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October 27, 2008

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T 19976-00001

Ms. Denise J. McNerney
Merits Cases Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *Carcieri v. Kempthorne*, No. 07-526

Dear Ms. McNerney:

This responds to your letter of October 20 concerning the above-captioned matter as well as the letter and emergency motion submitted to the Court this morning by Mr. Joseph S. Larisa, Jr., counsel for the Town of Charlestown, Rhode Island.

As you are aware, there are three petitioners in this case: Donald L. Carcieri, Governor of Rhode Island; the State of Rhode Island and Providence Plantations; and the Town of Charlestown, Rhode Island. After the Court denied the petitioners' competing motions for divided argument, and after the undersigned (on behalf of the Governor and the Attorney General) and Mr. Larisa (on behalf of the Town of Charlestown) submitted competing oral argument forms, you instructed the petitioners to designate a single attorney to present oral argument, explaining that the "decision as to which party will argue on behalf of petitioners in this case is now to be made amongst the *parties*" (emphasis added).

As Mr. Larisa's letter of this morning states, the petitioners, regrettably, have been unable to agree unanimously upon a process for making that decision. Mr. Larisa has insisted that the three petitioners resolve the matter by a 50-50 coin flip. He asserts that the Attorney General, by not having designated counsel from his office for argument, has "waived" any right to an equal, three-way process among the three petitioners for selecting argument counsel.

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The Governor and the Attorney General, on the other hand, have expressed the view that, if a unanimous decision among the parties is not possible, the issue should be settled by a majority of the three parties. The Governor and the Attorney General have explained that resolution by majority vote is particularly appropriate in this instance given that, as the Attorney General stated in his October 10 letter to you, the Governor and the Attorney General are constitutionally “empowered and obligated to speak for all of Rhode Island, including the Town of Charlestown,” while, conversely, the Town of Charlestown can only speak for that municipality and not “the broader interests of Rhode Island.” Both the Governor and the Attorney General have expressed the preference that if the argument is to be conducted by one person for all three petitioners, the undersigned should have that responsibility.

In response to this impasse, Mr. Larisa has filed today on behalf of the Town of Charlestown an emergency motion for reconsideration of this Court’s October 6 denial of the Town’s motion for divided argument. Today’s motion requests that the Court “order a division of time between Mr. Olson and Mr. Larisa with respect to the two questions presented and/or by minutes” or, in the alternative, that the Court “order a coin toss between counsel to determine who shall argue the entire case.”

The Governor has authorized me to state that, if this Court is inclined to reconsider its October 6 denial of the Town’s motion and permit divided argument, he does not object to a division of the argument between the State petitioners and the Town pursuant to which the undersigned would argue for 20 minutes (including rebuttal), and Mr. Larisa would argue for 10 minutes. The Governor does object to any division of time under which undersigned would have less than 20 minutes to present the arguments for the State petitioners.

With respect to Mr. Larisa’s alternative request for a Court-ordered coin toss, the Governor respectfully objects to that means of resolving the matter. The Court’s rules do not require a coin flip or other form of random draw to resolve this form of impasse. Moreover, the Attorney General has advised that he cannot, consistent with his oath of office in these circumstances, engage in a “random draw” to select counsel to represent the citizens of Rhode Island in this case, especially in light of the Attorney General’s view that the municipality of Charlestown would have conflicting interests with the State, and the Town’s attorney cannot, therefore, “ethically represent the broader interests of Rhode Island.”

If this Court is disinclined to reconsider the question of divided argument, the Governor respectfully suggests that that this Court should give effect to the wishes of the majority of the petitioners. The Court’s rules do not preclude a majority of the parties from selecting argument counsel, and this form of selection process would seem particularly appropriate when the two parties who agree on counsel are constitutional officers of a State empowered by the State’s Constitution to represent all of Rhode Island, including the Town of Charlestown, whereas the Town of Charlestown, as the Attorney General has explained, may have interests disparate from, or in conflict with, the interests of the State as a whole.

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Therefore, if the Court denies the instant Motion for Reconsideration, the Governor of Rhode Island respectfully requests that the undersigned be designated as the counsel to present argument for the petitioners in this case on November 3. If the Court chooses instead to compel the parties to resolve the oral argument dispute through a game of chance, the Governor respectfully submits that any such game must, at minimum, give each of the three petitioners an equal voice in that process.

The Governor of Rhode Island fully appreciates that the Court would prefer all parties to agree on counsel to represent them at oral argument. However, in cases of multiple parties, complete agreement may not always be possible, and the wishes of a majority of the parties should not be permitted to be foreclosed by a minority, particularly where, as here, the majority of the petitioners are constitutionally authorized to represent the entire State and its interests, whereas the minority party is not.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Theodore B. Olson', with a stylized, cursive script.

Theodore B. Olson

cc: Hon. William K. Suter
Cynthia Rapp
Hon. Donald L. Carcieri
Kernan King, Esq.
Hon. Patrick C. Lynch
Neil F.X. Kelly, Esq.
Joseph S. Larisa, Jr., Esq.