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Mini Briefing

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STATE SEEKS MORE TIME TO APPEAL TO U.S. SUPREME COURT

The Supreme Court of Illinois is the final authority on issues of Illinois law. In May of this year, the Court struck the Pension Reform Act as unconstitutional based upon the Pension Protection Clause and Contract Clause of the Illinois Constitution. To the extent that this is an interpretation of the Illinois Constitution, that is the last word.

The State argued to the Illinois Supreme Court that it could violate the Illinois Constitution based upon the reserved sovereign power doctrine, also known as the "police power". That is the power that must necessarily be exercised by the State to protect the health and welfare of the citizens. The Illinois Supreme Court's ruling last May held that the police power was inapplicable to the Pension Protection Clause of the Illinois Constitution and that it also could not be applied to violate debt contracts under the Contract Clause of the Illinois Constitution.

The Supremacy Clause of the U.S. Constitution is such that federal law is the law of the land. Any state law or state constitutional provision is therefore subservient to it. The State now argues that, the Illinois Constitution notwithstanding, the U.S. Constitution prohibits it from giving up its police power. As that is a question of U.S. Constitutional law, it is one for which the United States Supreme Court has the final word if it so chooses.

But just because an issue is one of Federal Constitutional law, does not mean that the Supreme Court will choose to hear the case. The Supreme Court is not an appellate court in that there is no right to have a case heard there. Cases like this are taken to the Supreme Court by a process called "petitioning for a *writ of certiorari.*" Essentially, the State has to ask the Supreme Court to issue such a writ to the Illinois Supreme Court stating that it is taking control of the case and will decide certain issues.

Under the rules, the State had 90 days from the final judgment entered by the Illinois Supreme Court to file that petition (that motion). On Monday, July 27, the State filed a motion for extension of time in which to file its petition for a *writ of certiorari* — its request that the U.S. Supreme Court hear the case. That request is for an extension until August 6, 2015.

The motion for extension goes to a single Justice. In the 7th Circuit which serves Illinois, Indiana, and Wisconsin, that would be Justice Elena Kagan. Given the nature of the motion, we would expect Justice Kagan to grant it — that is to give the State the additional time it seeks to file the request that the Supreme Court take the case. Just because the State has filed a motion for an extension of time, however, does not necessarily mean that it will, in the end, file the actual request for the Supreme Court to take the case.

If the State does file that petition by August 6, it will then be reviewed by the Justices of the Supreme Court. In order for the Court to grant that petition, the State must obtain affirmative votes of four out of the nine justices. (To be clear, these are simply votes for the Supreme Court to hear the case and mean nothing about the final determination on the merits.)

The Court typically grants certiorari in about 1% of the cases sent to it. That number is a bit higher for paid petitions, about 4% (as opposed pauper's petitions from indigent litigants.) This is out of approximately seven to eight thousand petitions filed each year. Thus, as a statistical matter, it is highly unlikely that the Supreme Court would grant the petition.

Nonetheless, these numbers do not take into account the number of cases that ignore the primary reasons a certiorari petition will be granted. Supreme Court Rule 10 essentially provides a guideline that the Court will consider petitions which show that there is a split between the lower courts (whether Federal Appellate courts, or in this case, State Supreme Courts) on the issue, or where there is an important question of federal law that is one of first impression or is in conflict with decisions of the United States Supreme Court. We can certainly expect that the State will do better than to simply file a petition without recognizing the guidelines of Rule 10 as thousands of litigants do each year.

In this case, the State appears to argue that the U.S. Supreme Court's opinion in *U.S. Trust Co. of N.Y v. New Jersey*, published at 431 U.S. 1 (1977) provides that a state is prohibited from surrendering an essential attribute of its sovereignty (i.e. its police power). We addressed this argument before the Illinois Supreme Court and believe that the State takes *U.S. Trust* out of context. We believe that a grant of *certiorari* is, in the end, not appropriate in this case, and are cautiously optimistic that the Supreme Court would refuse to hear the case.

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