No. 13-481

# In the Supreme Court of the United States

JOHN G. ROWLAND, Former Governor of the State of Connecticut, and Marc S. Ryan, Former Secretary of the Office of Policy and Management of the State of Connecticut, in their individual capacities,
*Petitioners,*

v.

STATE EMPLOYEES BARGAINING AGENT COALITION, et al.,
*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit**

## BRIEF OF THE CONNECTICUT ASSOCIATION OF BOARDS OF EDUCATION AS AMICI CURIAE IN SUPPORT OF CERTIORARI

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## QUESTIONS PRESENTED

The State of Connecticut faced a budget crisis in 2002. After the State's public employee unions rejected its demand for wage and benefit concessions, Governor John Rowland issued a directive to the State's agencies to reduce the size of the State's workforce by *eliminating positions* – a *legislative* action under *Bogan v. Scott-Harris*, 523 U.S. 44,56 (1998), and a sovereign power that the State expressly reserved in all collective bargaining contracts. Lacking the basis to challenge the layoffs as a breach of contract or as a statutory unfair labor practice, the unions "constitutionalized" the labor dispute by challenging the directive as a First Amendment violation. Specifically, the union alleges that Governor Rowland's stated reasons for the layoffs were a pretext for his 'true motives' – anti-union animus and political retribution. The Second Circuit held that the complaint alleged a valid First Amendment claim as to which the governor did not have qualified immunity.

Two questions are presented:

1. Are a governor's subjective motives for exercising a state's inherent power and contractual right to reduce the size of its unionized workforce legally relevant when a court is asked to determine the constitutionality of that legislative act?

## QUESTIONS PRESENTED – *Continued*

1. Did the Second Circuit err in requiring strict scrutiny of a governor's decision to reduce the size of a state's unionized workforce by falsely analogizing that decision to firing state employees based on their political party affiliation?

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## INTEREST AS AMICUS CURIAE

The Connecticut Association of Boards of Education (CABE) is a non-profit association representing approximately 150 of the 169 public school boards and their members in the State of Connecticut. Its primary interest is excellence in public school education through effective boards of education in our state. CABE provides education and training for public school board members, delivers legal advice on issues pertaining to school law, develops and recommends policy for school boards and advocates for its members.

CABE supports boards of education and their rights to hire, evaluate and dismiss employees. Connecticut law gives school boards extensive authority independent of even its own municipality. Under Conn. Gen. Stat. § 10-220, boards of education are required to maintain good public elementary and secondary schools, implement the educational interests of the state and provide such other educational activities as in its judgment will best serve the interests of the school district.

The educational interests of the state include providing excellent education for the children of our state, and such an enormous charge requires boards of education to manage complicated budgets, through good economic times and bad, in the best interests of the children, the district and the local taxpayer. Even when the economic climate is good, boards are sometimes forced to make difficult budget decisions

which can include, among other strategies, concessions from its employees and ultimately a reduction in force. Over the past several years, Connecticut boards of education have been forced to approach their employees numerous times for changes to already negotiated contracts, as well as for wage, benefit and other concessions during negotiations to meet educational demands under extremely tight budget constraints. Where employee unions have been unwilling to negotiate concessions, some boards of education have been forced to lay off unionized staff in order to keep the district operating. Such outcomes created much turmoil in many districts across the state. But, while the decisions were difficult to make, they were necessary to achieve the boards' fundamental charge of educating the state's children.

CABE's interest in this case concerns the possible 'trickle down' effect of the Court of Appeals decision where a board of education, as a state agency, could lose the right to make reductions to its workforce and lose its governmental qualified immunity for doing so, thus opening up board of education members, who are volunteers, to personal liability. CABE supports granting the petitions for writ of certiorari of the Petitioner in both their official and individual capacities for review by the Court in this case, as we believe the outcome is crucial to the ability of state agents and agencies, including boards of education, to function and exercise their inherent powers to legally reduce the

size of their unionized workforce. *Amici* therefore have a strong interest in the Court's full consideration of all issues presented in the case.[1]

[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission. Counsel of record for all parties received timely notice of intent to file this brief and consented to its filing.

## ARGUMENT

### 1. THE STRICT SCRUTINY STANDARD APPLIED BY THE COURT OF APPEALS WOULD INTERFERE WITH A BOARD OF EDUCATION'S RIGHT TO REDUCE ITS WORKFORCE UNDER LABOR RELATIONS LAW.

In Connecticut, as in many other states with unions and collective bargaining, a board of education has certain negotiating tools it can use in its collective bargaining processes with local unions. These tools do not in any way impede upon an employee's right to associate in a union. The result of the Second Circuit's application of strict scrutiny in this case has no constitutional basis. Most concerning is that such a standard would put local boards of education as employers in an untenable situation when dealing with contract negotiations, concessions during tight budget seasons and when the possibility of layoffs must be considered.

The Second Circuit relied on three cases to arrive at the decision that strict scrutiny of patronage practices were applicable when Governor Rowland instructed state agencies to make layoffs after negotiations for wage and benefit concessions were offered to state employees during a budget deficit. However, the First Amendment interests addressed in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Elrod v. Burns*, 427 U.S. 347 (1976) are

simply incomparable to the situation that took place when Governor Rowland ordered layoffs in 2002 after long and intense negotiations at wage and benefit concessions failed. Indeed, the unions' failure to reach an agreement on concessions to deal with a *budget deficit*, a purely economical situation, forced the hand of the Governor to order layoffs. There was no political coercion or punishment in the Governor's exercising what was a clear managerial right laid out in many a collective bargaining agreement to make a reduction in workforce when forced by economics and failed negotiations. The end result of the failed negotiations with state employees was purely a function of a very important tenant of labor relations law and a managerial right reserved in collective bargaining contracts.

Boards of education and their superintendents, essentially the chief executive officers of their districts, are in the difficult position, year after year, of fulfilling their state required duties of educating public school children while managing often tight budgets, along with fluctuating mill rates and public interest groups with competing agendas. During the years of the recent recession, boards of education were more often than not in dire financial straights as funding for education was simply unavailable. Much like the Governor in 2002, boards were many times pushed into the position of having to make layoffs, especially in situations where efforts to obtain wage and benefit concessions and save jobs were unsuccessful. As painful and difficult

as these decisions were, they were nonetheless a function of the negotiations process and a right expressly granted to employer boards of education in contracts between the parties. While the use of this labor relations tool is not an easy decision for boards of education, sometimes it is unavoidable, especially as state law requires district budgets to be balanced. The ability of boards of education to make reductions in its work force proved a vital strategy and sometimes the only viable option for a district or one of its schools to be kept open and running for children.

While boards of education may act independently of the municipality in many instances, the board of education is still bound to manage the budget appropriated to it by the municipality. Conn. Gen. Stat. § 10-222. The board of education must submit a request to the municipality for funds to operate the school and once the appropriation is made to the board, it is very difficult for a board to receive funds above and beyond what is appropriated for the fiscal year. They can return to the municipality for additional funds, and if they don't receive those funds, there are no other options. One troublesome area for boards of education is student special education. Sometimes during the course of the school year, unexpected special education costs arise, sometimes costing the district as much as $100,000. Even one or two major and extensive special education placements can cripple a board of education's budget. Sometimes one or several special

education students requiring out of district placements or extensive special education services will move into a district midway through the school year, with a district unprepared to cover these expenses, yet required to by law. In these cases, a board is forced to move money around to try and cover expenses or approach the municipality for additional monies. A major special education case can cause a ripple effect, wreaking havoc on a board's budget for years to follow, especially when a municipality is not able to provide enough funding to cover costs and the board does not receive adequate reimbursement from the state.

Another issue board members must face in making its' budget work, is the fact that school board members who authorize expenditures in excess of the funds appropriated to the board of education can face personal liability for such expenditures. Conn. Gen. Stat. § 7-349. While constantly struggling to make ends meet, board members must be especially careful not to overspend the board of education account, which can prove difficult during a tight budget year and when there are struggles with employee unions in seeking wage and benefit concessions to work within the budget.

A decision cited by the Second Circuit, *Smith v. Arkansas State Highways Employees, Local 1315*, 441 U.S. 463 (1979), points out several important points relevant to the case at hand as well as two crucial Supreme Court cases that have been the law in labor relations for almost sixty years. First, in

*Smith*, this Court opined that in the world of labor relations: "The First Amendment is not a substitute for the national labor relations laws," *Id.* At 464. Likewise, it was found that the unionized workforce "surely can associate and speak freely and petition openly, and are protected by the First Amendment from retaliation from doing so" and "the First Amendment does not impose any affirmative obligation on the government to listen, to respond or...to recognize the association and bargain with it." 441 U.S. at 465.

Second, in *American Ship Bldg Co. v. N.L.R.B.*, 380 U.S. 300 (1965) and *NLRB v. Brown*, 380 U.S. 278 (1965), this Court recognized that the federal labor laws permit "employers to use economic weapons of layoffs as means to put economic pressure on unions in collective bargaining" and that the "employer's use of economic weapons against a union does not violate the National Labor Relations Act". *Id* at 307-08 and 283, respectively.

A board of education's managerial right to make reductions in the size of its unionized workforce cannot be characterized as unconstitutional punishment of unions based on their status as such. Should that opinion be allowed to stand, collective bargaining and negotiations under state and federal labor relations laws would be forever changed. A board of education's right to lay off employees, consistent with the law, regulations and any applicable contract, plays a fundamental role in the operation of a school district and its

budget. The application by the Second Circuit of *Rutan*, *Branti*, and *Elrod* is inappropriate under the facts of this case. Allowing the opinion to stand would seriously impede the long standing right of all state agents and agencies and boards of education's right to use this critical strategy to solve a budget crises or deficit.

## II. ALLOWING THE STRICT SCRUTINY STANDARD TO STAND IN THIS CASE WOULD SIGNIFIGANTLY IMPEDE A BOARD OF EDUCATION'S LEGITIMATE MANAGERIAL RIGHT TO INSTITUTE LAYOFFS.

A board of education is a governmental agency that is in a very unique situation when it comes to labor relations and collective bargaining. A board will often employ both unionized and non-unionized workers, as well as those who hold specific certifications in certain educational areas and those who do not. The board in any given school district will employ teachers, custodians, paraprofessionals, reading specialists, specialty teachers, nurses, business managers, special education directors and principals and the superintendent. The case now before the court is exactly what boards of education and their unionized workers deal with on a yearly basis, as they grapple with the next year's budget. Negotiations between certified and non-certified employees are often long and expensive. While some contracts are settled during negotiations, others must be pushed forward through a mediation process and even an arbitration process to get an agreement in place between the parties.

With the Second Circuit's application of strict scrutiny in place in this case boards of education stand poised to lose one of their strongest bargaining strategies not only to their own detriment but, at the expense of non-unionized workers and school administrators. During negotiations or at any time,

boards can propose to reduce or freeze administrator salaries and in Connecticut, in the early days of the recent recession, it was more often than not the school administrators themselves who agreed to salary freezes and other concessions, rather than the teachers' unions. Non-union employees would also stand at a greater risk under a strict scrutiny standard in future budget years as a board can change the terms of their contracts at will and without negotiation. So, if in the future, unionized and certified employees refuse to bargain during regular negotiations or during a budget crisis, non-unionized workers and administrators, not to mention the students of the school district, all stand to suffer.

Petitioner's brief rightly points out this Court's concern about judicial intrusion into such governmental affairs. Pet. Brief at 31. "The government's interest managing its internal affairs requires proper restraints on the invocation of rights by employees when the workplace or the government employer's responsibilities may be affected." *Bourough of Duryea v. Guarnieri*, 131 S.Ct. 2488, 2497 (2011).

If this Court allows the Second Circuit's decision to stand the Court will undermine its own admonition against "invasive judicial superintendence" of state agents and agencies' employment. The only other options a school district is left with at this stage of the game are programmatic and curriculum cuts. The standard

would tie the hands of already financially strapped school districts in an effort to do one of the things this country holds so dear and one in which it takes much pride: educating our public school children so they can be successful, contributing members of our society.

Also of extreme concern is the Second Circuit's conclusion that Governor Rowland's order was unprotected by a qualified immunity defense. By applying a standard of strict scrutiny in future cases where a governmental official or agency exercises the option to make a reduction in the workforce, said officials and agencies would be open to litigation in their personal capacities, opening them up to a myriad of lawsuits and potentially devastating litigation costs.

Imagine a board of education is facing an extremely tough budget crisis. Cuts to the students' curriculum, specials such as art, music and physical education and after school programs and activities are on the chopping block. To buffer the children from these alterations to their education, the board turns to the unions to negotiate some sort of concessions to wages or benefits in an attempt to control costs and avoid changes to core academic practices and programs. The unions refuse to negotiate and the board exercises its managerial right under the collective bargaining contract to make layoffs.

Should the Second Circuit's application of strict scrutiny be allowed to stand in this case, those union workers could turn around and sue those board of education members in the *personal capacities* for their official actions serving on the board, despite the fact that board members are elected *volunteers*. In Connecticut, board of education members do not receive any compensation for their hard work and time and many have jobs outside of their duties of ensuring the education of our children. Removing the protection of qualified immunity for these individuals could personally and financially devastate these volunteers by opening each and every one of them up to litigation by a union. Why would anyone want to serve on a board of education when such personal liability is such a risk? What would happen to our boards of education when there are not enough people to fill the seats to operate the board because citizens are too frightened by litigation to run for office?

The rational basis standard should have been the basis for review in this case. The Governor had an objectively rational reason to order layoffs and likewise, it would be in a board of education's best interests to reduce the size of its workforce in an effort to save taxpayer money and manage the cost of the 'government'. Consideration of his alleged anti-union animus is legally irrelevant. When acting in their official capacities as 'state agents', boards of education must be protected by qualified immunity when exercising their managerial rights prescribed

by contract to make layoffs and any constitutional review of such action should be subject to the rational basis, rather than strict scrutiny, standard of review.

The Second Circuit's opinion alters long standing, integral state and federal labor relations laws that this Court itself has recognized and upheld over several decades. The effects would be far reaching and costly to school districts and all other governmental agencies across the nation. It would alter the collective bargaining landscape so fundamentally that it would reach the youngest members of our nation.

We believe the Second Circuit's ruling would ensure a major interference in many years of well set out labor relations laws and practices, an intrusion into the collective bargaining process between school districts and unions, and a major roadblock to school districts' already strapped and stressed budgets.

## CONLUSION

For the foregoing reason, CABE respectfully requests this Court to review the decision of the Second Circuit and grant the petitions for certiorari that have been submitted.

Respectfully submitted,

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## CERTIFICATION OF SERVICE

I hereby certify that three copies of the foregoing have been served via first class U.S. mail, postage prepaid, in accordance with Rule 29 of Rules of The Supreme Court of the United States to the parties named below.

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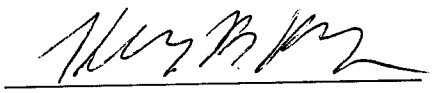

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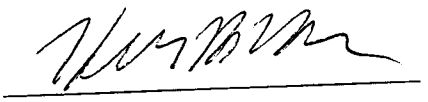
## CERTIFICATION OF WORD COUNT COMPLIANCE

I hereby certify that this brief complies with Rule 33.1 of the Rules of The Supreme Court of the United States and contains less than 6,000 words. The word count is 3,272.



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