

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

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 Chairman of the Retirement Board, and FRANK J. KARPINSKI, in his capacity as Secretary of the Retirement Board

S.U. 11-330
(P.C.C.A. No. 10-2859)

**MEMORANDUM OF PLAINTIFF-RESPONDENTS
IN OPPOSITION TO DEFENDANT-PETITIONERS'
PETITION FOR ISSUANCE OF A WRIT OF CERTIORARI**

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Parties

Respondents 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, Plaintiffs below, by their undersigned counsel, submit the within Memorandum in opposition to the Petition for Issuance of a Writ of Certiorari filed by Defendants below. For ease of reference, Plaintiff-Respondents will hereinafter be referred to collectively as “the Unions” and Defendant-Petitioners will hereinafter be referred to collectively as “the State.”

Question Presented

Should the Court issue its writ of certiorari to decide whether state employees and teachers who have contributed to and participated in the Employee Retirement System of RI for at least 10 years may be stripped of all pension rights and benefits up to the day that they are eligible to retire without any recourse under the Contracts or Takings Clause of the Rhode Island Constitution, and without requiring the State to provide any justification therefor?

Issue Presented

The Court should not issue its writ of certiorari to review a partial denial of summary judgment correctly decided by the Superior Court.

Proceedings Below

This civil action was commenced on May 12, 2010, by eight unions to challenge the constitutionality of a statute passed in 2009, 2009 Pub.L. ch. 68, art. 7 (“the 2009 Act”), as a

violation of the Contract Clause and the Takings Clause of the Rhode Island Constitution as to those state employees and teachers represented by the Unions who, on September 30, 2009, had at least ten years of credited service and contributions, but were not yet eligible to retire on that date. While the case was pending, the General Assembly enacted 2010 Pub.L. c. 23, Art. 16 (“the 2010 Act”), which took effect June 12, 2010. On July 21, 2010, the Unions filed an amended complaint to challenge the constitutionality of the 2010 Act, as a violation of the Contract Clause and the Takings Clause of the Rhode Island Constitution as to those state employees and teachers represented by the Unions who, on June 12, 2010, had at least ten years of credited service and contributions, but were not yet eligible to retire on that date. The State answered the Amended Complaint on September 15, 2010.

While discovery was proceeding, the State filed its Motion for Summary Judgment. The parties conferred and agreed that certain of the issues presented questions of law which could proceed to decision, while others, from the Unions’ perspective, required development of an additional factual record through discovery. The parties agreed, by stipulation, to focus on the issues presenting the questions of law and to defer the remaining issues, without prejudice to the State’s ability to pursue its motion and without prejudice to the Unions’ ability to seek a Rule 56(f) continuance to proceed with discovery.¹

After briefing and argument on the stipulated issues, on September 13, 2011, the Superior Court issued a lengthy decision carefully explaining its reasoning in concluding that the Unions' members, "as ten-year veterans of the State, possess a contractual relationship with the State

¹ A copy of the Stipulation is attached to the Unions' Memorandum in opposition to the Motion for Expedited Review as Exhibit 1. After the Superior Court issued its Decision below on the limited issues presented by the Stipulation, the parties again agreed to a scheduling order to address the remaining issues (Exhibit 2 to the Unions' Memorandum in opposition to the Motion for Expedited Review).

pertaining to retirement allowances and COLA benefits," Decision at 39 (also reported at 2011 R.I. Super. LEXIS 120 at *65-66), which provide the basis for challenges under the Contract and Takings Clauses of the Rhode Island Constitution. As the parties acknowledged and the Superior Court recognized, this determination was but a first, foundational, basis for the Unions' challenges under the Contract and Takings Clauses of the Rhode Island Constitution: "If no contract exists, the contract and takings clause inquiry ends. Conversely, if the Court determines that a contract exists and ... [that there is] substantial impairment of a contract, it may still conclude that the enactment 'pass[es] constitutional muster under contract clause analysis so long as it is reasonable and necessary to carry out a legitimate public purpose.'" Decision at 11 (citations omitted).

Thus, in its Petition, the State seeks this Court's intervention to review one aspect of proceedings below, the partial denial of summary judgment by the Superior Court, while other issues, including the balance of the State's motion for summary judgment (and the Unions' objection thereto) have not yet been addressed below.

Argument

Summary of Argument

The Court should deny the Petition. In its Petition, the State seeks this Court's intervention to review one aspect of proceedings below, the partial denial of summary judgment by the Superior Court. Other issues have not yet been addressed below.

The standards announced by the Court for issuance of a writ of certiorari have not been satisfied here. The Court has made clear that it disfavors piecemeal review and will decline to consider an interlocutory matter for which an adequate remedy at law exists. The State has an adequate remedy at law, because the issue which it seeks to present can and will be preserved for

later appellate review and the State will not suffer immediate or irreversible harm in the interim. Nor would resolution of this issue now, contrary to the State's characterization, provide "clear guidance" to any of the parties involved in the "pension overhaul" legislative process actively underway in the Rhode Island legislature, but the Court's acceptance of this matter for review may actually disrupt or derail the legislative process (the very reason identified by the State as the basis for urgent action).

If the Court were to issue its writ and review the Decision below, the Unions submit that the Decision would be affirmed and the matter returned to the Superior Court for further substantive proceedings, producing the likelihood of piecemeal appellate review which this Court seeks to avoid. The issue which the State seeks to present on certiorari is not, contrary to its argument, a matter of "well-settled law" in this State, and has not previously been addressed by the Court. The weight of authority from other states and past decisions of this Court support the resolution reached by the Superior Court, which did not commit error of law in reaching the Decision.

Accordingly, the Petition should be denied.

I. The standards for issuance of a writ of certiorari have not been met.

By its Petition, the State seeks interlocutory review of a partial denial of summary judgment in a pending matter. The Unions respectfully submit that, under this Court's jurisprudence, the Petition should be denied.

The Petition seeks review of a denial of summary judgment. While a Petition for issuance of a writ of certiorari is the appropriate way to proceed in the absence of a final

appealable order,² "[e]ven on petitions for certiorari, however, this Court generally declines to review interlocutory orders and decisions, including denials of motions to dismiss and for summary judgment. See *Imperial Casualty and Indemnity Co. v. Bellini*, 746 A.2d 130, 132 (R.I. 2000) (citing *Boucher v. McGovern*, 639 A.2d 1369, 1373 (R.I. 1994))." *Fayle v. Traudt*, 813 A.2d 58, 61 n.1 (R.I. 2003).

A. The State has a clear and adequate remedy at law.

The Court ordinarily will not issue a writ of certiorari when another remedy is available to determine the issue sought to be raised.

Under our cases certiorari does not ordinarily lie where another adequate remedy is available whereby the applicant's rights can be reviewed and determined by this court, nor where the petition seeks a review of an interlocutory order nor where to grant certiorari will result in bringing a matter before us in piecemeal fashion. This is the rule which has been followed in this state for many years, except where it is shown that unusual hardship or exceptional circumstances would void the benefits of an otherwise adequate remedy at law. *Shiller & Schwerin v. Gemma*, 106 R. I. 163, 256 A.2d 487 (1969); *Rogers v. Rogers*, 98 R. I. 263, 201 A.2d 140 (1964).

After hearing oral argument and studying the record, we have reached the conclusion that the record contains no unusual or exceptional circumstances which warrant the issuance of the writ, in view of the availability of an appeal from any adverse decision after a hearing on the merits. Nor are we convinced that the issuance of the writ is necessary to prevent unusual hardship or irreparable injury or loss. We find now that the writ was improvidently granted and should therefore be dismissed.

Barletta v. Kilvert, 304 A.2d 353, 354-355 (R.I. 1973) (quashing writ as improvidently granted; on petition seeking review of denial of preliminary injunction).

² "Ordinarily, the denial of a motion for summary judgment is interlocutory in character and not appealable as a matter of right. *Boucher v. McGovern*, 639 A.2d 1369, 1373 (R.I. 1994). The appropriate route for obtaining review of an interlocutory order denying a motion for summary judgment is by petition for certiorari in accordance with Rule 13 of the Supreme Court Rules of Appellate Procedure." *O'Gara v. Ferrante*, 690 A.2d 1354, 1356 (R.I. 1997) (other citations omitted). See also *Avila v. Newport Grand Jai Alai LLC*, 935 A.2d 91, 94 n.4 (R.I. 2007).

See also *Matunuck Beach Hotel, Inc. v. Sheldon*, 399 A.2d 489, 494 (R.I. 1979); *Concannon v. Concannon*, 356 A.2d 487, 490 (R.I. 1976) (each collecting cases).

The Unions respectfully submit that none of these considerations support departure from the bedrock principles identified in *Barletta*.

In its Petition, the State argues first that "[t]he relief sought here is not available in any other court or by any other procedure." Petition at 2 (citation omitted). The Unions disagree: the question of law which the State seeks to pluck from the proceedings below for selective review--before the case is concluded below--will be available and preserved for review on appeal. In contrast, for an example of a lower court ruling that would not be preserved for later appeal, see, e.g., *Crowe Countryside Realty Assoc. v. Novare Engineers, Inc.*, 891 A.2d 838 (R.I. 2006) (order mandating disclosure of pretrial discovery on an issue of first impression).

Second, the State asserts that the Decision below not only was based on error of law but "in derogation of[] well-settled law." Petition at 2. Notwithstanding the State's efforts to frame the issue as well-settled by decisions of *this* Court, this case raises issues not previously resolved by this Court. In the Superior Court, the State contended, relying upon federal case law applying *federal* Contract Clause analysis, that the established and controlling *Rhode Island* precedent permitted only one conclusion--that no contractual relationship exists. But the very federal precedents relied upon by the State acknowledged that this is not so: the First Circuit itself observed that "Rhode Island case law points in both directions," *NEA-RI v. Retirement Board*, 172 F.3d 22, 28 (1st Cir. 1999), *cert. denied sub nom. Casey v. Retirement Board*, 528 U.S. 929 ("*NEA-RP*"), and "[t]he existence of an employer-employee relationship does weigh in favor of finding an implied contract." *Id.* As will be discussed in greater detail later in this Memorandum, a review of cases from this Court and the weight of authority from other state

jurisdictions which have directly considered the issue support the recognition of a statutorily-created contractual relationship in the core retirement benefits at issue in the 2009 and 2010 Acts. "The modern trend and majority view is that a public employee's rights under a public pension statute are contract rights. In such jurisdictions, retired and active pension participants have contractually vested property rights created by the pension statute; such property rights are enforceable and cannot be impaired or diminished by the state." 3 McQuillin, MUN. CORP. § 12.144 (3rd ed.) (footnotes omitted).

B. The current pension "crisis" and pending legislation do not support the State's claim of unusual hardship or exceptional circumstances.

Third, the State contends, Petition at 2, that "immediate review of the Decision is necessary and warranted so that the State, the Governor and the General Assembly will have clear guidance on the law in Rhode Island as they endeavor to resolve" what the State describes as its current fiscal crisis involving an array of state and municipal pension programs, ranging far beyond the one plan at issue here. The case for which review is sought involves challenges to adverse changes in 2009 and 2010 to the Employees Retirement System ("ERSRI"), which applied to teachers and a segment of state employees. The asserted "unfunded-pension liability" to which the State makes reference in its Petition at 2 n. 3 includes municipal pensions administered by the State Retirement Board (Municipal Employees Retirement System, or "MERS"), dozens of municipal pensions administered by the individual municipalities, and judicial pensions.³

³ "Of roughly 155 public pension plans statewide, 37 are not run by the state and have been dealt with separately in the overhaul bill. Rather than enacting changes for those plans, the legislation directs municipalities to study the plans to determine how well funded they are and then to develop a 10-year strategy for improving their financial health." Parker, Paul, "Breaking News: At the RI pension hearing: Mayors are testifying," *Providence Journal* (11/1/11 on-line

The Unions respectfully submit that the State's attempt to link immediate resolution of the one issue decided so far in this case to solution of economic concerns under consideration in 2011 is nothing more than political hyperbole designed to convince the Court to step prematurely into the maelstrom of a legislative process currently enveloping the other two independent branches of government—the General Assembly and the Executive—which would likely be interpreted as a signal that the Court's decision on the contract issue—a substantial and important issue that the Court has not squarely confronted—would be imminent. As such, it may have the opposite effect of delaying, disrupting or derailing the legislative process.

Moreover, this Court's decision in this case—granting certiorari, denying certiorari, or rendering a decision on the merits—will not, most assuredly, provide the Governor and the General Assembly with “clear guidance” to address the comprehensive legislation now and for the first time under consideration by the General Assembly and not at issue in this case. The Unions make this argument based upon the realities of time to brief, deliberate and render a decision and upon the substance of the issues before the Court and before the legislature.

The State claims that it needs “immediate [interlocutory] review” in order to obtain “clear guidance” for a legislative process that is presently underway. But if the Court were to grant certiorari and set the matter for briefing and argument at this stage, it may actually slow that process down, while the two independent branches “wait and see” what the Court does before fulfilling their independent responsibility to consider legislation designed to address 2011 matters.

The General Assembly and the Executive branch have made clear, over many months, that, from their perspective, there is an urgent need, based upon 2011 fiscal considerations, to

edition), <http://news.providencejournal.com/breaking-news/2011/11/pension-overhaul.html#.TrAuj3Kxz8g>, accessed on 11/1/11.

consider modifications affecting not only state employees and teachers participating in the ERSRI retirement system at issue here, but also affecting state and municipal employees participating in other pension plans (MERS, state police and judicial pension plans, and municipally-administered plans), and affecting persons already retired and receiving retirement benefits from all of those plans. The General Assembly and the Executive branch have conducted public forums, meetings, issued press releases, and other announcements, all to the effect that this consideration cannot be delayed and would be presented as a legislative package to the General Assembly in October 2011,⁴ and a legislative package was indeed introduced on October 18, 2011 and is currently the subject of legislative hearings.⁵

This case raises issues not previously resolved by this Court. The State concedes that the parties should be entitled to brief the issues presented by the Petition and that the Court should hold oral argument and issue a considered decision. These issues deserve—and undoubtedly will

⁴ See, e.g., Stanton, M., “At forum, lines drawn on how to solve R.I. pension crisis,” *Providence Journal*, 10/4/11, http://www.projo.com/news/content/Pension_Reform_Forum_10-04-11_0HQO7BA_v14.6ef3b.html, accessed on 10/4/11, reporting on the fourth and final meeting of the Pension Advisory Group, a group established in June 2011 with the stated purpose of “The 12 member voluntary group is an advisory body that includes local and national experts on pension reform from business, academia and labor. The charge of the group is to vet and organize information for the Governor and Treasurer as they work to develop a comprehensive solution to submit to the General Assembly in October for the special session on pension reform.” Press Release 14075, “RI.gov: Governor, Treasurer Partner to Work Toward Pension Solution,” issued 6/15/11, <http://www.ri.gov/press/view/14075>, accessed 10/8/11.

See, e.g., Press Release issued by the Office of the Governor on behalf of the Governor and the General Treasurer on September 13, 2011, in response to the Superior Court decision in this action: “While we are disappointed that today’s ruling did not grant immediate dismissal of the plaintiffs’ claims against the state at this time, we remain committed to submitting comprehensive pension reform legislation for the General Assembly to consider during their October special session.” Accessed on 10/5/2011 at <http://www.ri.gov/press/view/14737>.

⁵ Senate Bill 2011-S1111 may be accessed at <http://www.rilin.state.ri.us/billtext11/senatetext11/s1111.htm>. House Bill 2011-H6319 may be accessed at <http://www.rilin.state.ri.us/BillText/BillText11/HouseText11/H6319.htm>. Videographic records of the hearings can be accessed at <http://www.pensionreformri.com/index.html>.

receive—careful consideration by the Court. The legislative process, promised to proceed now, will *not* be assisted by the Court’s exposition, unless that legislative process is put on hold.

Further, a resolution in this matter will not provide "clear guidance" on the pending issues. In the Superior Court, the State contended that the pension plan established under the ERSRI does not establish a contractual relationship with its active (currently employed) participants, therefore foreclosing any Contract Clause review and that the Unions’ Takings Clause claim, which is dependent upon the existence of contract rights, likewise fails. The Superior Court, after substantial briefing by the parties and its own independent review, disagreed, finding that the Retirement system “does give rise to an implied contract,” Decision at 2, and “that Plaintiffs[’ members], as ten-year veterans of the State, possess a contractual relationship with the State pertaining to retirement allowances and COLA benefits.” Decision at 39 (citations omitted).

By obtaining this favorable determination from the Superior Court, the Unions won the right to continue with their constitutional challenge. As the Unions have acknowledged, establishing the existence of a contractual relationship is but the first step in Contract Clause analysis: from there, three questions—fact driven—arise: First, has the state law in fact substantially impaired a contractual relationship? Second, if the law constitutes a substantial impairment, can the state show a legitimate public purpose behind the regulation? Third, is the legitimate public purpose sufficient to justify the impairment of the contractual rights? *Rhode Island Depositors Economic Protection Corp. v. Brown*, 659 A.2d 95, 106 (R.I. 1995), *cert. denied*, 516 U.S. 975 (1995). If the Court were to grant certiorari and rule in the Unions’ favor, this further inquiry would be undertaken on remand. It would provide no “clear guidance” as to the constitutionality of the pending legislation, which is far broader in scope.

The State had hoped to shut down the inquiry by establishing that no contractual relationship exists. If one accepts the State's argument about the nature of the pension rights at issue here, we never get to these questions at all. Instead, the State's position is that the State is simply free to subtract from or abrogate entirely the promised benefits at will until a participant qualifies for retirement.

If the Court were to grant certiorari and rule in the State's favor, it would signal that, in evaluating a Contract Clause or Takings Clause challenge on pension legislation, the interests of current employees, not eligible to retire (even by a day), can be wiped away.⁶ But the pending legislation incorporates, as a core provision, cut backs on benefits of *current retirees* as well.⁷

⁶ Some may speculate that, given the financial climate, a rollback or freeze in 2011 of pension entitlements would survive a Contract or Takings Clause challenge, even as to current retirees, so what's the big deal if the Court gives the State the ruling it is looking for right now? But, at the risk of stating the obvious, a determination that vested, current employees have *no* rights at stake to mount a Contract or Takings Clause challenge would do so much more: it would mean, for example that, after the current crisis is resolved and the financial dust settles, a new legislative and executive branch could roll back or wipe out all such entitlements—perhaps simply because it is politically expedient to do so—for those vested but not-yet retirement eligible, without having to justify the action at all.

⁷ See, e.g., proposed revisions to R.I.G.L. §36-10-35, contained in both the House and Senate bills, cited in n. 5, *supra*, adding subparagraph (g) thereto, which would modify and/or suspend payment of cost of living adjustments to current retirees and/or their beneficiaries under certain circumstances as of July 1, 2012. The Treasurer, in her "Executive Summary" to explain key components of the legislation, described the operative effects of these provisions as follows: "The COLA is one of the most expensive aspects of the current pension system (continuing to pay a COLA without enough investment earnings will eventually deplete the pension fund). RI [Retirement Security Act] suspends the COLA until the system is healthy and at actuarially acceptable funding levels. This is a *system-wide suspension*, impacting all state employees, teachers, judges, municipal employees and public safety employees, including the state police. Once the system reaches healthy funding levels, a *reduced* COLA, tied to investment performance, will automatically return." "The Retirement Security Act, Executive Summary," by Treasurer Raimondo (emphasis added), accessed on 11/1/11 at <http://www.pensionreformri.com/docs/index.html>.

The Treasurer has repeatedly expressed the view that any solution would involve "shared sacrifice" by all stakeholders, identified as taxpayers, retirees, vested active employees and new hires. "Ultimately, fixing the state's pension system will require direct and honest dialogue with

Since the matter at bar does not address at all the right of current retirees to receive pension benefits or whether that relationship *does* constitute a contractual relationship triggering Contract and Takings Clause analysis,⁸ a ruling in this case would provide no guidance on how to assess the constitutionality of the pension legislation for 2011. It is disingenuous for the State to contend otherwise.

Moreover, to the extent that the State believes that a resolution of legal questions relating to the pending legislation is critical to its actions, the State has a direct route to seek concrete and responsive action by this Court in the form of a request for an Advisory Opinion directly relating to the specifics of such legislation. The Governor or either House of the General Assembly can ask this Court to issue an Advisory Opinion. R.I. Constitution, Art. X, §3. Such an Opinion, if issued, would directly address the specific terms of the legislation at hand, and in that way provide “clear guidance.” One would not need to extrapolate or analogize from an earlier case.

On the other hand, announcement of consideration, briefing and anticipated decision on this matter may have the unintended and unfortunate effect of disrupting, derailing, and actually

the understanding that sacrifices will be expected by everyone.” Office of the General Treasurer, Secure Path RI, <http://www.treasury.ri.gov/secure-path-ri>, accessed 10/8/11. *See also* “A Letter to State Employees from Treasurer Raimondo and Governor Chafee (September 30, 2011), <http://www.treasury.ri.gov/documents/SPRI/EMP-LETTER-09302011.pdf>, accessed 10/8/11 (reporting on plan under consideration to suspend or reduce cost of living adjustment payments to current retirees). “There is more than one legislative solution that can accomplish these shared goals and produce a sustainable retirement system. This report is clear, however, the pension system’s challenges are so great that it will be mathematically impossible to fix without dramatic changes that will affect *all stakeholders* not just the youngest and most recent employees.” Office of the General Treasurer, “TRUTH IN NUMBERS: The Security & Sustainability of Rhode Island’s Retirement System,” at page 11 (June 2011) (emphasis added), <http://www.treasury.ri.gov/documents/SPRI/TIN-WEB-06-1-11.pdf>, accessed 10/4/11.

⁸ In argument before the Superior Court, the State contended that participants in the state pension system “have no contractual entitlement to receipt of benefits authorized by the pension statute *at any time before their retirement.*” State’s Memo. in Support of Summary Judgment at 2 (emphasis added).

delaying the ordinary and regular processes of the other two independent branches of government, causing them to delay in moving forward with their own processes while awaiting the outcome of a decision which will not address current issues, because the current issues lie outside the scope of the issues presented by the Petition.

The "Pension Reform" legislative train has already left the station. It does not present an exceptional circumstance or hardship justifying the Court's departure from its stated standards for issuance of certiorari.

C. Consideration of the issue at this time is likely to produce piecemeal appellate review.

If the Court were to grant certiorari and ultimately conclude, as the Unions submit, that the Superior Court did not err in its legal analysis, this matter would be far from over and would embroil the Supreme Court in precisely the prospect of "piecemeal" appellate review which it disfavors. In contrast, the State is under no immediate impediment or harm from considering this matter in due course after all trial-level proceedings are concluded. At this stage, the State is not directed to take some irreversible step. There are no interlocutory mandates or funding requirements. And the prospect that the State will be required to participate in further proceedings below, which involve the potential for litigation expense, does not distinguish this matter from any other case where a party, firmly believing that it is entitled to summary judgment, must nonetheless proceed below. If that notion were all that is required to convince the Court to grant certiorari, this Court would be inundated with petitions seeking interlocutory review of denials of motions to dismiss or for summary judgment, since, by their very nature, a successful motion would terminate proceedings before trial and reduce expense.

II. Because the Superior Court correctly decided the issue in denying partial summary judgment, a review by this Court, ultimately upholding the decision below, will produce piecemeal review.

In the discussion which follows, the Unions will demonstrate that the State is not correct in its exposition of the law of the State of Rhode Island and its premise that it is entitled to summary judgment. Thus, if the Court undertakes the review sought by the State and ultimately concludes that the Superior Court committed no legal error in denying the State's motion for summary judgment on these grounds, the matter would then be returned to the Superior Court for further proceedings, producing precisely the type of piecemeal review that this Court has made clear it seeks to avoid.

The Unions respectfully submit that the State is wrong in its characterization of applicable case law. The Decision and analysis of the Superior Court conform to controlling decisions of this Court and follow the weight of authority from other state courts. The Superior Court did not err in its denial of summary judgment on both arguments.

In this action, the Unions have sued on behalf of their members who participate in the Employee Retirement System and who are "vested"--meaning they have at least 10 years of credited service. The Unions have challenged the constitutionality of two Public Laws, one passed in 2009 and one in 2010, which altered the retirement eligibility standards and reduced the value of the benefits available on retirement for all participants who were not, on their effective date, eligible to retire. It is undisputed that, in comparison to the standards in place before the adoption of the two Acts, the alterations in 2009 and 2010 increased the length of time for vested employees to reach retirement eligibility; reduced the value of the attainable pension; and reduced or eliminated post-retirement cost of living adjustments. The Unions, on behalf of their members, have asserted that these changes violated their rights under Rhode Island's

Contract and Takings Clauses. The State claimed that, regardless of the changes, the Unions' members have no rights protected by these Clauses until they meet the standards for retirement in effect at that time.

The Unions claimed, and respectfully submit that decisions of this Court confirm, that the pension rights at issue here are contract rights. The position taken by State, in contrast, if taken to its bedrock conclusion, is that the Unions' members have no legally enforceable or protectable contract right to a pension at all, up until the moment that they achieve eligibility to retire (on whatever basis remains).⁹

A. A brief overview of the Employees' Retirement System.

The Employees' Retirement System ("ERSRI") was first established by legislation in 1936. The Retirement Board was created and designated to administer the ERSRI. A brief review of the legislative history establishing the ERSRI appears in *Kass v. Retirement Board*, 567 A.2d 358, 359 (R.I. 1989).¹⁰ See generally Decision at 2-8.

The Retirement Board administers the State Retirement System. There are several plans under its administration. At issue here is the Employee's Retirement System ("ERSRI"), whose members are public school teachers employed by participating municipal school systems, and

⁹ As the Superior Court recognized, the issue before it was a question of law without the need to refer to any underlying factual contentions. The Unions made clear that, in the event that the State's motion for summary judgment on this basis were denied, the Unions intended, after completion of discovery, to develop the factual record to support the scope and substantiality of the impairment of their members' rights effected by the challenged Acts.

¹⁰ In *Kass*, the Court considered the history of the ERSRI in the context of a constitutional challenge by a taxpayer challenging the authority of the legislature to permit members of the General Assembly to participate.

most state employees.¹¹ The judiciary, for example, does not participate in this plan, but rather in a separate plan administered by the Retirement Board. For years, the retirement plan for the judiciary was “non-contributory,” meaning that the judicial participants did not contribute a portion of their compensation in order to be eligible to participate. *See generally Kass*, 567 A.2d at 359.

In contrast, the ERSRI *requires* and has historically required participants to contribute a percentage of their annual salary to the plan: now and since 1995, 9.5% for teachers, §16-16-22, and 8.75% for state employees, §36-10-1. These are substantial contributions, far exceeding the national average of 6.4%.¹² Source: United States Department of Labor, Bureau of Labor Statistics (as of 2009, 2008).¹³

The ERSRI is a defined benefit plan. In exchange for their payments, participants receive a fixed retirement allowance based on a formula for years of service and salary level achieved.¹⁴

¹¹ For those teachers who are covered by the ERSRI, all are *required* to participate in the ERSRI "as a condition of their employment as teachers," R.I.G.L. § 16-16-2. For those state employees covered by the ERSRI, all employees "shall, under contract of their employment become members of the retirement system," R.I.G.L. § 36-9-2.

¹² The current rates were set in 1995. 1995 Pub. L.ch. 370, Art. 15, §§1- 2.

¹³ Accessed 6/20/2011:
<http://stats.bls.gov/ncs/ebs/benefits/2009/ebb10044.pdf>,
<http://stats.bls.gov/ncs/ebs/benefits/2008/ownership/govt/table03a.pdf>
http://stats.bls.gov/ncs/ebs/benefits/2008/ownership_government.htm

¹⁴ Under a defined benefit plan, as explained by the district court in *National Educ. Association-Rhode Island v. Retirement Bd.*, 972 F. Supp. 100, 103 and n.2 (D.R.I. 1997), *vacated*, 172 F.3d 22 (1st Cir. 1999), *cert. denied sub nom. Casey v. Retirement Bd.*, 528 U.S. 929 (1999), “benefits paid to a participating employee are calculated as a percentage, determined by the number of years of credited service, of the average of his or her three highest consecutive years of compensation, multiplied by his or her years of service. *See R.I. Gen. Laws § 36-10-10*. Employees participating in the Retirement System must contribute a fixed percentage to the Retirement System. R.I. Gen. Laws. § 36-10-1.” In contrast, under a “defined contribution” plan, “the benefits payable to each employee are based directly on the contributions made by or on behalf of that employee, combined with associated investment income. *See Connolly v.*

The ERSRI provides that employees who make ten years of payments into the Retirement System are “vested.” §36-10-9 (state employees), §16-16-12 (teachers).

Prior to 2008, the State, while making some adjustments in the pension program, had not purported to alter the program to the disadvantage of existing vested employees. To the contrary, over the years, when the requirements for qualifying for retirement were adjusted, the changes benefitted the participants. Thus, for example, the total years of contributory service that a participant had to provide in order to be eligible to retire without regard to age was reduced from 38 years to 35 years in 1985, 1985 Pub.L.ch. 331 §§1-2, and from 35 years to 30 years, 1987 Pub.L.ch. 209 §1, and from 30 years to 28 years in 1989, 1989 R.I. Pub.L. c. 126, art. 55 §§1-2 (amending §§16-16-12 and 36-10-9), where it remained as to vested employees until the passage of the 2009 Act. Otherwise, the employee could retire at 60 years of age with 10 years of service. In 1989, the service-only requirement was reduced to 28 years of service. Likewise, commencing in the early 1970s, an annual cost of living adjustment (“COLA”) was added.¹⁵

Prior to 2009, in exchange for their payments, vested participants were promised a fixed retirement allowance based on a formula for years of service, up to a maximum of 80% for 35 years of service, and salary level achieved, based on the average of the employee’s three highest years. In 2005, the program was amended to reduce the formula for calculating retirement benefits and to increase the service and age requirements for participants who had not yet vested

Pension Benefit Guaranty Corp., 475 U.S. 211, 229-230, 89 L. Ed. 2d 166, 106 S. Ct. 1018 (1986) (O’Connor, J., concurring). Under a ‘defined contribution’ plan, benefits paid to an individual are fully funded by the combination of employer and employee contributions. *Id.* By contrast, under a ‘defined benefit’ plan, the contributions paid on behalf of an individual may not fully fund the projected costs of the benefits paid to that particular employee, although the combination of employee contributions and annual state appropriations is calculated to fully fund the Retirement System on an aggregate basis.”

¹⁵ The initial years were 1.5%, climbing to 3.0% in 1971. (1970 Pub.L. ch. 112, Art. X, §§1-2, amending §§ 16-16-40, 36-10-35).

as of July 1, 2005. 2005 Pub.L. chapter 117, art. 7, §§1-2 (amending §§ 16-16-13, 36-10-10).

In 2009, the State altered the standards applicable to vested employees--that is, employees who, on the effective date of the change, had at least 10 years of credited service and contributions, but were not yet eligible to retire on that date. Effective October 1, 2009, the State increased the amount of time an employee was required to work before reaching retirement eligibility, increased the minimum age for retirement with 10 years of service, reduced the maximum percentage benefit from 80% to 75% and increased the number of years to achieve the new maximum from 35 to 38 years, and changed the measurement for highest average salary from one calculated on the highest three years to the highest five years. None of these changes benefitted the participants. 2009 Pub.L. ch. 68, art. 7 ("the 2009 Act").

In 2010, the State again altered the standards applicable to vested employees--that is, employees who, on the effective date of the change, had at least 10 years of credited service and contributions, but were not yet eligible to retire on that date. Effective June 12, 2010, the State completely eliminated the COLA (first instituted in 1970) for all amounts above the first \$35,000 of retirement benefits. For benefits up to \$35,000, the COLA was no longer automatic or set at 3% for all vested employees, but only available up to 3% when supported by the Consumer Price Index. None of these changes benefitted the participants. 2010 Pub.L. c. 23, Art. 16 ("the 2010 Act").

At all times material hereto, the State declared its intention to guarantee the retirement benefits:

36-10-7. Guaranty by state - Annual appropriations.

The general assembly of the state of Rhode Island hereby declares that it is the intention of the state to make payment of the annuities, benefits, and retirement allowances provided for under the provisions of this chapter and to that end that it is the intention of the state to make the appropriations required by the state to meet its obligations to the extent provided in this chapter. The general assembly

shall make annual appropriations which shall be sufficient to provide for the payment of the annuities, benefits, and retirement allowances required of the state under this chapter. The amounts to be appropriated shall be included in the annual appropriation bill and shall be paid by the general treasurer into the retirement system.

The Unions, eight unions which either directly or through their affiliates serve as certified bargaining unit representatives for Rhode Island state employees and teachers who are vested participants in the ERSRI, sued on behalf of their members, asserting that the 2009 and 2010 Acts impaired rights protected from impairment by the Contract Clause of the RI Constitution, Article I §12, and contravenes the Takings Clause of the RI Constitution, Article I §16.

B. The Unions' members have a contractual relationship protected by the Contract and Takings Clauses of the Rhode Island Constitution.

The Contract Clause of the Rhode Island Constitution provides:

No ex post facto law, or law impairing the obligation of contracts, shall be passed.
Rhode Island Constitution, Art. I §12

The language can be found in the Rhode Island Constitution dating back to 1843. Similar language appears in the Contract Clause of the U.S. Constitution, Art. I, § 10, and in most state constitutions.¹⁶

The Takings Clause of the Rhode Island Constitution provides:

Private property shall not be taken for public uses, without just compensation.
R.I. Constitution, Art. I §16.

The State contended that it was entitled to summary judgment as a matter of law because the Unions' claims under the Contract and Takings Clauses are based upon the existence of its members' contract rights to retirement allowances and COLA benefits under the ERSRI and,

¹⁶ A Lexis search disclosed constitutional prohibitions against impairment of contract in over 35 states. See, e.g., North Carolina Const. art. I, § 16 (2011); Oklahoma. Const. Art. II, § 15 (2011); Virginia Const. Art. I, § 9 (2011); Washington Const. Art. I, § 23 (2011).

according to the State, there are none.¹⁷

A review of decisions of this Court addressing the proper application of the Rhode Island Contract Clause in the area of pension rights will demonstrate that this Court has not confronted or resolved the issue presented in this matter. *Accord* Decision at 18 ("the issue ... is one of first impression. The Rhode Island Supreme Court has described a pension as comprising elements of contract and deferred compensation, but it has never answered the specific question before this Court." Citation omitted.) A review of jurisprudence from other states, applying analogous contract clause provisions, will demonstrate that, while there is a split in authority, the "modern trend" and evolving view, contrary to the State's argument, is to find a contractual relationship between the State and its employees actively participating in a contributory retirement program *before* retirement or retirement eligibility.

1. The decisions of this Court chart the constitutional analysis under the Contract Clause and support the existence of a contractual relationship here.

In its Memorandum in Support of the Petition for Certiorari, the State has asserted that this Court's "prior holdings in *In re Almeida* and *Arena*, [] establish the right of the city or state to change prospectively the criteria for receipt of pension benefits and the benefits themselves at

¹⁷ The Unions' claim under the Takings Clause is also based upon the existence and deprivation of rights in contract. The interdependence of the analysis was captured by the First Circuit (under federal constitutional law) in *NEA-RI* ("the question for us is whether, apart from what has been paid in by the member or already paid out by the state, the prospective payments of the state's share of the defined benefits are currently "property" of the plaintiffs under the Takings Clause. If there were a contractual right to such payment, that right itself would be property for the purposes of the Takings Clause. *See United States Trust*, 431 U.S. at 11 n.16. But in this case we have already said that the state's prospective payments, over and above the members' contributions, are not contractually obligated under the Contract Clause--at least as to 'last minute' entrants such as the plaintiffs." 172 F.3d at 30.) The Superior Court's Decision denied summary judgment as to both constitutional provisions. Decision at 12 ("Plaintiffs' takings clause claim is undisputedly based upon the existence and deprivation of rights in contract; therefore, the Court's decision today bears equally upon both of Plaintiffs' claims."

any time before an employee's retirement." State Cert. Mem. at 19 (footnote omitted). A review of decisions of this Court addressing the proper application of the Rhode Island Contract Clause in the area of pension rights will demonstrate that this Court has not confronted or resolved the issue presented in this matter. The Unions respectfully submit that the Superior Court correctly analyzed past decisions of this Court in reaching the Decision below.

In *Brennan v. Kirby*, 529 A. 2d 633 (R.I. 1987), the Court considered a Contract Clause challenge to the retrospective repeal of a statute which purported to confer additional seniority rights based on military service for public and private sector employees. In *Brennan*, the Court did not consider a retirement program at all. It was not presented with a statute which required a contribution by the employee *in exchange for* a stated benefit. And, finally, the Court assumed, without deciding, that the analysis would be the same under the Rhode Island and federal Contract Clause provisions.

Applying federal Contract Clause analysis in *Brennan*, the Court “looks first to the statutory language in determining whether a particular statute gives rise to a contractual obligation.” 529 A.2d at 639 (citation omitted). The Court acknowledged the United States Supreme Court’s admonition that the passage of an enactment, in the absence of “a clear indication by the Legislature that it intended to bind itself contractually,” would be presumed merely to “declare[] a policy to be pursued until the legislature shall ordain otherwise.” *Id.* at 638, quoting *Dodge v. Board of Education*, 302 U.S. 74, 79 (1937) (internal quotations omitted).

Under that analysis, the result in *Brennan* was straightforward. The statute at issue granted a benefit or recognition to returning veterans without consideration and extended it not only to veterans employed by the State or participating in the ERSRI, but to veterans in both public and private sector employment.

In *In re Almeida*, 611 A.2d 1375 (R.I. 1992), the Court confronted the “nature of a pension” in the context of a challenge of the termination or forfeiture of a pension as an element of the removal of a disgraced judge found to have engaged in repeated acts of dishonesty and misconduct. There the Court explored decisions from other jurisdictions confronting the nature of pensions. It should be noted that Court was called to assess the nature of the retirement benefit where the judge had already retired and was collecting the benefit and had participated in what was then a non-contributory retirement plan. Even so, the Court was unwilling to align itself with the line of cases which views the pension relationship as a “gratuity,” instead recognizing it as having elements of both “deferred compensation” and “contract.”

The Court observed:

Different viewpoints exist not only about the nature of pensions but also about the question of when rights to those pension benefits vest. Some courts have followed the theory that a pension is a gratuity of the state, “a bounty springing from the appreciation and graciousness of the sovereign; [and] an inducement to conscientious, efficient and honorable service.” *Ballurio*, 29 N.J. Super. at 389, 102 A.2d at 666; see *Keegan v. Board of Trustees*, 412 Ill. 430, 434, 107 N.E.2d 702, 705 (1952); *City of Dallas v. Trammell*, 129 Tex. 150, 158, 101 S.W.2d 1009, 1013 (1937). One court has held that when the pension plan is compulsory and noncontributory, it is considered to be a gratuity and the employee has no vested rights until all application conditions are met. *Haverstock v. State Public Employees Retirement Fund*, 490 N.E.2d 357, 360 (Ind. Ct. App. 1986). Although the pension plan in the present case is noncontributory, we decline to categorize it as a gratuity of the state.

Other courts categorize a pension as a contract, considering it to be part of the employment contract itself. See *Betts v. Board of Administration*, 21 Cal. 3d 859, 863, 582 P.2d 614, 617, 148 Cal. Rptr. 158, 161 (1978); *Dorsey v. State ex rel. Mulrine*, 283 A.2d 834, 836 (Del. 1971); *Board of Trustees of the Police Pension and Retirement System v. Weed*, 719 P.2d 1276, 1277 (Okla. 1986); *Leonard v. City of Seattle*, 81 Wash. 2d 479, 485-86, 503 P.2d 741, 746 (1972). According to this theory, the pension is completely vested once the employment contract is signed and employment begins. Pursuant to a contributory plan, the contractual obligations are formed when the conditions of employment are satisfied. *Weed*, 719 P.2d at 1278.

In the *Leonard* case the court considered pension benefits to continue vesting with each day of service, thereby amounting to an enforceable right to funds. *Leonard*, 81 Wash. 2d at 487, 503 P.2d at 747. However, in that case the property

right, the vested right to the pension was not acquired through the recipient's criminal activity in his position. The pension had vested earlier, and the conviction was not connected to his employment. *Id.* at 488, 503 P.2d at 747; *see also Weed*, 719 P.2d at 1278.

According to the contract theory, a pension has been referred to as deferred compensation. Property rights are in the nature of vested rights in deferred compensation from the employer. The right to this deferred compensation has been considered to vest when the employee completes the years of eligibility. *See Wright v. Allegheny County Retirement Board*, 390 Pa. 75, 79, 134 A.2d 231, 233 (1957). Contract rights may attach upon entering public employment and service. *Miller v. State*, 18 Cal. 3d 808, 814, 557 P.2d 970, 973-74, 135 Cal. Rptr. 386, 389-90 (1977). A pension has also been considered ““compensation for services previously rendered and [it acts] as an inducement to continued and faithful service.”” *Steinmann v. State Department of Treasury*, 116 N.J. 564, 572, 562 A.2d 791, 795 (1989). One court has held that long-term faithful service is an implied condition for receiving the benefit of deferred compensation. *Ameruso v. City of New York*, 141 Misc. 2d 389, 393, 532 N.Y.S.2d 992, 995 (1988).

Certain courts utilize a middle-ground approach according to which a pension is considered more contractual than gratuitous, but also as deferred compensation. *City of Frederick v. Quinn*, 35 Md. App. 626, 629, 371 A.2d 724, 725-26 (1977); *Uricoli v. Board of Trustees, Police and Firemen's Retirement System*, 91 N.J. 62, 71-72, 449 A.2d 1267, 1272 (1982). Because the right to a pension does not vest once the employment contract is signed, the pension therefore may be terminated for employee's misconduct. We similarly decline expressly to categorize a pension because such a limiting categorization might lead to an improper consequence. *Instead we conclude that a pension comprises elements of both the deferred compensation and the contract theories. The right to deferred compensation vests upon meeting the terms of employment, but that vesting is subject to divestment because it is conditioned on continued honorable and faithful service.* We need not distinguish between the contributory and the noncontributory natures of a public pension because vesting is continually subject to the implied condition of good behavior and honorable service in all areas of public service. These prerequisites must be satisfied to receive a pension and are quintessential for one employed in public service, especially as a judge. Vesting of the amount to be paid by the state in pension as deferred compensation is therefore subject to suspension, in a manner similar to the requirements for receiving compensation. This approach best serves the purpose sought to be achieved by the Legislature by not limiting our consideration of the vesting of pension benefits.

Id. at 1385-1386 (omissions in original; emphasis added).

Thus, in *Almeida*, this Court, analyzing a non-contributory retirement program, nonetheless aligned itself with the view that a retirement program represents elements of

deferred compensation and contract, and not a mere gratuity. Respectfully, the State's reliance upon *Almeida* as establishing that the right to a pension does not vest until retirement is simply wrong. *Almeida*, to the contrary, stands for the proposition that pension rights vest far earlier, but are subject to an "implied condition of good behavior and honorable service" and are subject to divestment for failure to adhere to that standard. *Id.* at 1386.

In *Retired Adjunct Prof. v. Almond*, 690 A.2d 1342 (R.I.1997), professors who had retired from public university employment and were now receiving State pension benefits brought a challenge to a state law, enacted after their retirement, which limited the amount of post-retirement State employment they could receive before their pension benefits were suspended. The Superior Court had issued a permanent injunction against application of the law to the plaintiffs on the basis that the "statutory reemployment opportunities as they existed when they retired were contractual rights that could not be altered...without offending the contract clauses in both the State and Federal Constitutions." 690 A.2d at 1344-1345 (footnote omitted).

Reaffirming that the first question to be answered in analyzing a challenge under the Contract Clause is "Is there a contractual relationship?," the Court stated that "[b]ecause the State has never been obliged to offer post-retirement reemployment to plaintiffs and because plaintiffs have never been required to accept such reemployment, plaintiffs had no contractual or other protected property right in being reemployed by the State after their retirement." 690 A.2d at 1345. The Court explained that "[i]n the determination of whether public-contract rights exist, the most important fact is legislative intent as it is expressed in the language of the statute." *Id.* at 1346 (citations omitted). The Court acknowledged that a legislative enactment could create a contractual relationship "when the language and the circumstances of the statute's enactment evince a clear legislative intent to create private and enforceable contract rights against the

state,” but did not find one in that case, because the benefit at issue did not present “the kind of ‘bargained-for-exchange’ that is the hallmark of contracts.” *Id.* at 1345-1346 (citations omitted).

In concluding that the statement of the post-retirement employment provision in effect at the time plaintiffs retired did not create a contractual relationship,¹⁸ the Court specifically distinguished this relationship from the pension benefit program at issue in *National Education Association-Rhode Island v. Retirement Board of the Rhode Island Employees Retirement System*, 890 F. Supp. 1143 (D.R.I. 1995), *vacated*, 172 F.3d 22 (1st Cir. 1999), *cert. denied*, 528 U.S. 929. The Court observed that the NEA plaintiffs gave “specific, bargained-for consideration in exchange for” specific benefits. The retired professors had not been guaranteed the opportunity for post-retirement work, “nor are they being asked to forfeit any payments due them for work they have already performed.” *Retired Professors*, 690 A.2d at 1347. Here, in contrast, the Unions’ members, year in and year out, have contributed a substantial percentage of their annual compensation in direct exchange for participation in the retirement system on specific terms. The standards for eligibility and the amount of the pension were guaranteed by the State.

Below, the Superior Court also examined this Court’s ruling in *Pellegrino v. R.I. Ethics Comm’n*, 788 A.2d 1119, 1125 (R.I. 2002), as instructive. In *Pellegrino*, the Court rejected the State’s argument that the doctrine of sovereign immunity shielded the State from liability for payment of attendance stipends to members of the Ethics Commission. Observing that the “[l]egislature is presumed not to have relinquished any part of the state’s sovereign power unless

¹⁸ The Court also observed that even if the benefits at issue created contract rights, “there was no evidence presented to the [superior] court suggesting that the challenged amendments substantially impaired those rights.” 690 A.2d at 1347. The Unions here intend to present that evidence and have been actively engaged in discovery related to it. That issue, by agreement of the parties, has been reserved and was not before the Superior Court.

it's intent to do so has been clearly expressed or arises by necessary implication from the relevant statutory language," the Court nonetheless concluded that "it appears to us that a waiver of the state's sovereign immunity has been accomplished by necessary implication from the very statutory terms that provided for specific compensation to be paid to commission members for attending commission meetings." 788 A.2d at 1123-1124 (internal quotations, citations omitted).¹⁹

In *Arena v. City of Providence*, 919 A.2d 379 (R.I. 2007), this Court considered the rights of retired firefighters to continued receipt of a cost of living adjustment in place at the time of retirement. To do so, the Court was required to consider a convoluted litigation history and the language of applicable municipal ordinances and collective bargaining agreements. It did not address the ERSRI or its governing language, nor did it engage in an analysis under the Rhode Island or federal Contract Clause. Although the State cited *Arena* for the proposition that this Court there announced a holding that pension benefits are not contractual in nature and may be changed prospectively for employees who have not yet retired, State Cert. Mem. at 16-17, the Court did not purport to announce a global rule applicable here. The Court's ruling in *Arena* was rendered in the context of the Ordinances, home rule authority and collective bargaining history carefully discussed and applied by the Court there, and cannot be understood as a universal or generic statement applicable to the Unions' members rights under the ERSRI.

To the contrary, in *Arena*, the Court examined the Ordinances of the City of Providence to determine whether and what contract rights applied. Before reaching its conclusion, the Court again reviewed the case law from other jurisdictions, previously discussed in *Almeida*, again recognizing the split among jurisdictions between those which "classify pension benefits as

¹⁹ *Pellegrino* was not decided under Contract Clause analysis.

contractual[,] generally view[ing] them as part of the employment contract itself, providing deferred compensation for services rendered during the employment period.” 919 A.2d at 392 (citations omitted). In those jurisdictions, “contractual pension rights, such as employee contributions, vest immediately once the employment contract is signed and employment begins [or, a]lternatively, benefits that are deemed deferred compensation vest when the employee completes his or her years of eligibility.” 919 A.2d at 392 (citations omitted). While “[o]ther jurisdictions view pension rights as merely gratuitous,” the Court reaffirmed its decision in *Almeida* “to adopt a middle-ground position composed of elements of both the contractual and deferred compensation theories, holding that ‘[t]he right to deferred compensation vests upon meeting the terms of employment, but that vesting is subject to divestment because it is conditioned on continued honorable and faithful service.’...Thus, to determine plaintiffs’ pension rights and whether the COLA benefits included therein are vested or gratuitous, we must look to the applicable pension ordinance.” 919 A.2d at 392-393 (citations omitted).

In *Arena*, the parties agreed that the Ordinance in effect at the time of plaintiffs’ retirement was the controlling authority. The Ordinance in effect at the time expressly provided that “eligibility for a retirement allowance and the amount of such allowance shall be determined in accordance with the provisions of the ordinance ... *as in effect on the last day of a member’s employment.*” 919 A.2d at 393 (emphasis supplied by Court).²⁰ The City attempted to rely upon later versions of the ordinance, which expressly characterized the grant of COLAs as “voluntary gratuities.” Prior to plaintiffs’ retirement, collective bargaining agreements which had provided for a COLA benefit had expired. The Court, considering “the nature of the COLA benefit itself[,]” 919 A.2d at 392, and decisions from other jurisdictions, readily found that the COLA

²⁰ Similar specific language does not appear in the ERSRI statutory scheme.

benefit, when provided, is designed to attract and retain public employees in service, and that the Ordinance in effect at the time of retirement “clearly establish[ed] plaintiffs’ vested interest in ...[the] COLA.” 919 A.2d 394. The Court also concluded that “when a jurisdiction has adopted a mixed contract/deferred compensation theory of pension benefits” (as the Court espoused in *Arena*), the case law supported viewing a COLA as a vested pension benefit when offered as part of the pension benefit package.²¹ *Id.* (citations omitted).

Surveying other decisions, the Court discussed at length the decision of the Ninth Circuit in *Shaw v. International Assoc’n of Machinists and Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985), and its analysis of the place of a COLA in the panoply of benefits under a pension plan. While neither the decision nor analysis is controlling here, since the Ninth Circuit was addressing the features of a pension plan developed through collective bargaining, the Supreme Court’s approval of the Ninth Circuit’s analysis is instructive. The Court wrote approvingly of the characterization of the COLA as a “‘promised, anticipated and accrued’ benefit, the reduction of which violated the plaintiffs’ right to receive a vested benefit[,]” as opposed to the “‘decidedly ancillary benefits such as medical coverage or early retirement[.]” 919 A.2d at 394 (citation omitted).

Thus the decisions of this Court reject the view of the pension rights, including the right to receive cost of living adjustments, as mere gratuities but rather support the view that such rights are a form of deferred compensation and support a finding of the existence of the foundational contractual relationship necessary to invoke Contract and Takings Clause analysis.

²¹ The Unions acknowledge that the Court in *Arena* emphasized the importance of looking at the benefits available at the time of retirement. 919 A.2d at 395. However, the Court’s focus was the time frame of benefits available at retirement or offered post-retirement, and cannot be understood as providing a critical determination on the claims at issue here.

2. The State's reliance upon decisions of the federal district and circuit courts of appeals as controlling or persuasive is misplaced.

The State relies heavily upon decisions of the federal district and circuit courts rejecting Contract Clause challenges to state pension plans, and particularly to two modifications within Rhode Island's retirement system addressed in *RI Council 94 v. Rhode Island*, 705 F.Supp.2d 165, 2010 U.S. Dist. LEXIS 36582 (D.R.I.2010) ("*Council 94*"), and *NEA-RI*, 172 F.3d 22. The Unions respectfully submit that the federal court decisions are not controlling here for two reasons: one, they do not address the core aspects of the ERSRI retirement system at issue here and are therefore distinguishable; and two, to the extent that they stand for the proposition that there is no contractual relationship between the State and the State employee and teacher participants in the ERSRI until they actually are eligible to retire and/or retired, they are inconsistent with decisions of this Court and should not be followed. *See, e.g., Horn v. Southern Union Co.*, 927 A.2d. 292 (R.I. 2007) (holding the R.I.G.L c. 42-112 is governed by a one-year statute of limitations notwithstanding a contrary earlier decision of First Circuit in *Rathbun v. Autozone*, 361 F.3d 62 (1st Cir. 2004) (finding a three-year statute of limitations under Rhode Island law).

In *NEA-RI*, the federal court considered a challenge by union officials and employees who were briefly allowed to buy service credits at discounted rates to participate in the ERSRI and then retire. The statute permitting their participation ("the buy-in," enacted 1987) was repealed shortly after its passage (1988) and, in 1994, after the repeal proved ineffective, another statute was passed to "evict" the union officials from the pension program. The individuals who had retired and those who had purchased service credits but were not yet eligible to retire sued, asserting, among other claims, a violation of the Contract Clause.

The First Circuit rejected the Contract Clause challenge of all of the union officials. It

observed that the effect of the buy-in “was to allow a number of highly paid union officials to qualify for state pensions almost immediately in amounts greatly in excess of their contributions to the system.” 172 F.3d at 24. The First Circuit undertook a review based upon the federal Contract Clause. In reaching its assessment, based on federal standards, that the pension statute did not speak sufficiently clearly or unequivocally in the language of contract to establish a contractual relationship protected by the federal Contract Clause, the First Circuit acknowledged that “Rhode Island case law points in both directions. The state supreme court has implied that under state law pensions cannot be freely terminated; but it has also allowed cut-offs (of, for example, a faithless judge) not easily reconciled with a strict contract theory. *See In re Almeida*, 611 A.2d 1375 (R.I. 1992). In all events, whether a contract exists for Contract Clause purposes is a federal question.” 172 F.3d at 28 (other citation omitted).

The First Circuit acknowledged that “[t]he existence of an employer-employee relationship does weigh in favor of finding an implied contract,” 172 F.3d at 28, which was absent in *NEA-RI*, 172 F.3d at 29, but is certainly present here. Moreover, the Court expressly “decline[d] to decide now whether this last consideration would tip the balance if, for example, Rhode Island took a meat axe to the pensions of long-time state employees.” 172 F.3d at 29.

That is precisely the premise presented by the State in its Petition: that, until the moment an individual vested participant in the ERSRI meets all of the eligibility requirements to retire, there is *no* contractual relationship between the participant and the State sufficient to subject *any* modification--including wholesale revocation of promised benefits--to scrutiny under the Contract Clause of the Rhode Island Constitution.

It is important to recall that determining the existence of a contractual relationship protected by the Contract Clause does not end the discussion. As this Court has made clear,

establishing the existence of a contractual relationship is but the first step in Contract Clause analysis: from there, three questions--fact driven--arise: First, has the state law in fact substantially impaired a contractual relationship? Second, if the law constitutes a substantial impairment, can the state show a legitimate public purpose behind the regulation? Third, is the legitimate public purpose sufficient to justify the impairment of the contractual rights? *Rhode Island Depositors Economic Protection Corp. v. Brown*, 659 A.2d 95, 106 (R.I. 1995), *cert. denied*, 516 U.S. 975 (1995). But if one accepts the State's argument about the nature of pension rights, we never get to these questions at all. *Instead, the State's position is that the State is simply free to subtract from or abrogate entirely the promised benefits at will until a participant qualifies for retirement.*

In *Council 94*, the United States District Court considered and rejected a constitutional challenge, raising claims under the federal and Rhode Island Contract and Takings Clauses, to a 2008 amendment to the ERSRI, and particularly R.I.G.L. §36-12-4, which reduced the State's share of post-retirement health insurance benefits for ERSRI participants who either were not eligible to, or even if eligible did not, retire on or before September 30, 2008. The federal court's focus was the existence of a contractual relationship concerning retiree health benefits. In rejecting the existence of a "contractual obligation by statute," the court specifically questioned the applicability of plaintiffs' arguments and the pension case law upon which they relied to health benefits, observing that it was persuaded "that health benefits are more akin to the reemployment benefits in *Retired Adjunct Professors of the State of R.I. v. Almond*, 690 A.2d 1342 (R.I. 1997), and may as such, be altered at any time." 705 F.Supp. 2d at 179.²²

²² The Court also focused on the fact that one of the attributes (the "bump up" at age 60) upon which a group of plaintiffs relied did not even explicitly appear in the statute before the challenged amendment. This Court in *Arena* noted the distinction between core pension right to

3. Decisions from other states support the existence of a contractual relationship here.

In reaching its Decision below, the Superior Court undertook a comprehensive review of "the evolution of public pension law, as well as present national trends relating to this issue," Decision at 12, concluding, Decision at 13, that "[t]oday, a majority of states recognize that public pensions give rise to contractual obligations." (Citations omitted) "Among those states without clear constitutional or statutory provisions, a growing number have adopted the view that public employees possess implied-in-fact contractual rights to their statutorily-created pensions." Decision at 14 (citation omitted).

A review of cases from other jurisdictions supports the recognition of a statutorily-created contractual relationship in the core retirement benefits at issue here.²³ "The modern trend and majority view is that a public employee's rights under a public pension statute are contract rights. In such jurisdictions, retired and active pension participants have contractually vested property rights created by the pension statute; such property rights are enforceable and cannot be impaired or diminished by the state." 3 McQuillin, MUN. CORP. § 12.144 (3rd ed.) (footnotes omitted). "As the concept of retirement developed from a gratuity theory to a compensation

the calculated compensation and cost of living adjustment, on the one hand, and ancillary benefits, such as health benefits. Similarly, the Colorado Supreme Court in *Colorado Springs Fire Fighters Ass'n v. City of Colorado Springs*, 784 P.2d 766, 771 (Colo. 1989), distinguished health benefits from core pension benefits because the cost and design of the health plan are subject to change and employee participation and level are optional.

²³ A number of states, by statute or constitution, have declared that membership in the employee retirement system shall constitute a contractual relationship. *See, e.g.*, Alaska Constitution Art. XII §7. The Unions acknowledge that the ERSRI does not contain such language. However, a review of cases from other states that likewise do not have such a declaration supports the Unions' argument. In the cases collected and discussed here, the Unions have attempted to provide case authority from the latter jurisdictions only.

theory, benefits secured the protection of federal and state constitutional prohibitions against impairment of the obligation of contract. Article I, Section 10 of the United States Constitution, and every state constitution, squarely outlaws legislation aimed at altering preexisting contractual rights. This theory has been applied to retirement benefits at key stages in an employee's tenure." Sanchez, Klausner, ST. LOC. EMP. LIAB. §13:7 (footnote omitted; collecting cases).

Before the Superior Court, the State argued that the case law is clearly in its favor, except for a stray mid-century case from Arizona, *Yeazell v. Copins*, 402 P.2d 541 (Ariz. 1965), or Georgia, *Burks v. Board of Trustees*, 104 S.E.2d 225 (Ga. 1958). But a review of cases from other jurisdictions demonstrates that the "modern view" is to recognize the existence of a statutorily-created contractual relationship protected by that state's Contract Clause or equivalent.²⁴

For example, the Supreme Court of West Virginia has "clarified that even employees who are not yet eligible to retire can have constitutionally protected, or 'vested,' rights to their expected pension plan benefits. [*Booth v. Sims*, 193 W.Va. 323,] 337, 456 S.E.2d at 181 [(1995)]. Once a member's rights to his or her pension benefits are 'vested,' the Legislature is constitutionally prohibited from reducing that member's benefits, unless he or she acquiesces to the change or unless the Legislature provides just compensation." *Myers v. West Virginia Consolidated Public Retirement Board*, 704 S.E.2d 738, 747 (W.Va.2010) (other citation omitted). (No specific or unmistakable expression of a contractual relationship was asserted or cited by the Court in reaching this conclusion.) The West Virginia Supreme Court recognized that employees "have legitimate expectations that 'the government will not detrimentally alter

²⁴ The Unions acknowledge that not all state courts have adopted the reasoning expressed in these decisions. However, the Unions submit that these decisions hew closer to the rulings of this Court than the federal and selective state court decisions cited by the State.

the pension scheme once the employee has spent sufficient time in the system to have relied to his or her detriment,” and concluded that detrimental reliance was presumed after ten years of state service. 704 S.E.2d at 747-748 (other citation omitted).

In *Singer v. Topeka*, 227 Kan. 356, 363 (1980), the Kansas Supreme Court, reviewing its earlier cases, stated, “‘State retirement systems create contracts between the state and its employees who are members of the system.’ This is the rule followed in most recent cases on the subject, and seems to us the more enlightened view. A public employee, who over a period of years contributes a portion of his or her salary to a retirement fund created by legislative enactment, who has membership in the plan, and who performs substantial services for the employer, acquires a right or interest in the plan which cannot be whisked away by the stroke of legislative or executive pen, whether the employee’s contribution is voluntary or mandatory.” (Citation omitted)

The Kansas Supreme Court surveyed the developing law in other jurisdictions concerning the time of vesting, 227 Kan. at 365. While it was not prepared to subscribe to *Yeazell’s* view that all elements of the contract vest upon employment, it did join those jurisdictions which conclude “that the employee has vested contract rights prior to actual retirement.... Continued employment over a reasonable period of time during which substantial services are furnished to the employer, plan membership is maintained, and regular contributions into the fund are made, however, cause the employee to acquire a contract right in the pension plan.”

See also Bailey v. State of North Carolina, 348 N.C. 130, 150 (1998) (reaffirming that contributions to the retirement system are a form of “deferred compensation”; “[w]e therefore hold that the relationship between the Retirement Systems and employees vested in the system is contractual in nature, the right to benefits exempt from state taxation is a term of such contract”);

Taylor v. State, 897 P. 275, 278-279 (Okla. 1995) ("We hold, as do a majority of jurisdictions, that while public employees' pension rights are contractually based, and are trust funds, the legislature may modify them if modification is necessary and reasonable, and any disadvantages employees suffer through the changes are offset by new advantages") (collecting cases from Oklahoma, California, West Virginia, and North Carolina); *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 899-900, 320 N.W.2d 910 (1982) (collecting cases from Washington, California, and New York).

In *Burlington Fire Fighters' Ass'n v. Burlington*, 149 Vt. 293 (1988), the Court addressed a challenge to a revision in a retirement ordinance which was designed to increase the employee contribution of current employees retroactively, along with an increased prospective benefit. Although the Court rejected the Contract Clause challenge on its merits, it did not hesitate to find a contractual relationship in the retirement plan as asserted by active employees:

We note that where an employee makes mandatory contributions to a pension plan, that pension plan becomes part of the employment contract as a form of deferred compensation, the right to which is vested upon the employee's making a contribution to the pension plan. See *Snow v. Abernathy*, 331 So.2d 626, 631 (Ala.1976) (pension is vested contract right upon acceptance of plan); *Olson v. Cory*, 27 Cal.3d 532, 540, 636 P.2d 532, 537, 178 Cal.Rptr. 568, 573 (1980) (pension plans create vested contract rights accruing upon acceptance of employment); *In re State Employees' Pension Plan*, 364 A.2d 1228, 1235 (Del.1976) (pension is vested contract right for employees who fulfill pension's eligibility requirements); *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 898, 320 N.W.2d 910, 914 (1982) (public employee pensions are deferred compensation and create "reasonable expectations which are protected by the law of contracts") (quoting *Pineman v. Oechslin*, 494 F.Supp. 525, 538 (D.Conn.1980)).
149 Vt. at 297.

The Court observed that "any changes in the plan which result in disadvantage to the employees must be accompanied by comparable new advantages. *Bakenhus*, 48 Wash.2d at 702, 296 P.2d at 540 (citing *Allen*, 45 Cal.2d at 131, 287 P.2d at 767)." 149 Vt. at 298.

In *Weaver v. Evans*, 495 P.2d 639, 648 (Wash.1972), the Washington Supreme Court reiterated its view, relying upon cases from other jurisdictions as well, that the public pension system creates contractual rights for employee participants such as the vested employees at bar: “Our state, along with other states, adheres to the ‘contract of employment vested right’ theory relative to public pension systems as opposed to looking upon retirement benefits as mere gratuities which may be granted at the conclusion of long and faithful service.” Quoting from *Bakenhus v. Seattle*, 48 Wash.2d 695, 698, 700-702, 296 P.2d 536 (1956), and pointing to decisions in California, Georgia, and Pennsylvania, the Court observed that “a pension granted to a public employee... is deferred compensation for services rendered.... *There are cases which hold that, since the right to receive a pension does not arise until all the conditions are fulfilled, the employee’s rights must depend upon the law as it exists at that time. This view is insupportable.* Unless the services are rendered in reliance on an offer, they are consideration for nothing, and any pension received thereafter can only be a gratuity. *The promise on which the employee relies is that which is made at the time he enters employment; and the obligation of the employer is based upon this promise.*” *Id.* (emphasis added).

4. The State's invocation of an "Unmistakability Doctrine" is a retreat of its argument that federal case law is controlling.

Throughout its argument to the Superior Court and in its Memorandum in support of Certiorari here, at pages 7, 10, 13, 14, 16 and 17, the State has invoked the specter of the "unmistakability doctrine" as a bedrock principle which this Court had clearly espoused as its standard of constitutional analysis under the Contract and Takings Clauses of the Rhode Island Constitution.

To the contrary, the Unions have found no cited reference to the "unmistakability

doctrine" in any decision of this Court.²⁵

The "unmistakability doctrine" is a formulation coined by the federal courts in analyzing challenges asserting impairments of contract by the states (under the federal Contract Clause) or by the federal government (sovereign immunity defense). Its history, application and meaning(s) were explored, at length, in four separate opinions of the United States Supreme Court in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), none of which commanded a majority decision, and the culmination of which was a conclusion that the doctrine did not foreclose the action against the government.²⁶

In the preceding sections, the Unions submit that they have demonstrated that this Court has not walked in lock-step with the federal courts in its analysis of the nature of pension rights and benefits and that the modern and persuasive trend among the states is to recognize the existence of a protectable contractual relationship in a statutory program such as at issue under the ERSRI. Invocation of the "unmistakability doctrine"--a formulation by the federal courts which has produced a view of these rights rejected by many state courts--does not alter that analysis.

²⁵ For example, in its Memorandum in support of Certiorari at 8, the State has cited and quoted this Court's decision in *Brennan* in a manner which may leave the impression that the Court explicitly invoked "the unmistakability doctrine." That coinage, however, does not appear in the quoted reference in *Brennan*, nor in the two decisions of the United States Supreme Court there cited, *Dodge v. Board of Education of Chicago*, 302 U.S. 74 (1939), or *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe R. Co.*, 470 U.S. 451 (1985).

²⁶ Writing for three justices concurring in the judgment, Justice Scalia described the "unmistakability doctrine" as having "little if any independent legal force beyond what would be dictated by normal principles of contract interpretation. It is simply a rule of presumed (or implied-in-fact) intent. ... The requirement of unmistakability embodies this reversal of the normal reasonable presumption. Governments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts must be interpreted in a commonsense way against that background understanding." *United States v. Winstar Corp.*, 518 U.S. at 920-921 (Scalia, J., concurring in the judgment).

5. The Superior Court properly applied principles of contract law and analysis to conclude that the requisite contractual relationship has been established.

The analysis conducted by the Superior Court, Decision at 30-39, applying principles of contract law against the presumption that legislative enactments declare policies and do not bind the sovereign, was thorough and compelling. It did not depart from prior decisions of this Court and is supported by decisions from other states and by principles of the laws of contract. Nor, as the Superior Court observed, does a recognition of the existence of an implied unilateral contract signal that the rights and benefits of vested employees are set in stone, Decision at 37-38. As the Superior Court observed:

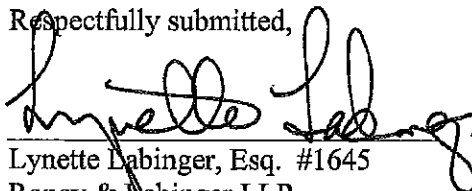
Defendants envision an ERSRI under which the State may, with or without justification, significantly alter or completely terminate a public employee's pension benefits at any time--even just one day--before retirement. In light of the major purposes underlying public pensions, as recognized by our own Supreme Court, such a construction of the ERSRI is untenable. See *Almeida*, 611 A.2d at 1387 (discussing pensions' dual purposes to induce people to accept and maintain public employment and to ensure employees' financial security (citing *Uricoli*, 449 A.2d at 1276)). Given our Supreme Court's renouncement of the gratuity approach, such a construction is likewise inconsonant. [Citations omitted.] ... The case law does not preclude but rather supports this Court's holding that Plaintiffs, as ten-year veterans of the State, possess a contractual relationship with the State pertaining to retirement allowances and COLA benefits which are not subject to collective bargaining. See *Almeida*, 611 A.2d at 1385 (discussing realization of contractual rights and obligations under contract and deferred compensation theories); see also *NEA II*, 172 F.3d at 29 ("happily" deferring issue of whether long-term state employees enjoy statutorily-created contractual relationship with State with regard to retirement allowance).
Decision at 38-39.

Thus, the Unions submit that, if this Court were to grant certiorari, it would sustain the Decision below and return the matter for further proceedings on the merits, thereby producing the likelihood of piecemeal review.

Conclusion

The Unions respectfully submit that the Court should deny the State's Petition for the Issuance of Certiorari and return the matter to the Superior Court for further proceedings. In the alternative, in the event that the Court nonetheless grants the Petition and issues its Writ, the Unions respectfully pray that the Court set the matter down for full briefing and argument on this important issue.

Respectfully submitted,



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Certification

I hereby certify that on this the 4th day of November, 2011, a true copy of the within document was mailed, postage prepaid, and sent by e-mail to John Tarantino (jtarantino@apslaw.com), Patricia K. Rocha (procha@apslaw.com), and Nicole J. Benjamin (nbenjamin@apslaw.com), each of Adler Pollock & Sheehan P.C., One Citizens Plaza, 8th Floor, Providence, RI 02903.

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