STATE OF RHODE ISLAND **SUPREME COURT**

THE STATE OF RHODE ISLAND, by and through PETER KILMARTIN, in his capacity as ATTORNEY GENERAL, *Plaintiff/Appellee*	)))))	
v.	))	SU-2017-0330-A (Lower Court PC-2017-0918)
RHODE ISLAND TROOPERS ASSOCIATION, *Defendant/Appellant*	)))))	

AMICUS BRIEF OF STATES OF INDIANA, ARIZONA, IDAHO, LOUISIANA, MISSISSIPPI, NEBRASKA, NORTH CAROLINA, AND UTAH IN SUPPORT OF APPELLEE STATE OF RHODE ISLAND

ON APPEAL FROM A JUDGEMENT FROM
THE RHODE ISLAND SUPERIOR COURT

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

CURTIS T. HILL, JR.
Attorney General of Indiana
THOMAS M. FISHER
Solicitor General of Indiana

Counsel for Amici States

Additional counsel for Amici States listed after signature block

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

ARGUMENT 2

I. Common Law Sovereign Immunity Provides Critical Background for this Dispute 2

II. Attorneys General Have Broad Common Law Authority over Litigation Decisions 4

A. Historically, attorneys general control all aspects of litigation 4

B. Rhode Island has adopted the common law powers of the attorney general and this Court has embraced the organic growth of those powers 7

III. Unless Plainly Allocated Elsewhere, the Decision Whether To Indemnify State Employees Falls Within Common Law Attorney General Authority 11

A. The indemnification decision requires a case-by-case inquiry that only the attorney general is equipped to provide 11

B. Unrelated core powers of the legislature or governor do not justify interference with the attorney general's litigation authority 13

CONCLUSION 17

ADDITIONAL COUNSEL FOR AMICI STATES 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

CASES

Andrade v. State,
448 A.2d 1293 (R.I. 1982) 2

Buquer v. City of Indianapolis,
No. 1:11-CV-00708-SEB-MJD, 2013 WL 1332137
(S.D. Ind. Mar. 28, 2013) 2

Calhoun v. City of Providence,
390 A.2d 350 (R.I. 1978) 2,3

State ex rel. Discover Fin. Servs., Inc. v. Nibert,
744 S.E.2d 625 (W. Va. 2013) 14

Dyson v. Rhode Island Co.,
57 A. 771 (R.I. 1904) 7

Fergus v. Russel,
110 N.E. 130 (Ill. 1915) 5, 6, 7

Com. ex rel. Hancock v. Paxton,
516 S.W.2d 865 (Ky. 1974) 5

In re House of Representatives (Special Prosecutor),
575 A.2d 176 (R.I. 1990) 8

Int'l Depository, Inc. v. State,
603 A.2d 1119 (R.I. 1992) 2

Magniafico v. Blumenthal,
471 F.3d 391 (2d Cir. 2006) 12

McCarthy v. McAloon,
83 A.2d 75 (R.I. 1951) 7, 16

State ex rel. McGraw v. Burton,
569 S.E.2d 99 (W. Va. 2002) 8, 14

Mich. State Chiropractic Ass'n v. Kelley,
262 N.W.2d 676 (Mich. 1978) 10

Mottola v. Cirello,
789 A.2d 421 (R.I. 2002) 11, 16

Newport Realty, Inc. v. Lynch,
878 A.2d 1021 (R.I. 2005) 13

Roach v. State,
157 A.3d 1042 (R.I. 2017) 2

Fla. ex rel. Shevin v. Exxon Corp.,
526 F.2d 266 (5th Cir. 1976) 4. 5. 6. 11

State v. Lead Indus. Ass'n,
951 A.2d 428 (R.I. 2008) .... *passim*

State v. Rollins,
359 A.2d 315 (R.I. 1976) 13

Suitor v. Nugent,
199 A.2d 722 (R.I. 1964) 1, 8

United States v. Ottati & Goss, Inc.,
630 F. Supp. 1361 (D.N.H. 1985) 10

Verity v. Danti,
585 A.2d 65 (R.I. 1991) 2

Zoeller v. E. Chi. Second Century, Inc.,
904 N.E.2d 213 (Ind. 2009) 1, 6

STATE CONSTITUTIONAL PROVISIONS

R.I. Const. art. IX, § 12 8

STATUTES

1 R.I. Col. Rec. 225 7

Ind. Code § 4-6-2-1.5(a) 1

Ind. Code § 34-13-4-1 1

R.I. Gen. Laws § 9-31-1 3

R.I. Gen. Laws § 9-31-2 to -5 3

R.I. Gen. Laws § 9-31-6 to -7 3

R.I. Gen. Laws §§ 9-31-6 to -11 14

R.I. Gen. Laws § 9-31-8 3

R.I. Gen. Laws §§ 9-31-8 – 9-31-11 3

R.I. Gen. Laws § 9-31-9 .... 3, 12, 16

R.I. Gen. Laws § 9-31-10 .... 3, 16

R.I. Gen. Laws § 9-31-12 .... 3, 14

R.I. Gen. Laws § 9-31-12(b) 4

R.I. Gen. Laws § 16-41-1 15

R.I. Gen. Laws §§ 28-9.5-3 to -4 15

R.I. Gen. Laws § 28-9.5-4 15

R.I. Gen. Laws § 36-13-2 15

R.I. Gen. Laws § 46-2-21 15

OTHER AUTHORITIES

7 Am. Jur. 2d *Attorney General* § 5 7

Howard Friedman, *To Protect and Serve?*, 47 Trial 14 (2011) 11

Maureen McKenna Goldberg, *Rhode Island's Unique Constitutional History*, 72 Alb. L. Rev. 601 (2009) 7, 8

National Association of Attorneys General, *Common Law Powers of State Attorneys General* (1975) 10

National Association of Attorneys General, *State Attorneys General Powers and Responsibilities* (Emily Myers ed., 3d ed. 2013) 4, 5, 6, 7, 10

Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DePaul L. Rev. 231 (1998) 9

1 Richard J. Pierce, Jr., *Administrative Law Treatise* (2010) 10

William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446 (2006) 13

STATEMENT OF INTEREST

Amici Curiae are the States of Indiana, Arizona, Idaho, Louisiana, Mississippi, Nebraska, North Carolina, and Utah. Amici States file this brief in support of the Appellee State of Rhode Island in the interest of protecting the common law powers of state attorneys general. Appellant Rhode Island Troopers Association (RITA) seeks to abrogate the attorney general's common law powers through its collective bargaining agreement. Amici are states with either constitutionally or statutorily established offices of the attorney general vested with the powers of that office at common law. *See, e.g.*, *Zoeller v. E. Chi. Second Century, Inc.*, 904 N.E.2d 213, 219 (Ind. 2009). Their interest in this case stems from a broad concern for advancing the authority of state attorneys general over decisions bearing on state litigation interests.

In its demand for arbitration, RITA seeks to divest the Rhode Island Attorney General of authority to determine whether the taxpayers of Rhode Island will provide legal counsel and indemnification to state employees. But the Rhode Island Government Tort Liability Act, the state constitution, and the common law vest this power exclusively with the attorney general. *Cf. Suitor v. Nugent*, 199 A.2d 722, 723 (R.I. 1964) ("[W]ith the office [of attorney general] came the common-law powers and duties thereof . . . ."). If this Court sides with RITA, a single paragraph of a collective bargaining agreement will override the case-by-case discretionary authority of the attorney general to act in the public interest and will vitiate the office's statutory, constitutional, and common law powers.

Attorneys general for other states are similarly vested with the discretion to determine whether a lawsuit has arisen within the scope of a state employee's official duties, making the employee eligible for state representation and indemnification. *See, e.g.*, Ind. Code §§ 34-13-4-1 (providing that government employees are indemnified only when they are defended), 4-6-2-1.5(a)

(giving the attorney general discretion to decide whether to defend). While this case narrowly concerns collective bargaining agreements, it has broader implications for whether other state officials can circumvent statutory, common law, or even constitutional authority of the attorney general—an issue that continues to arise in many settings. *See, e.g.*, *Buquer v. City of Indianapolis*, No. 1:11-CV-00708-SEB-MJD, 2013 WL 1332137, at *1 (S.D. Ind. Mar. 28, 2013) ("[T]hree legislators lack the power to substitute themselves for the Office of the Attorney General in order to pursue their own strategic litigation preferences.").

Amici States urge this Court to uphold the judgment of the Superior Court that it is within the discretion of the Rhode Island Attorney General to determine whether to defend and indemnify a state employee.

ARGUMENT

I. Common Law Sovereign Immunity Provides Critical Background for this Dispute

At common law, "governmental immunity abrogate[d] the state's liability when individuals [we]re tortiously injured as the result of an action by either an agent of the state or one of the state's subordinate, political bodies." *Verity v. Danti*, 585 A.2d 65, 66 (R.I. 1991). In other words, "individuals lacked recourse for state-induced tortious injuries." *Roach v. State*, 157 A.3d 1042, 1049 (R.I. 2017). In Rhode Island, common law sovereign immunity is abrogated only where the legislature's intention is "clearly expressed or arises by necessary implication from the statutory language." *Int'l Depository, Inc. v. State*, 603 A.2d 1119, 1122 (R.I. 1992) (citations omitted). Therefore, damages and indemnification by the government may arise only where specifically authorized by statute. *See Andrade v. State*, 448 A.2d 1293, 1294 (R.I. 1982).

During the 1960s and 70s, however, most states, including Rhode Island, gradually passed statutes abrogating sovereign immunity, but within certain limits. *Calhoun v. City of Providence*,

390 A.2d 350, 354–55 (R.I. 1978). "Although these jurisdictions vary somewhat in their formulations of the extent of the limitation upon state tort liability . . . their message is clear and unanimous reasoned judgment demands that certain government enterprises engaged in by employees and officers must be free from the threat of potential litigation." *Id.* at 355.

In Rhode Island, the Governmental Tort Liability Act (GTLA) abrogates state sovereign immunity for the limited purpose of tort claims against the state. Under the GTLA, the state is "liable in all actions of tort in the same manner as a private individual or corporation," R.I. Gen. Laws § 9-31-1, but only within specific limits on damages. *Id.* §§ 9-31-2 to -5. The Act also specifies that the attorney general must be served in any action against the state, shall appear on behalf of the state, and is authorized to settle suits on behalf of the state with approval of the Superior Court. *Id.* §§ 9-31-6 to -7.

With respect to damages claims against state employees, abrogation of common law sovereign immunity is not necessary (because the state is not the target for liability), but in its discretion, the State may nonetheless indemnify the employee. And that is indeed what Rhode Island provides, up to a point. The GTLA provides that "the attorney general shall . . . defend any action brought against the state employee . . . on account of an act or omission that occurred within the scope of his or her employment with the state," *id.* § 9-31-8, except in cases of fraud or willful misconduct on the part of the employee, or where the representation would create a conflict of interest for the State, among other circumstances, *id.* § 9-31-9. Furthermore, "[t]he state reserves the right to determine whether or not it will indemnify any employees defended pursuant to §§ 9-31-8 – 9-31-11, if a judgment is rendered against the employee." *Id.* § 9-31-12. Consonant with that overall scheme, when defending a state employee, the attorney general assumes exclusive control over the employee's representation, including the authority to settle claims. *Id.* § 9-31-10.

Indeed, where AG representation and indemnification of the employee are appropriate, the statute provides a mechanism for simply substituting the state as the party defendant. *Id.* § 9-31-12(b).

The GTLA abrogates sovereign immunity only where the attorney general both chooses to defend the state employee and determines that indemnification is appropriate; no statute provides for state indemnification where the attorney general does not defend the employee, either in a class of cases or on a case-by-case basis. History and tradition show that the attorney general has broad authority to control all state litigation decisions, which should extend to indemnification decisions absent clear direction to the contrary from the legislature.

II. Attorneys General Have Broad Common Law Authority over Litigation Decisions

A. Historically, attorneys general control all aspects of litigation

The office of the attorney general originated in England during the mid-thirteenth century. National Association of Attorneys General, *State Attorneys General Powers and Responsibilities* 1 (Emily Myers ed., 3d ed. 2013). The attorney general of England was the King's lawyer, the foremost legal advisor to the Crown, and the representative of the government's interests in all litigation. *Id.* Originally, the attorney general represented only the interests of the Crown, but over time, the attorney general acquired discretion to act in the public interest as well: "As chief legal representative of the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion[.]" *Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268 (5th Cir. 1976). By the early 1500s, the attorney general was acting as a liaison between the House of Lords and the House of Commons. *State Attorneys General Powers and Responsibilities*, *supra*, at 3. And in 1670, the attorney general first sat as a member of the House of Commons. *Id.* "Thus, by the early 1700s, the attorney

general's role had evolved from an assistant to the Lords to an advocate for Commons as an elected Member of Parliament." *Id.*

When the English colonists arrived in North America, they brought with them their common law traditions, including the office of the attorney general. *Id.* at 1. While the first colonial attorneys general were appointed as delegates of the attorney general of England, *id.*, the Rhode Island attorney general was elected from the start, *id.* at 5. The shift from appointed attorneys general to popularly elected attorneys general solidified the office's role as a representative of the public interest, rather than merely the interest of the government itself. "Transposition of the institution to this country, where governmental initiative was diffused among the officers of the executive branch and the many individuals comprising the legislative branch, could only broaden this area of the attorney general's discretion." *Fla. ex rel. Shevin*, 526 F.2d at 268.

When the colonies gained their independence from the English monarchy, the offices of attorney general continued to function with many of the same powers as before. "[U]nder the democratic form of government now prevailing the people are the king . . . so the Attorney General's duties are to that sovereign rather than to the machinery of government." *Com. ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974) (citations omitted). Because "all of the prerogatives which pertain to the crown in England under the common law are here vested in the people," the common law duties which the attorney general once owed to the Crown are now owed to the people themselves. *See Fergus v. Russel*, 110 N.E. 130, 143 (Ill. 1915) (holding that Illinois constitutional provision giving the attorney general "such duties as may be prescribed by law" includes common law powers).

Today, the attorney general continues to function "as the great officer of state to whom the responsibility of safeguarding and representing the public interest is entrusted." *State Attorneys General Powers and Responsibilities*, *supra*, at 31 (quoting Edwards, The Law Offices of the Crown 295 (1964)). And while "American courts have not formulated an accepted delineation of common law powers of the attorney general in this country," the "preservation and protection of the public interest is the principle that typically governs a court's decision to recognize an attorney general's exercise of a power or prerogative that is claimed to have its source in the common law." *Id.* at 31–32. Accordingly, the attorney general "typically may exercise all such authority as the public interest requires" and has "wide discretion in making the determination as to the public interest." *Fla. ex rel. Shevin*, 526 F.2d at 268–69. For this reason, the "duties and powers [of the attorney general] typically are not exhaustively defined by either constitution or statute but include all those exercised at common law." *Id.* at 268.

Even in states where the powers of the attorney general are defined by statute, courts have held that the office also retains its common law powers. *See, e.g.*, *Fergus*, 110 N.E. at 143 ("The Constitution provides, as has been noted, that the Attorney General shall perform such duties as may be prescribed by law. The common law is as much a part of the law of this state, where it has not been expressly abrogated by statute, as the statutes, and is included within the meaning of this phrase."); *Zoeller v. E. Chi. Second Century, Inc.*, 904 N.E.2d 213, 219 (Ind. 2009) ("While the Attorney General is now considered a statutory officer possessing statutory powers, the legislature's subsequent adoption of the trust code . . . did not abrogate the common law view of the Attorney General's authority, but rather codified it." (citations omitted) (internal quotation marks omitted)).

Of particular relevance, a state attorney general typically has broad authority to control all state litigation on behalf of the public interest. *See Fergus*, 110 N.E. at 143 ("[A]t common law the Attorney General was the law officer of the crown and its chief representative in the courts."); 7 Am. Jur. 2d *Attorney General* § 5 ("In the exercise of these common-law powers, an attorney general may not only control and manage all litigation on behalf of the state, but may also intervene in all suits or proceedings which are of concern to the general public." (footnotes omitted)). Therefore, it is the attorney general that is empowered to make litigation decisions on behalf of the state. *See McCarthy v. McAloon*, 83 A.2d 75, 78 (R.I. 1951) ("In this state it was long ago settled that [s]uits for the public should be placed in public and responsible hands. . . . The public officer vested with that authority is the attorney general of the state." (citations omitted) (internal quotation marks omitted)).

B. Rhode Island has adopted the common law powers of the attorney general and this Court has embraced the organic growth of those powers

The Rhode Island Office of the Attorney General was established in 1650 by legislative act, *see Dyson v. Rhode Island Co.*, 57 A. 771, 780–81 (R.I. 1904), thirteen years before the colony was granted a royal charter by King Charles II. Maureen McKenna Goldberg, *Rhode Island's Unique Constitutional History*, 72 Alb. L. Rev. 601, 601 (2009). The original act outlined the powers and duties of the attorney general, including the power "to impleade any transgresssion of the lawe[,]" "to bringe all such matters of penall lawes to tryall[,]" and "to impleade in the *full power and authoritie of the free people of this State, their prerogatives and liberties*[.]" 1 R.I. Col. Rec. 225 (emphasis added). From the beginning, the attorney general was an elected position, except from 1740 to 1742, when an attorney general was appointed to represent each county. *State Attorneys General Powers and Responsibilities*, *supra*, at 5. The office remained essentially

unchanged throughout the revolutionary period until Rhode Island enacted its state constitution in 1842. *See* Goldberg, *supra,* at 602. Thus, from the beginning, the attorney general was vested with the power and authority of the state to control all state litigation, *i.e*., "to impleade in the full power and authoritie" of the State.

That broad authority did not abate when Rhode Island entered its constitutional era, for the Rhode Island Constitution has provided from the very beginning that "[t]he duties and powers of the . . . attorney-general . . . shall be the same under this Constitution as are now established, or as from time to time may be prescribed by law." R.I. Const. art. IX, § 12. Since then, the attorney general has continued to exercise his broad common law powers over all state litigation. "The constitution did not purport to create [the office of the attorney general] but recognized it as existing and provided for continuance of the powers and duties exercised by its occupant prior to the adoption of the constitution." *Suitor v. Nugent,* 199 A.2d 722, 723 (R.I. 1964). For this reason, "with the office came the common-law powers and duties thereof." *Id.* This Court has gone so far as to hold that the Rhode Island legislature may not infringe on the fundamental common law powers of the attorney general. *See In re House of Representatives (Special Prosecutor)*, 575 A.2d 176, 179–80 (R.I. 1990); *State ex rel. McGraw v. Burton,* 569 S.E.2d 99, 107 (W. Va. 2002) ("We believe it is clear . . . that there are certain core functions of the Office of Attorney General that are inherent in the office, of which the Office of Attorney General may not be deprived . . . .").

Furthermore, this Court elaborated on the constitutional powers of the attorney general in *State v. Lead Indus. Ass'n,* where it approved the attorney general's contingency fee arrangement with outside counsel in a public nuisance case against lead paint manufacturers, provided "the Office of the Attorney General have absolute control over the course of [the] litigation." 951 A.2d 428, 476 (R.I. 2008). It held that "the Attorney General is entitled to act with a significant degree

of autonomy, particularly since the Attorney General is a constitutional officer and is an independent official elected by the people of Rhode Island." *Id.* at 474. The attorney general is endowed with both "all the powers inherent at common law" and any additional powers with which "the General Assembly may imbue the Attorney General." *Id.* at 471. For this reason, the attorney general "has a special and enduring duty to 'seek justice,'" *id.* (citations omitted), and is "vested with broad discretion" to carry out that duty, *id.* at 473. Therefore, "[i]n view of the Attorney General's position as a constitutional officer and in view of his or her considerable discretionary powers, this Court has historically tended, whenever appropriate, to give deference to the strategic and tactical decisions made by those who hold that high office." *Id.* at 474.

RITA argues that because government employees were not indemnified for their torts at common law, the indemnification decision cannot be included within the attorney general's litigation power. Appellant's Br. 27–29. But the modern state attorney general exercises common law powers in many ways that the seventeenth century English attorney general could not have. Broad common-law litigation authority includes decisions, like contingency-fee arrangements and indemnification, only made necessary by subsequent constitutional and statutory development. Contingency fee arrangements, like the indemnification of government employees, did not exist in 1650 and would have been in their infancy in 1842. *See* Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DePaul L. Rev. 231, 231–32 & n.2 (1998) (dating the earliest use of contingency fees to the mid-nineteenth century). Yet this Court held that the attorney general's common law authority over state litigation included the discretion to enter into such an arrangement. *Lead Indus. Assn.*, 951 A.2d at 475.

Similarly, modern attorneys general have the common law power to challenge the constitutionality of administrative actions and to intervene in utility rate cases, *see* National Association of Attorneys General, *Common Law Powers of State Attorneys General* 29–30 (1975), neither of which would have existed in 1650 or 1842, as administrative law is largely a twentieth century invention, *see* 1 Richard J. Pierce, Jr., *Administrative Law Treatise* 12–18 (2010) (recounting the proliferation of administrative law during the early twentieth century). In addition, the attorney general exercises common law powers to enforce professional licensing laws and to protect the environment. *See United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1406 (D.N.H. 1985) (referring to "the common law powers of the attorney general in protecting the environment"); *Mich. State Chiropractic Ass'n v. Kelley*, 262 N.W.2d 676, 677 (Mich. 1978) (holding that common law authority to abate a public nuisance justified professional licensing enforcement); *State Attorneys General Powers and Responsibilities*, *supra*, at 44 & nn.75–76. Thus, the common law powers of the attorney general to control state litigation and to act in the public interest include many specific litigation decisions that would not have taken place in either 1650 or 1842.

To argue, as RITA does, that the attorney general's powers were somehow frozen in time when the office was established in 1650 or when the state constitution was enacted in 1842, *see* Appellant's Br. 19, 21, 25, contravenes that broad conception of attorney general authority over litigation-related decisions. "All the powers inherent at common law," *Lead Indus. Assn.*, 951 A.2d at 471, includes the organic growth of the office of attorney general beyond what was originally prescribed by the 1650 statute that established the office. This Court has specifically stated that common law attorneys general, like Rhode Island's, are vested with "a wide variety of powers," including the ability to "control and manage all litigation on behalf of the state." *Id.* at

473 n.45 (citations omitted). Thus, the powers of the attorney general "are not exhaustively defined by either constitution or statute," but instead, the attorney general "'typically may exercise all such authority as the public interest requires.'" *Id.* (quoting *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 286, 268–69 (5th Cir. 1976)). To determine who decides whether state employees should be indemnified for their tortious acts, therefore, this Court should look not only to its own precedents but also to the broad common law power of the attorney general to control all state litigation.

III. Unless Plainly Allocated Elsewhere, the Decision Whether To Indemnify State Employees Falls Within Common Law Attorney General Authority

A. The indemnification decision requires a case-by-case inquiry that only the attorney general is equipped to provide

This Court has already determined that the attorney general has the sole discretion to undertake the legal defense of a state employee, explaining in *Mottola v. Cirello*, that "[i]t is not the province of this Court, or the Superior Court, to dictate how the Attorney General elects to carry out the statutory functions of his office." 789 A.2d 421, 425 (R.I. 2002). Like the decision whether to represent a state employee, the decision whether to indemnify a state employee for tortious acts falls well within the broad power of the attorney general to control state litigation. When making the decision to indemnify, the attorney general may consider a number of factors: whether the conduct at issue was within the scope of the employment; whether the employee was found guilty of any criminal conduct; whether the employee has been terminated for the conduct at issue; whether the conduct was willful, malicious, or fraudulent; and any other factor the attorney general deems relevant. *See* Howard Friedman, *To Protect and Serve?*, 47 Trial 14, 16–17 (2011) (noting wide divergence among states concerning how the indemnification decision is made). With respect to both the decision to defend and the decision to indemnify, as the state

official most involved in the litigation process, the attorney general is best equipped to analyze the facts of a particular case and decide what is appropriate.

RITA argues that the attorney general cedes control over the litigation—including indemnification—when declining to represent a state employee. Appellant's Br. 17–18. But imposing that condition on the decision whether to indemnify would fragment and undermine traditional attorney general authority. If the attorney general may decide not to represent a state employee because that employee was not acting within the scope of employment, *see* R.I. Gen. Laws § 9-31-9, there are no grounds to require the state to indemnify the employee for those same acts. The attorney general's unquestioned authority to decide whether to defend only underscores how the indemnification decision is an inherent function of the office that other officials may not contract away.

The Second Circuit's reasoning in *Magniafico v. Blumenthal*, also helps explain why it should be the attorney general, as "the state's primary legal representative," who makes the indemnification decision on behalf of the state. 471 F.3d 391, 397 (2d Cir. 2006). There, the Second Circuit afforded absolute immunity to the Connecticut attorney general's decision whether to indemnify a state employee. *Id.* It compared the attorney general's discretion over an indemnification decision to that of a prosecutor deciding whether to charge someone with a crime. *Id.* at 396–97. "In both instances, the government attorney is serving as an advocate of the state, determining whether to commit the state's resources, reputation, and prestige to litigation." *Id.* at 396. Determining that such decisions should be absolutely immune from private challenge, the court explained that, "[t]o hold otherwise would permit outsiders to second-guess delicate decisions deliberately lodged by the legislature with the state's primary legal representative." *Id.* at 397.

The observations of the Second Circuit in *Magniafico* resonate here. Under Rhode Island law, "[t]he Attorney General is the only state official vested with prosecutorial discretion," *State v. Rollins*, 359 A.2d 315, 318 (R.I. 1976), and "the authority to maintain suits seeking redress of a public wrong," *Newport Realty, Inc. v. Lynch*, 878 A.2d 1021, 1032 (R.I. 2005). It is implicit that such independent authority includes the ability to make decisions concerning whether state employees will be afforded state representation and whether they will be indemnified for any judgments rendered against them. *See State v. Lead Indus. Ass'n*, 951 A.2d 428, 474 (R.I. 2008) ("It is our view that the Attorney General is entitled to act with a significant degree of autonomy, particularly since the Attorney General is a constitutional officer and is an independent official elected by the people of Rhode Island."). Indeed, "a primary reason for having an independent attorney general is to allow for independent legal judgment." William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2464 (2006).

If a collective bargaining agreement is allowed to control all indemnification decisions, it will vitiate the ability of the attorney general's discretion to make a case-by-case determination whether indemnification is appropriate. Such a one-size-fits-all solution will necessarily impede the attorney general's power to make litigation decisions in the public interest.

B. Unrelated core powers of the legislature or governor do not justify interference with the attorney general's litigation authority

RITA argues that granting the attorney general the power to make indemnification decisions would conflict with the General Assembly's power of the purse and the governor's power to enter into contracts on behalf of the state. Appellant's Br. 29. Not so. The General Assembly retains its power to allocate funds for indemnification, but it is the attorney general that

must decide which state employees have cases worthy of withdrawing from those funds. Similarly, the governor retains the power to enter into contracts on behalf of the state, but may not contract away the inherent powers of the attorney general. Ultimately, the indemnification power naturally falls within the AG's litigation authority.

1. While the attorney general may not spend money that has not been appropriated, that does not mean all decisions with financial implications are beyond the attorney general's powers. In *State ex rel. McGraw v. Burton*, the West Virginia Supreme Court elaborated on the relationship between the attorney general and the state legislature: "The suggestion . . . that the Legislature possesses unfettered discretion to define, delineate, and limit the duties of the Attorney General is wholly at odds with the historical and well-settled understanding of the constitutional role of the Attorney General." 569 S.E.2d 99, 107 (W. Va. 2002). While the legislature may add to the attorney general's duties, it may not strip the attorney general of his role as the State's chief legal officer, "which status necessarily implies having the constitutional responsibility for providing legal counsel to State officials and State entities." *Id.* at 107–108. Although the legislature does have some limited power to "repeal specific aspects of the Attorney General's inherent common law powers[,]" the "'common law is not to be construed as altered or changed by statute, unless legislative intent to do so be plainly manifested.'" *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 647 (W. Va. 2013) (citations omitted).

Here, the Rhode Island General Assembly has manifested no such intent to modify the common law. The statute simply grants "the state" complete discretion to determine whether to indemnify state employees, R.I. Gen. Laws § 9-31-12, and generally references the attorney general's responsibilities throughout the GTLA, *see id.* §§ 9-31-6 to -11. It does nothing to alter the ability of the attorney general to make this litigation decision on behalf of the state. The

existence of instances where the legislature has specifically delegated representation of state agencies and employees to state officers other than the attorney general, *see* Appellant's Br. 17 n.19, are not evidence that it has done so here. On the contrary, such examples show that the General Assembly knows how to abrogate the attorney general's power when it wants to. If the Court rules here that the Government Tort Liability Act has abrogated the attorney general's common law power to control state litigation, it will greatly expand the power of the General Assembly to strip the attorney general of his inherent common law powers.

2. The governor's power to enter into contracts on behalf of the state is neither exclusive nor absolute, and it does not justify encroachment on the authority of other officials. Multiple state officials, including the attorney general, have similar state contracting authority. *See, e.g.*, R.I. Gen. Laws § 46-2-21 ("[A]ll the contracts and agreements shall be approved as to form by the attorney general . . . ."); *id.* § 16-41-1 ("The Rhode Island higher education assistance authority, on behalf of the state, is authorized and directed to execute a compact . . . ."); *id.* § 36-13-2 ("The chief administrative officer of any city or town or director of administration of the state of Rhode Island is hereby authorized to enter into contractual agreements . . . on behalf of the state . . . .").

In particular, the attorney general's power to make indemnification decisions does not violate the State Police Arbitration Act. *See* Appellant's Br. 39–40. The Act gives "state authorities" the power to negotiate "the terms and conditions of employment," R.I. Gen. Laws § 28-9.5-3 to -4, but nowhere does it grant these officials the power to abrogate the common law duties of the attorney general by guaranteeing indemnification for all state employees, regardless of whether they were acting within the scope of their employment. Indeed, that Act limits what can be collectively bargained as a term of employment. *See id.* § 28-9.5-4 (giving state police the

right to collectively bargain for "wages, rates of pay, hours, working conditions, and all other terms and conditions of employment").

The existence of other unquestioned litigation-related limits on collective bargaining help illustrate the point. For example, no one doubts the authority of the attorney general to decide whether to represent officials in lawsuits, *id.* § 9-31-9, and surely no one would argue that the Governor may bargain away that authority as part of the collective bargaining power. No one would likewise suggest that a governor facing personal civil liability could enter into a contract for private legal counsel and indemnification at taxpayer expense. Similarly, the governor could not contract away the attorney general's right to refuse to defend an employee that had engaged in fraud, willful misconduct, or actual malice, *id.*, or give the state employee exclusive control to settle a lawsuit that the attorney general has chosen to defend, *id.* § 9-31-10.

It follows that the governor cannot, by means of a collective bargaining agreement, yield the state's discretion to determine whether state employees will be indemnified for their torts. The General Assembly did not clearly manifest an intent to strip the attorney general of common law authority over state litigation when it passed the State Police Arbitration Act. The attorney general has mounted no "attack on the collective bargaining process" generally, Appellant's Br. 41, but simply defends inherent common law powers from erosion-by-contract.

***

This Court has held that the Rhode Island attorney general is vested with both "autonomy" and "broad discretion." *State v. Lead Indus. Assn.*, 951 A.2d 428, 473–74 (R.I. 2008). He is "independent from other branches of government." *Mottola v. Cirello*, 789 A.2d 421, 424 (R.I. 2002). And he is the only state official vested with the authority to litigate on behalf of the public interest. *See McCarthy v. McAloon*, 83 A.2d 75, 78 (R.I. 1951). In line with these precedents, this

Court should hold that the attorney general, and no other state officer, has the authority to decide whether to defend and indemnify state employees for their tortious acts.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the superior court.

Respectfully submitted,

STATE OF INDIANA
By Its Attorney,
CURTIS T. HILL, JR.
ATTORNEY GENERAL

THOMAS M. FISHER
Solicitor General of Indiana
Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

Counsel for Amici States

Additional counsel listed below

ADDITIONAL COUNSEL FOR AMICI STATES

MARK BRNOVICH
Attorney General
State of Arizona

LAWRENCE G. WASDEN
Attorney General
State of Idaho

JEFF LANDRY
Attorney General
State of Louisiana

JIM HOOD
Attorney General
State of Mississippi

DOUG PETERSON
Attorney General
State of Nebraska

JOSHUA H. STEIN
Attorney General
State of North Carolina

SEAN D. REYES
Attorney General
State of Utah

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2018, I mailed a true copy of the foregoing document to the following parties:

Michael B. Forte, Jr., Esq.
530 Greenwich Avenue
Warwick, RI 02886

Rebecca Tedford Partington, Esq.
Chrisanne E. Wyrzykowski, Esq.
Assistant Attorneys General
Ariele Yaffee, Esq.
Special Asst. Atty. General
Office of the Attorney General
150 South Main Street
Providence, RI 02903