absolutely clear on a
17 few points because the first thing, I was not suggesting,
18 and I want to make sure the record is clear on that, that
19 there would be a Contract Clause violation if benefits
20 were changed after someone retired. I specifically said
21 that that's not an issue we're dealing with, that it's
22 not something that I had to address or brief, that there
23 are some cases that make the distinction between
24 pre-retirement benefits and then retirement benefits.

25 THE COURT: I understood what you're saying.

1 MR. TARANTINO: But I just want to make sure, I am
2 not suggesting the legislature couldn't do that if it
3 chose to do so, it's just not an issue that's before the
4 Court or that we've briefed.

5 The second thing that I want to make sure the record
6 is clear on is, again, I agree with Ms. Labinger, I'm not
7 suggesting that if you rule against the State, the case
8 is over. As I said, again, then you would go to the
9 issues of: Has there been an impairment of contract and
10 was there a justification for it? So again, the point
11 that I was trying to make is you never get to those other
12 elements if there's no contract in the first instance.
13 There can't be a contract violation if there's no
14 contract. There can't be an impairment of a contract if
15 there's no contract. So I wasn't suggesting that
16 somehow, I believe you should rule in my favor but if you
17 don't, somehow there's nothing left to be done on the
18 Contract Clause issue.

19 THE COURT: I understand your argument.

20 MR. TARANTINO: The next thing that I would just
21 like to briefly address, and the State says this again in
22 its papers as well as what Miss Labinger said today, they
23 try to deal with Judge Smith's case by saying he used
24 expansive language. Well, I'm not exactly sure what that
25 means. I do know that he interpreted this statute. I do