In the Supreme Court of Rhode Island

NO. SU-2020-0066-A

MICHAEL BENSON, ET ALS., PLAINTIFFS-APPELLANTS
V.
DANIEL MCKEE[1], ET ALS., DEFENDANTS-APPELLEES

ON APPEAL FROM A JUDGMENT ENTERED
IN THE SUPERIOR COURT, PROVIDENCE COUNTY
NO. PC-2019-6761
(DARIGAN, J.)

REPLY BRIEF OF PLAINTIFFS-APPELLANTS MICHAEL BENSON, ET ALS.

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[1] Speaker Shekarchi succeeded Speaker Matiello on January 5, 2021, and Governor McKee succeeded Governor Raimondo on March 2, 2021. They are therefore substituted as defendants in the caption of this case, consistent with this Court's practice under R.I. Super. R. Civ. P. 25(d). *See Retired Adjunct Professors v. Almond*, 690 A.2d 1342 n.1 (R.I. 1997).

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I. INTRODUCTION

Defendants implore this Court to unjustly create an end run around the fact that this case is at the mere pleading stage - - where the United States Supreme Court has held that Plaintiffs' burden of proof on the issues is at its lowest ebb.[2] Further, Defendants miss the mark, and blur the lines, as to when a court may undergo an analysis of the merits of a constitutional construction case, along with who bears the preliminary, versus ultimate, burden of proof here. Defendants further mislead this Court when they suggest that all parties agree on the meaning, construction, and interpretation of any portion of the Rhode Island Constitution. They do not.

In a further misguided attempt at encouraging this Court to prematurely dispose of this case, Defendants astoundingly try to equate Plaintiffs' appeal with that of a *pro se* plaintiff who advanced no arguments on appeal beyond simple declarations of entitlement. Defendants reliance on *Terzian v. Lombardi* here is misplaced. (Def.Br.7, 9, 21, 23). In *Terzian*, this Court, applying the waiver doctrine, held that the *pro se* plaintiff, "utterly failed to comply with the dictates of

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[2] Plaintiffs cite to their Reply Brief herein as (P.Reply.page number), to Plaintiffs' primary appellate brief as (P.Br.page number); to Plaintiffs' Appendix at (P.App.page number); to Defendants' Opposition brief as (D.Br.page number); to Defendants' Appendix as (D.App.page number).

Rule 16(a) in his appellate brief [wherein it] does not contain an impassioned exhortation relative to his case ... it does not contain any citations to documents or transcripts or any part of the record in the case ...it does not contain a single citation to legal authority ... [and, moreover,] while it is clear from reading Mr. Terzian's brief that it is his belief that he should prevail on the facts of his case, the brief does not make it even remotely clear to this Court just what errors of fact and/or law he is claiming were committed by the hearing justice." *Terzian v. Lombardi*, 180 A.3d 555, 558 (R.I. 2018). Quite the opposite, in support of Plaintiffs' primary appellate brief here, they cite to twenty-one (21) United States Supreme Court decisions, two (2) additional federal court decisions, twenty-six (26) Rhode Island Supreme Court decisions, one Superior Court decision, eleven (11) Rhode Island statutes, three (3) state court rules of procedure, and other relevant authority on point - - in support of their sixty-three (63) page argument. What's more, Plaintiffs cite to the trial court record no less than one hundred and forty (140) times. Defendants, nevertheless, use selective portions of Plaintiffs' primary brief, which generally summarize discreet and detailed arguments in the body of their brief, to wrongly lead this Court to think Plaintiffs' arguments are less than fully developed and supported. (D.Br.7, 9,21, 23). Such logic runs afoul

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of this Court's precedent and stretches Defendants' credulity here. [3]

As to the standing issue itself, Defendants merely regurgitate their arguments made before the Trial Justice, but fail to adequately address the reversible Trial Justice errors Plaintiffs laid out before this Court. Key to Defendants' faulty reasoning is their overbroad use of the word "person" when mis-characterizing Plaintiffs' claims and arguments. (D.Br.33-35).

Defendants' argument, that the "substantial public interest" exception is inapplicable here, rests solely on the faulty premise that Plaintiffs' claims are merely brought as "taxpayers;" and, that the first impression constitutional issues raised by this case should be of no concern to this Court. (D.Br.51-55). Here, again, Defendants proceed in a vacuum and extrapolate only portions of Plaintiffs' First Amended Complaint[4] while ignoring the entirety of it - - including Plaintiffs' invocation of permissive alternative pleading. (P.Br.59-62).

Accordingly, Defendants' arguments fail. This Court must reverse.

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[3] As Defendants cite to and argue from Plaintiffs' Memorandum in Opposition to Motion To Dismiss without its appendix, Plaintiffs attach said relevant portions as an Addendum to Plaintiffs' Reply herein and cite the same as (P.Addendum.page number).

[4] Plaintiffs incorporated by reference all their Exhibits to their First Amended Complaint, as if originally set forth therein, in their primary brief. For Defendants to suggest otherwise is disingenuous. (P.Br.10, fn 7).

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II. RELEVANT BACKGROUND

Plaintiffs have consistently argued that the wording of Article I, Section 2 of the Rhode Island Constitution ("Article I, Section 2") is an affirmative restraint against the General Assembly's imposition of the will of the then-majority to the detriment of the then-minority. On June 19, 2019, at an emergency temporary restraining order hearing before then Superior Court Justice, Melissa A. Long, Plaintiffs argued that, "... it is not so much that the General Assembly can't do what it's doing [promulgating a law like the RPA[5]], it's that they can't do what they are doing the way they're doing it, and they can't do it now...." (P.App.123). Justice Long denied Plaintiffs' motion for the temporary restraining order. (P.App.149). Justice Long made generalized conclusions as to Plaintiffs' burden of proof and success on the merits; and, ultimately denied the temporary restraining order primarily on ripeness grounds. (P.App. 148-149).

Consistent with Plaintiffs' argument before Justice Long, Plaintiffs filed with the Trial Justice here – a Memorandum from the 1986 Constitutional Convention Legal Service presenting a legal opinion as to the "effect (positive and negative) a 'due process' clause would have on the [Rhode Island] state constitution. (P.Addendum.63-66). This document was not stricken by the Trial

[5] Reproductive Privacy Act ("RPA").

Justice nor deemed lacking in competence at hearing on Defendants' Motion To Dismiss. Quoting,

> "It has been held that a state adopting the language of the 14th Amendment due process clause in its own state constitution adopts with it the interpretation it has received (Walters vs. Blackledge, 220 Miss. 485); however, the federal question and the state question are not necessarily the same, **the state clause generally having no purpose other than to check to general assembly, as representing the majority for the time being, from encroaching upon this reserved right of the minority or of the individual**. State vs. Henry, 37 NM 536."(emphasis supplied). (P.Addendum.64).

Plaintiffs further filed here, a published summary of "Facts About the 1986 Constitutional Convention," by the American Civil Liberties Union of Rhode Island ("RI ACLU"). (P.Addendum.26-28). The RI ACLU stated plainly,

> "The most significant amendment was one designed to ban all abortions in the state. It passed the convention with just one more than the 51 votes required. * * * While that amendment was ultimately defeated, **a stealth amendment was approved barring certain constitutional protections from being used to protect abortion rights**."(emphasis supplied). (P.Addendum.27).

This document was not stricken by the Trial Justice nor deemed lacking in competence. These documents were also attached to Plaintiffs' First Amended Complaint, along with an "Amicus Brief," dated March 18, 2019, the affidavits of General Counsel to the President of the 1986 Rhode Island Constitutional Convention, Patrick T. Coney, Ph.D., J.D., and the then-serving Speaker of the

Rhode Island House of Representatives, Matthew J. Smith. (P.Addendum.1-66). All supporting the conclusion that when Rhode Island adopted Article I, Section 2, it was for the purpose of excluding from the "due process" right, the right to abortion.

Alternatively, Plaintiffs argued before the Trial Justice that the language of Article I, Section 2 is ambiguous. (P.Br.44-47). The Trial Justice ruled nevertheless that,

> "I do recognize the Plaintiffs have made a very strong argument that the Court should not go beyond the standing review, but I do think that on a constitutional or statutory interpretation case that is based on the language that is black and white, I think that for rightly or wrongly that it is in the province of this Court to look at the actual language that is being addressed and **endeavor to interpret it**, so that's what I've done, and having done that, I disagree with Plaintiffs' position that Article I, Section 2 is ambiguous, and I don't think it is ambiguous." (P.App.62-63) (emphasis supplied).

As to the General Assembly's authority to pass the RPA as done here, the Trial Justice held, "that the General Assembly's broad authority to enact laws and this RPA in particular has not been limited by Article I, Section 2, or any other provision that's been presented to the Court under the Rhode Island or United States Constitution. (P.App.63). Plaintiffs' Objection to Motion To Dismiss cited the repeal of the residual powers and the supremacy clause, as additional bases for

limitations on the General Assembly's power to promulgate the RPA. (D.App.56-58).

Further, the Trial Justice reasoned,

> "And, again, for better or for worse, rightly or wrongly, I think that my decision comports with the direction of the Rhode Island Supreme Court to presume that laws that are enacted by the General Assembly are valid and constitutional and that the Superior Court must exercise the greatest possible caution in reviewing a challenge to the constitutionality of a statute, and I understand that Plaintiffs argue and believe that the standards have been flipped here and that a greater burden is being placed on Plaintiffs than is proper at this [pleading] stage of the proceeding." (P.App.63-64).

Finally, the Trial Justice confirmed that her ruling relative to the standing issue, and her interpretation of Article I, Section 2, was based only on state law. (P.App.65). In response to Plaintiffs' query of the Trial Justice as to the federal questions they raised in their First Amended Complaint, under the due process and equal protection clauses, the Trial Justice held, "It is correct that I have relied upon Rhode Island law, and I have not really considered federal law." (P.App.65).

The Trial Justice acknowledged that proof "beyond a reasonable doubt" is required to dismiss Plaintiffs' claims. (P.App.59). The Trial Justice, however, made no findings of fact nor conclusions of law relative to how she reconciled, if at all, Plaintiffs's unchallenged exhibits (evidence from the 1986 convention) with

her "interpretation" of the Rhode Island Constitution.

Plaintiffs took exception, raised objections to the Trial Justice's decision and judgment, and timely perfected their appeal of right. (P.App.3). Specifically, the following colloquy took place before the Trial Justice below:

> "MS. MAGEE: And, respectfully, your Honor, Plaintiffs may enter their exception to your decision." *** If the Court is taking the position that you have the authority to determine the underlying merits, then that just became part of the appeal. We object to an order that goes beyond the granting of the motion to dismiss as filed...." (P.App.66-67). ***
> "THE COURT: I certainly think that on a 12(b)(6) motion that the order of the Court is a final order.
> MS. MAGEE: I understand that, yes.
> THE COURT: That is appealable as of right.
> MS. MAGEE: Right.
> THE COURT: Which I fully expected and I suppose a separate judgment - - I know that the practice is a little wishy-washy whether an order simply enters on a 12(b)(6) or an order and a judgment. * * * Perhaps its actually required under Rule 58 and something that is observed more in the breach." (P.App.67).

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III. ARGUMENT

A. Defendants' arguments against Plaintiffs' claims of error resulting from the Trial Justice's premature determination of the merits of this case fail. (D.Brief.8-22).

Plaintiffs have consistently articulated, unlike Defendants here, the **full** standard of this Court relative to constitutional construction. (P.Br.29-30). Specifically, this Court said, in *Mosby v. Devine*, 851 A.2d 1034 (2004),

"[t]his Court's purpose in construing the Rhode Island Constitution is to effectuate its framer's intent. *See, City of Pawtucket v. Sundlun*, 662 A.2d 40, 45 (R.I. 1995). In doing so, this Court applies the traditional rule of construction that when words in the constitution are unambiguous, they must be given their plain, ordinary, and generally accepted meaning. *Id.* 'Every clause of the constitution must be given its due force, meaning and effect, and no word or section can be assumed to have been unnecessarily used or needlessly added.' *Id.* 'This [C]ourt presumes that the language in a clause was carefully weighed and that the terms imply a definite meaning.'" *Mosby v. Devine*, 851 A.2d 1034, 1038 (2004). (P.Add.7).

Specifically, "[i]t was clear error of law for the Trial Justice to engage in an underlying determination of the merits of this case and, ultimately, impose an exponentially higher burden of proof (beyond a reasonable doubt) on Plaintiffs here, than our state and federal precedent require." (P.Br.30). Further, "[a]s Plaintiffs' Counsel argued at hearing, '[i]t is a unique circumstance in which the Court would actually undertake constitutional construction or statutory construct,' and determine the merits of this case, on a rule 12(b)(6) motion. (P.App.57-59)."

(P.Br.29). Even so, Plaintiffs' argued here that, [a]ssuming arguendo that the Trial Justice had authority to consider the underlying merits of this case on a Rule 12(b)(6) motion, brought at the mere pleading stage of litigation, she exceeded any authority by dismissing facts (not legal conclusions) which she was bound to accept at true [i.e. the 1986 historical documents and supporting affidavits]. That was clear error." (P.Br.34).

Defendants' arguments in opposition on appeal are incongruent and without merit, as they state, in the first instance, that "Plaintiffs express virtually no disagreement with the Motion Justice's constitutional construction....," and then remarkably claim, in the second instance, that "Plaintiffs seek to undermine the Motion Justice's interpretation by suggesting the construction was infected with various errors." (D.Br.9). Defendants slay their own arguments and then seek to have this Court disjointedly impose the doctrine of waiver on Plaintiffs. (D.Br.9-10). Here, again, Defendants' reliance on *Terzian v. Lombardi, 180 A.3d 555 (R.I. 2018)* is fatally flawed. Defendants' arguments fail.

Defendants concede that this Court's constitutional construction rules mandate that, "[u]nless a contrary intent clearly appears on the face of the provision, absent equivocal or ambiguous language, the words cannot be interpreted or extended but must be applied literally." (D.Br.11).

The mere fact that the Trial Justice "endeavor[ed] to interpret" Article I, Section 2, is prima facie proof that the language therein is not "black and white." (i.e. the word "black" means black and the word "white" means white - - no interpretation is necessary. Not so here.). (P.App.62-63). If this Court decides that the Trial Justice did not err in reaching the underlying merits of this case here, then it must apply the literal meanings of the words "grant" and "secure" in Article I, Section 2 - - as set forth in Plaintiffs' First Amended Complaint Exhibit 1. (P.Addendum.11-19).

To that end, the word "grant" is defined as: "1. To consent to : allow." *Webster's II, New Riverside Dictionary, Revised Edition (1996*). And, the word "secure" is defined as: "3. To guarantee : ensure." *Webster's II, New Riverside Dictionary, Revised Edition (1996)* - - and, to safeguard or protect *Meriam Webster*. This Court must then literally interpret Article I, Section 2 to mean that "nothing in this section [including the due process and equal protection clauses] shall be construed to [consent to or allow] or to [guarantee, ensure, protect, or safeguard] any right relating to abortion or the funding thereof." *See, Rhode Island Constitution, Article I, Section 2*. And, as Defendants conceded, this Court "... presumes that the language in a clause was carefully weighed and that the terms imply a definite meaning," a proper literal construction of Article I, Section 2,

mandates reversal; because, Article I, Section 2 is, in fact, ambiguous. And, this Court must reverse the Trial Justice's decision and judgment, and remand this case for trial on the merits. *See, Mosby v. Devine*, 851 A.2d 1031, 1038 (R.I. 2004).

Moreover, while the Trial Justice erroneously held that Article I, Section 2 was not ambiguous, she also committed reversible error by not giving the distinct terms their "... plain, ordinary, and usually accepted meaning[s]." *Woonsocket School Committee et al. v. The Honorable Lincoln Chaffee in his official capacity as the Governor or the State of Rhode Island, et al.*, 89 A.3d 778, 788 (R.I. 2014). Defendants also never argued against this point, only to presume the words meant the same. Specifically, the plain, literal and usually accepted meaning of the word "grant" relates to the present tense permission and the word "secure" means the future tense protection and safeguarding. It was error for the Trial Justice to not recognize or distinguish the framer's intentional use of two distinct words of "grant" and "secure," and to ascribe their distinct meanings thereto. Instead, the Trial Justice made an erroneous, general, and impermissible "interpretation" of both words collectively, in order to dismiss Plaintiffs' case. (P.App.62-63). This Court must reverse.

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B. The General Assembly Lacked Legislative Authority to Pass the RPA

This Court precisely stated, and Plaintiffs argued to the Trial Justice, that "the General Assembly's 'broad and plenary power to make and enact law,' is, in fact, restricted by 'textual limitations * * * that are specified in the Federal or State Constitutions.'" (D.App.57). As Plaintiffs argued before the Trial Justice, "... Defendants attempt to create some plenary authority for the general assembly, by a tortured interpretation of a section of the Rhode Island Constitution relating to the establishment of the separate 'houses' of the Legislature. [ ] Moreover, they completely ignore the very first section of the Rhode Island Constitution, Article VI [Supremacy Clause], which subordinates all legislative actions to all restrictive provisions within the entire Rhode Island Constitution. * * * The power of the Rhode Island General Assembly is not absolute [or plenary as Defendants wrongly argue here], under either the Rhode Island Constitution or under Rhode Island Supreme Court jurisprudence." (D.App.56-57); *See also, East Bay Community Development Corporation v. Zoning Board of Review of the Town of Barrington*, 901 A.2d 1136, 1150 (R.I. 2006). Defendants extrapolation of this Court's holding in *East Bay Community Development Corporation* gives the appearance that this Court was conferring some **absolute** plenary authority on the General Assembly - - when, in fact, it was clarifying just the opposite. (D.Br.13-17).

Defendants spend an inordinate amount of time arguing for the presumed constitutionality of the RPA, highlighting that it is the Plaintiffs that must prove beyond a reasonable doubt the unconstitutionality of the RPA. (D.Br.13-14). The Trial Justice erroneously adopted this faulty and misplaced standard. (P.App.59-64). Precisely, as Plaintiffs argued to the Trial Justice, it is "Defendants [who] must prove 'beyond a reasonable doubt,' and 'to a certainty,' that there are no circumstances whatsoever where Plaintiffs may advance their claims." (P.Br.5).

The "textual" and "constitutional" limitations Plaintiffs argue here have never been limited to Article I, Section 2. Defendants do not dispute that when the Rhode Island Constitution was amended in 1986, by voter referendum, to include Article I, Section 2, the exact language of that provision was a specific affirmative prohibition against anyone invoking the newly minted Rhode Island "due process" or "equal protection" clauses as a basis to presume or "grant" a new "fundamental right" to abortion in Rhode Island. And, that was the supreme law of Rhode Island, wherein "any law inconsistent therewith shall be void." *Rhode Island Constitution, Art. VI, Section 1*. Proving inconvenient for Defendants, they simply ignore - - because they cannot reconcile - - these facts and constitutional mandates. The Trial Justice erroneously, and against Plaintiffs' repeated arguments against absolute "plenary authority" of the General Assembly, and,

instead wrongly adopted Defendants' flawed analysis. (P.Br.24-25; P.App.63-64).

Even Defendants concede here that constitutional construction and statutory interpretation "must be read in the context of the law that existed," when it was passed. (D.Br.16); *See, e.g., Barrett v. Barrett*, 894 A.2d 891, 898 (R.I. 2006) ("we presume that General Assembly knows the state of the law when enacting new legislation"). Defendants' arguments fail in the full light of the entire text of the Rhode Island Constitution - - viewed as a whole.

C. The Trial Justice erred in reaching the merits of this case.

It is unfathomable why Defendants would argue that Plaintiffs "cite no authority" in support of Plaintiffs' argument that the Trial Justice erred in reaching the merits of Plaintiffs' case here. (D.Br.17). Not only did Plaintiffs cite to the prevailing United States Supreme Court authority on this issue, to which this Court has acknowledged it is bound, but Plaintiffs specifically distinguished all the cases upon which Defendants relied for their opposing arguments. (P.App.23-30, 57-59); *See also, Sweeney v. Notte*, 183 A.2d 286, 300 (R.I. 1962) ("All have recognized, as must we, that the states are bound by the decisions of the United

States Supreme Court').[6]

As Plaintiffs argued below, this Court in *McKenna v. Williams*, A.2d 217 (R.I. 2005), when faced with constitutional construction issues, ruled only on the issue of standing - - wherein this Court, [e]mphasized the longstanding principle that standing is an access barrier to the courts. * * * that calls for assessment of one's credentials to bring suit." *McKenna* at 223 (citing *Blackstone Valley Chamber of Commerce v. Public Utilities Commission*, 452 A.2d 931, 932." (P.App.22-24). More specifically, the McKenna Court held that, [a]n evaluation of standing should be made **before reaching the merits of the claim**...." (P.App.24) (emphasis supplied).

Finally, when responding to Defendants' primary authoritative source (erroneously relied upon by the Trial Justice in her bench decision)[7], of the

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[6] Defendants repeat here their original cases raised below, but still fail to challenge the unique circumstances under which the trial court addressed the merits of those cases - - specifically, "two of them are about self-executing statutes that would be a precondition to coming to the court. The other is about immunity. This doesn't fall within that." (P.App.57-59).

[7] The Trial Justice erroneously cites to only one Superior Court case in her entire bench decision, avoiding any reference to this Court's precedent, and affirmatively ignoring all United States Supreme Court precedent here. (P.App.60-66). This Court will create a vague and unstable precedent for the first impression issues in this case, from which subsequent cases could neither utilize nor rely upon for future guidance.

Superior Court decision of Harrop, Plaintiffs placed Judge Stern's decision in its full context arguing, "Judge Stern specifically cited McKenna v. Williams and Flast v. Cohen when he said, 'When, as here, a plaintiff's standing to pursue the action is challenged, the focal point shifts to the claimant, not the claim, and a court must determine if the plaintiff, whose standing is challenged, is a proper party to request the adjudication of a particular issue and not whether the issue itself is justiciable.'" (P.App.28). When the Trial Justice queried Defense Counsel whether he wanted to respond to Plaintiffs' arguments against the Trial Justice reaching the merits here, Defense Counsel responded, "Not unless your Honor has questions. Thank you." (P.App.59). Unable to answer/challenge Plaintiffs' arguments before the Trial Justice and on appeal on this issue, Defendants, instead, proffer two new cases here. (D.Br.19 at fn 6).

In *Crenshaw v. State*, 227 A.3d 67 (R.I. 2020), this Court, faced with ambiguous statutory language, was not a case rooted in a standing challenge. But, this Court determined that, "when faced with an ambiguous statute, 'it is incumbent upon us to apply the rules of statutory construction and examine the statute **in its entirety** to determine the intent and purpose of the Legislature.'" *Powers v. Warwick Schools*, 204 A.3d 1078, 1086 (R.I. 2019) (quoting *State v. Diamante*, 83 A.3d 546, 548 (R.I. 2014)." *Crenshaw v. State* at 71 (emphasis

supplied). Notably, *Crenshaw* was not a constitutional challenge but a mere jurisdictional statutory challenge (i.e. whether Crenshaw was a proper party plaintiff). As here, however, the *Crenshaw* Court, when "faced with statutory silence and consequent ambiguity," "look[ed] to the principles of statutory construction **in order to ascertain the intent** of the General Assembly in this regard. (citation omitted)." *Crenshaw v. State*, 227 A.3d 67, 72 (R.I. 2020). To that end, this Court in *Crenshaw* sought "to exegete the language of the statute while examining public policy considerations that underlie whisleblowers' protection statutes such as the Act in order to ascertain the intent and purpose of the [statute] as enacted by the General Assembly." *Id*. This Court emphasized that, "[O]ur purpose is to determine and effectuate the Legislature's intent and [ ] attribute to the enactment the meaning most consistent with its policies or obvious purposes." *Crenshaw v. State*, 227 A.3d 67, 72 (R.I. 2020) (citations omitted). That is what the Trial Justice failed to do here.

Tarzia v. State, as cited by Defendants, is inapplicable here because, "Tarzia's proposed interpretation of the statute require[d] complete disregard of the term "known," and was not a case of constitutional construction of an ambiguous article of the Rhode Island Constitution, as here. *Tarzia v. State*, 44 A.3d 1245, 1254 (R.I. 2012). Significantly, none of Defendants new cases involve

a standing question before the trial court, as here, and provide no support for the Trial Justice erroneously reaching and deciding the merits of this case. Defendants' arguments fail.

This Court more recently held that when, due to "[t]he inartful drafting of pertinent statutory language here renders it plainly 'susceptible of more than one reasonable meaning,' *Balmuth v. Dolce for Town of Portsmouth*, 182 A.3d 573, 585 (R.I. 2018) (quoting *Drs. Pass and Berthman, Inc. V. Neighborhood Health Plan of Rhode Island*, 31 A.3d 1263, 1269 (R.I. 2011)), [and] 'because was are confronted with a genuine ambiguity, and not one divined by crafty lawyering, we "will employ our well-established maxims of statutory construction in an effort to glean the intent of the Legislature."' *Id*. (footnote omitted) (quoting *In re Proposed Town of New Shoreham Project*, 25 A.3d 482, 505 (R.I. 2011))*."In re J.T.*, Supreme Court No. 2020-253-Appeal (MH-20-400), June 24, 2021. Plaintiffs consistently argued before the Trial Justice that the words, "grant" and "secure" were ambiguous, at best, and "susceptible to more than one meaning." (P.Addendum.1-25). The Trial Justice, however, never made a finding of fact or a conclusion supported by law when the clear constitutional construction rules state that the deliberate use of two different words carry two distinct meanings - - one referencing the present and the latter pertaining to the future. (P.App.59-68). This

was reversible error.

D. The Trial Justice Shifted the Burden of Proof

It is disingenuous for Defendants to argue Plaintiffs "cite no portion of the record," on their arguments that the Trial Justice erroneously shifted the burden of proof here. (D.Br.20-21). More specifically, in the 58 pages of Plaintiffs' primary brief here, preceding the scant extrapolation by Defendants, Plaintiffs set forth in detail how the Trial Justice erred in imposing the "beyond a reasonable doubt" burden of proof on Plaintiffs. (P.Br. 28-33, 41-42, 45-46, 55-56, 58-59; D.App.46). Plaintiffs further argued, yet the Trial Justice erroneously ignored, the United States Supreme Court binding precedent as to the quantum of evidence necessary for plaintiffs to survive a motion to dismiss at the mere pleading stage of litigation. Specifically, "'no complaint will be deemed insufficient unless it is **clear beyond a reasonable doubt** that plaintiff will be unable to prove his, her, or its right to relief, that is to say, unless it appears **to a certainty** that he, she, or it will not be entitled to relief under any set of facts that might be proved in support of the plaintiff's claims.'" *See, Forecaster of Boston, Inc. V. Woonsocket Sponging Co.*, 505 A.2d 1379, 1380 (R.I. 1986) (emphasis supplied); (P.Br.3-5). Defendants fail to argue against the concreteness of this requirement.

Plaintiffs' complaint set forth sufficient facts to raise a plausible alternate interpretation of the RPA. The Trial Justice failed to make any specific findings/conclusions as to Plaintiffs' ambiguity challenge, instead, wrongly choosing to dismiss the allegations in Plaintiffs' First Amended Complaint for her own admitted "interpretation," in order to "end the case." (P.App.59-68).

Excepting where this Court held that, "it would be reversible error for a trial justice to apply the wrong burden of proof," Defendants reliance on *Cranston Police Retirees Action Committee v. City of Cranston,* 208 A.3d 557, 573 (R.I. 2019) is misguided. *Cranston Police Retirees Action Committee v. City of Cranston,* 208 A.3d 557, 573 (R.I. 2019). Specifically, the *Cranston* Court's *de novo* review there was rooted in a full trial having been completed - - not at the mere pleading stage, as here.

Not only did Plaintiffs cite to the record relative to the Trial Justice's burden shifting here, but set forth in great detail each instance of burden shifting in the context of both Plaintiffs' standing and the Trial Justice's conclusory decision on the underlying merits of Plaintiffs' constitutional challenge to the RPA. (P.Br. 28-33, 41-42, 45-46, 55-56, 58-59). Here again, as argued *supra*, Defendants' reliance on and arguments based on *Terzian* are meritless. Specifically, by mandating Plaintiffs clear a much higher burden of production at the mere

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pleading stage of this litigation, by presuming the constitutionality of the RPA before Plaintiffs were even allowed "access to the courts," and where the Trial Justice *de facto* laid upon Plaintiffs the burden of proving the RPA unconstitutional, and required Plaintiffs to set forth more than the "mere trifle" the United States Supreme Court held was the low hurdle Plaintiffs must clear here, committed reversible error. (P.Br.30-31, 38, 48).

Further, Defendants' reliance on *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992) is misplaced and rests on their surgical citation without context. (D.Br.21, 49). As Plaintiffs argued, "... the hurdle of justiciability, at the pleading stage, is at its lowest ebb. *See, Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2137 (1992)." (P.Br. 28). The United States Supreme Court went on further to hold, "we 'presume that the general allegations embrace those specific facts that are necessary to support the claim.' *Id.* (Citation omitted)." (P.Br.28-29). Defendants opposition brief cites no legal precedent that suggests that Plaintiffs bear the "beyond a reasonable doubt" burden to prove anything at the pleading stage of litigation. To the contrary, the well-settled state and federal case law supports that all presumptions, inferences and doubts must be resolved in Plaintiffs favor at such stage. (P.Br. 28-30). Had the Trial Justice properly applied this Court's, and the United States Supreme Court's, binding precedent, Plaintiffs'

claims survive the motion to dismiss and must progress to trial. (*See*, P.Br.58-59). Defendants novel idea that, at the mere pleading stage of litigation on issues of justiciability, Plaintiffs carry the ultimate burden is unsupported and without merit. This Court must reverse and remand.

E. Trial Justice Erred in Excluding the Conley and Smith Affidavits

Even excluding the affidavits of General Counsel to the President of the 1986 Constitutional Convention, Patrick T. Conley, and then-serving Speaker of the Rhode Island House, Matthew J. Smith, if the Trial Justice did, in fact, consider, all the documents attached to Plaintiffs' First Amended Complaint, and applied the proper standard of review, the Trial Justice was bound to dismiss Defendant's Motion To Dismiss because there were sufficient unchallenged and un-stricken public documents that supported Plaintiffs' claims that the RPA was, at best, ambiguous. (P.Addendum.1-25). Defendants, neither at oral argument on their Motion To Dismiss nor in their opposition brief here, challenge the, "'amicus' brief ... a printout from the American Civil Liberties Union [of Rhode Island] website concerning the 1986 Constitutional Convention, a 1986 Report of the Citizens Rights Committee concerning the Equal Protection Clause, the 1986 Resolution relating to the Right of the people," nor do they contest the inclusion of

the "Memorandum," dated 03-18-86, from the Constitutional Convention Legal Service regarding ,"what effect (positive and negative) a 'due process' clause would have on the state Constitution." Individually, these exhibits and documents raise obvious ambiguities relative to the meaning and intent of the due process clause in Article I, Section 2. (Def.Br.24; P.Addendum.1-66).

As to the affidavits of Conley and Smith, Defendants present the same arguments as they did at oral argument. And, while Defendants argue here that "[t]he Motion Justice was on firm legal ground," and that "[t]his Court has considered and rejected the precise issue Plaintiffs present," their arguments miss the mark because their key case, *Laplante v. Honda North America, Inc., 697 A.2d 625 (R.I. 1997)*: (1) deals with the "canons of statutory" not constitutional construction, (2) is over 17 years old, and, (3) whose holding this Court has refined since. As Plaintiffs argued that, "our court has come a long way with its ability to accept extrinsic evidence, particularly in a constitutional construction case." (P.App.50).

Citing, *Woonsocket, Viveiros,and Riley*, before the Trial Justice, Plaintiffs quoted, "our Supreme Court, specifically stating, 'when confronted with an issue of constitutional interpretation, this court's chief purpose is to give effect to the intent of the framers. We also will look to the historical context of the

constitutional provision when ascertaining its meaning, scope and effect. Thus, this court may properly consult extrinsic sources including the history of the times, the state of affairs as they existed when the constitutional provision was adopted, as well as the proceedings of the constitutional convention," and that's quoting City of Pawtucket v. Sundlun, 662 A.2d 45." (P.App.50-51; D.App.14-81). Defendants fail to effectively challenge this precedent.

Defendants fail, also, to answer how the Trial Justice's mishandling of the Plaintiffs' First Amended Complaint does not "destabilize [ ] the current law relative to dispositive motions and constitutional construction in this State." (P.Br.59). Specifically, the Trial Justice erred, and Defendants failed to reconcile here, when she held, "... the focus of my analysis anyway has been on really the traditional rule of construction of looking at the actual language that is at issue, and I don't find that those affidavits are competent evidence relative to the statutory analysis." (P.App.61). Under the *City of Pawtucket v. Sundlun* rule, the Trial Justice here did not apply the "traditional rule" when she struck the two affidavits. Compounding her error, as Plaintiffs argued throughout, is her impermissible consideration, "interpretation," and determination of the underlying merits - - at the mere pleading stage. (P.Reply.6).

The Trial Justice committed clear error when she failed to accept the

uncontested exhibits to Plaintiffs' First Amended Complaint, over and above - - but, including - - any affidavits, that set forth sufficient evidence that Article 1, Section 2, is ambiguous and the Trial Justice further erred in, then interpreting Article I, Section 2, ruling it was not. This Court must reverse.

F. Plaintiffs Have Sufficient Standing To Proceed To Trial

Instead of meeting Plaintiffs' claims of error by the Trial Justice head on, Defendants fundamentally regurgitate their faulty lower court reasoning here. (D.Br.28-31).

1. Plaintiffs, Baby Mary Doe and Baby Roe do not lack standing.

Defendants spend an inordinate and unnecessary amount of time on the faulty premise that Plaintiffs seek a determination from the court that Baby Mary Doe and Baby Roe are "persons" for all purposes under the Rhode Island and United States Constitutions. (D.Br.28-42,49-51). When, in fact, Plaintiffs seek a very limited and narrow definition of "person" here - - in the limited context of the Uniform Declaratory Judgments Act ("UDJA"). (P.Br.34-46). Defendants' arguments are over broad and without merit.

As argued on appeal, Baby Mary Doe and Baby Roe specifically challenge

the constitutionality of the RPA, under the "due process" clause and "equal protection" clause under the Rhode Island and US Constitutions. (P.Brief.34-46). Plaintiffs' focus is on the change in their respective "status" resulting from the RPA's repeal of R.I. Gen. Laws §§11–3-1 through 11-3-5 and §11-23-5. It is not surprising Defendants avoid this critical distinction.

Specifically, Defendants over emphasis on *Roe v. Wade,* 410 U.S. 113 (1973) is misplaced. Justice Blackmun, writing for the *Roe v. Wade* Court held, "[w]e need not resolve the difficult question of when life begins." *Roe v. Wade at 159.* This is significant and often overlooked by generic references to *Wade*, as Defendants do here. The High Court then went on to create the trimester approach for determining the interests involved. Even so, this holding was squarely overturned in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). As was the strict scrutiny "fundamental rights" standard of review relative to abortion legislation. - - the new standard being now a hybrid rational basis test/undue burden test. *See*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, ___ (1992).

Defendants fail to articulate the complete holding of the court in *Doe v. Isreal,* to the extent that it is rooted in the part of the *Roe v. Wade* decision (i.e. the trimester approach and the strict scrutiny standard of review) which *Casey*

overturned - - which dilutes Defendants' arguments and renders them unhelpful here. (D.Br.35).

Defendants advance no legal precedent that supports Defendants' nebulous argument that a statute still in existence under Rhode Island law must be declared "revived." Even so, it doesn't matter here because Baby Mary Doe and Baby Roe are not seeking a determination from this Court that they are "persons," for all constitutional purposes. This Court must make a limited narrow ruling here, under the UDJA, and reverse the Trial Justice's sweeping over broad ruling that Baby Mary Doe and Baby Roe have no standing. (P.App.59-68).

More specifically, Defendants argument that "as a matter of law, since the declaration of unconstitutionality in 1973, Chapter 3 of Title 11 has been a legal nullity," is fatally flawed since case law may change relative to existing statutes that remain on the books (such as R.I. Gen Laws §§ 11-3-1 through 11-3-5), but the statutes, nevertheless remain law. (D.Br.5). Moreover, Plaintiffs in fact argued that §11-3-1 et seq. confers legal standing here, notwithstanding Defendants mis-characterization of Plaintiffs' arguments. (D.Br.37).

Defendants have not, nor can they, reconcile the fact that, the §11-3-1 et seq. need not be "revived" as it remained on the books in 2019 – placing no further affirmative duty on Plaintiffs in seeking the remedy afforded thereto. Nor

can Defendants explain why the necessity for the RPA's repeal of the law if they were so certain it had no legal weight or effect. They did not even try.

As to the "quick child" statute, the clear and unambiguous language of the statute itself, and binding precedent, define a quick child tantamount to a "person." (P.Br.2, 11-14). Defendants offer no rebuttal to Plaintiffs arguments that R.I. Gen. Laws §11-23-5 confers on Baby Mary Doe a legal or privileged "status". (P.Br.11-14). Defendants fail to see the obvious correlation.

Even if this Court were to hold a post viability fetus is not a "person" here, in the limited context of the UDJA, Defendants fail to counter Plaintiffs' arguments that the undeniable status of "quick child" was stripped by the RPA. (P.Br.11-14). Pointedly, Defendants misconceive the nature of the declaratory relief sought here. It is the mere stripping of the legal status of "quick child" that is the injury to Baby Mary Doe - - not the anticipation of a future injury. Defendants' arguments, again, are unfocused.

Defendants do not challenge to Baby Mary Doe and Baby Roe's eligibility to seek relief under the UDJA. (Def.Br.50). They challenge only their respective claims to a "cognizant legal interest in the striking or repeal of R.I. Gen. Laws §§ 11-3-1 and 11-23-5." (Def.Br.50). Nevertheless , the Trial Justice errroneously failed to recognize the narrow and limited nature of the unborn plaintiffs' claims.

(P.App.59-68).

Defendants preoccupation with the fact that Baby Mary Doe was not murdered or is still alive is mere distraction. (D.Br.38-42). The stripping of the quick child "status" became a present injury upon passage of the RPA - - ripe for adjudication before the court. Moreover, the Trial Justice erroneously offered no analysis or support for her edict that Baby Mary Doe's arguments were "not persuasive." (P.App.59-68). This was clear error.

2. Plaintiffs, Benson, Rowley, and Jane Doe ("BRD"), do not lack standing.

Defendants arguments relative to Plaintiffs, BRD's, standing lack merit, because nowhere in Plaintiffs' First Amended Complaint due they allege or demand or claim the relief of a compelled "general election." (Def.Br.42). Defendants focus their arguments almost exclusively on the wrong premise that Plaintiffs BRD filed their complaints as mere taxpayers. (Def.Br.42-49). And, second, that they have no individualized claims beyond the general public at large. (D.Br.42-49). Both arguments rely on this Court accepting Defendants' mis-characterization of Plaintiffs' First Amended Complaint.

Defendants fail to meet, however, directly any of Plaintiffs' arguments relative to the case law that supports Plaintiffs' arguments that an individualized

injury common to the general public is not a bar to standing. (P.Br.47-58). Instead, Defendants persist in ignoring Plaintiffs' alternative pleadings and focus on the separate and distinct claims that are general. (P.Br.47-58; D.Br.42-49). Permissible alternative pleading, pursuant to this Court's precedent, is not "manipulation" of standing principles, as Defendants' wrongly assert. (P.Br.51; D.Br.46).

This Court would have to ignore its own precedent, that holds that even if one claim of plaintiffs complaint falls short of the sufficiency mark, the complaint can stand on the remaining sufficient pleadings, in order to accept Defendants' arguments here, (i.e. if Plaintiffs' claims as "voter" like all other Rhode Islanders fails, the specific allegations of direct voter suppression may still survive). (P.Br.32-33). Further, for Defendants' argument to hold any water, this Court must believe that all Rhode Islanders would vote "no" on a Rhode Island Constitutional Amendment to secure and fund a new right to abortion. Not so here.

The Trial Justice's failure to consider binding federal law relative to standing here, and based on Plaintiffs' assertion of due process and equal protection violations under the Fourteenth Amendment of the United States Constitution, was an error of the Trial Justice which Defendants glossed over. (D.Br.48; P.App.59-68). Contrary, Plaintiffs did not argue that the standing

principles do not apply in "equal protection" cases. (D.Br.47 fn 15). A more careful reading of Plaintiffs' arguments reveal that Plaintiffs were referencing the "terminal infirmity" with the cases cited by Defendants, in that Defendants feeble arguments "offer[ ] no sword against Plaintiffs BRD's alternative allegations of violations of state and federal equal protection clauses." (P.Br.54). To the contrary, Plaintiffs First Amended Complaint and arguments before the Trial Justice make clear that an equal protection challenge raises standing issues to which federal precedent applies - - and, to which the Trial Justice erroneously ignored. (P.Br.59-68). Neither is it an "accusation" that the Trial Justice failed to consider federal precedent binding on this Court and raised by Plaintiffs in their First Amended -Complaint. (D.Br.47). It is a fact.

This Court is bound by United States Supreme Court precedent. And, Plaintiffs' argued so before the Trial Justice - - citing both state and federal case law. *See, Sweeney v. Notte*, 183 A.2d 286, 300 (R.I. 1962) ("All have recognized, as must we, that the states are bound by the decisions of the United States Supreme Court'); *See also, Cooper v. Aaron*, 358 U.S. 1 (1958). Here, again, Defendants offer nothing new to counter Plaintiffs' arguments that the Trial Justice committed reversible error in dismissing Plaintiffs BRD's claims using only State law and wholesale ignoring valid and relevant federal law precedent on

point. Notably, Defendants fail to oppose Plaintiffs' arguments that United States Supreme Court precedent controls the **quantum of evidence necessary to clear the low procedural bar of standing a the mere pleading stage of litigation**. (P.Br.6, 30-31, 38, 48). And, the Trial Justice erred in adopting and applying said precedent. (P.App.59-68). This Court must reverse and remand.

G. The "Substantial Public Interest" Exception Applies Here

Defendant's argument that this Court should pass on the "substantial public interest" exception, to the traditional standing principles, requires this Court to ignore the first impression issues of constitutional magnitude before it. (D.Br.51-55).

Attempting to dilute Plaintiffs' compelling arguments relative to the public's significant interest in the scope of the General Assembly's "plenary authority," the impact of the Rhode Island Constitution's Supremacy Clause (Article VI, Section 1) to Act as a check on that authority, the affirmative repeal of the residual powers granted the General Assembly, and the first time constitutional construction of Article I, Section 2, Defendants boldly claim there is nothing of interest here. (D.Br.51-55). Plaintiffs cited case law, when read in its full context, amply supports that, should this Court deem all Plaintiffs failed to clear the

"injury-in-fact" procedural hurdle, the exception applies here. (P.Br.59-62).

"At a minimum, Plaintiffs argue that the relevant portions of the Rhode Island Constitution are ambiguous - - requiring this Court's interpretation." P.Br.61). Defendants fail to squarely meet and counter Plaintiffs' arguments (ie. *Watson v. Fox* was not on point here as it sought an advisory opinion from this Court - - not so, here.) that the Trial Justice erred in failing to deny Defendants' Motion To Dismiss, because the "substantial public interest" exception applies to Plaintiffs' claims. (P.Br.62). This Court must reverse.

IV. Conclusion

None of the Trial Justice's errors here are harmless. This Court must vacate, reverse, and remand this case back to the trial court.

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 18(B)

Using the word count program of the word processing system on which this Brief was prepared, I hereby certify that this document contains 7489 words, and is in compliance with the word limit in this Court's Rules of Appellate Procedure.

s/ Diane Messere Magee (Bar Id. No. 5355)
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CERTIFICATION

I hereby certify that a copy of this document, together with its addendum, was served on all parties entitled thereto via this Court's e-file and serve system. Parties Counsel of Record served:

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I further certify that:

An original and nine (9) copies of this brief and an original and five (5) copies of the addendum, are being mailed to the Clerk, Rhode Island Supreme Court, 250 Benefit St. - 7th Floor, Providence, RI 02903, within five (5) days of notice of acceptance, in accordance with R.I. S. Ct. R. App. P. 18.

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