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 IN OPPOSITION

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QUESTION PRESENTED

Have petitioners presented a compelling reason to review the Court of Appeals' narrow and unremarkable interlocutory holding that the allegations of respondents' Amended Complaint are deemed to be true at the motion to dismiss stage and, in this case, state an established claim under 42 U.S.C. § 1983 for political retaliation in violation of the First and Fourteenth Amendments, precluding dismissal of respondents' *individual* capacity claims against petitioners on grounds of qualified immunity at this stage of the proceedings?

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INTRODUCTION

The decision below separately addressed respondents' *official* capacity claims against Connecticut's current Governor and current Secretary of the Office of Policy Management and respondents' *individual* capacity claims against petitioners, Connecticut's former Governor and former Secretary. Although petitioners, in an effort to make their Petition for a Writ of Certiorari ("Petition") seem more certworthy, repeatedly seek to blur the lines between these two separate aspects of the decision below, the only issues properly raised in the Petition pertain to respondents' *individual* capacity claims.

The State of Connecticut, representing the current Governor and current Secretary in their official capacities, has withdrawn its petition for *certiorari* seeking review of the Second Circuit's ruling in respondents' favor on the official capacity claims and has agreed to enter into settlement discussions with respondents to resolve this case, *including the individual capacity claims* against petitioners, whom the State has expressly agreed (in writing) to indemnify.

Nonetheless, Connecticut's *former* Governor and his *former* executive branch appointee are persisting in pursuing this separate Petition addressed to the Court of Appeals' ruling that petitioners' qualified immunity defense to respondents' individual capacity claims could not prevail at the motion to dismiss stage of the proceedings. *Certiorari* to review that holding is plainly unwarranted for three reasons:

(1) The Second Circuit held that the allegations in respondents' Amended Complaint that respondents' public employment was terminated because of their political opposition to the reelection of the sitting governor and support for his opponent are deemed to be true at the pre-discovery stage and state an established claim for First Amendment retaliation, precluding dismissal at this stage on grounds of qualified immunity. This holding is wholly unexceptional, does not conflict with any holding of this Court or any Court of Appeals, and presents no issue worthy of review.

(2) The Second Circuit's ruling is interlocutory in nature and, after development of a factual record, may or may not ever result in a judgment adverse to petitioners. Petitioners will have the right to seek further appellate review, pretrial, of their entitlement to qualified immunity on a developed factual record. Review on *certiorari* now is premature.

(3) Even if review were otherwise appropriate, the possibility that settlement will render this matter moot further counsels against hearing the case now.

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STATEMENT OF THE CASE

Respondents – a coalition of Connecticut state employee unions and union employees – brought this action pursuant to 42 U.S.C. § 1983 to challenge the constitutionality of former Connecticut Governor Rowland's termination of the employment of 2,800 unionized state employees.

At the time of the terminations, the State of Connecticut's 50,000 person work force was 25% non-union, and many of the 12,500 non-union employees held positions identical to union positions. Respondents' Amended Complaint asserts claims against the defendants in their official and individual capacities. Respondents' official capacity claims allege, *inter alia*, that the Governor intentionally singled out employees for termination based on union membership and intentionally limited the terminations to union employees, in violation of respondents' First and Fourteenth Amendment rights to freedom of association. Respondents' individual capacity claims allege that the Governor intentionally limited the terminations to members of only those unions that had opposed his reelection and supported his opponent, in violation of respondents' First and Fourteenth Amendment rights to engage in political activity.

Respondents' official capacity claims were decided below based upon a highly-particularized stipulation of facts intended to frame the former Governor's legal contention that his termination decisions, even if

they targeted protected groups, were immune from judicial review.

Petitioners declined to allow the stipulation to apply to respondents' individual capacity claims. (A22-23).* The sole record basis for the individual capacity claims against petitioners is respondents' Amended Complaint (A125), which alleges facts not covered by the stipulation.

In particular, the individual capacity claims in the Amended Complaint expressly allege that respondents' public employment was terminated by petitioners in retaliation for respondents' opposition to Governor Rowland's reelection and support for his opponent:

> 51. In deciding which state union employees to terminate, defendant Rowland was motivated by the desire to retaliate against his political opponents.
>
> . . . .
>
> 58. All of the state union employees selected for termination are members of the endorsing unions that supported defendant Rowland's opponent in the 2002 gubernatorial race and opposed defendant Rowland's reelection. Although state employees performing police functions in the endorsing unions have

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* References to pages in Petitioners' Appendix are denoted as "A___."

> been selected for termination, no members of CSPU [the Connecticut State Police Union, which endorsed Rowland] have been terminated or selected for termination by defendants.
>
> 59. The Named Plaintiff[s] and the members of the plaintiff Affected Employees Class are all members of the endorsing unions. Defendants directed that all of the terminations at issue in this lawsuit be from members of the endorsing unions **in retaliation for the endorsing unions' political opposition to defendant Rowland and for their failure to support defendant Rowland in the 2002 gubernatorial race**.
>
> 60. As a result of the conduct of defendants as aforesaid, the Named Plaintiffs and the plaintiff Affected Employees Class have been **impermissibly penalized for exercising their First and Fourteenth Amendment rights to support, individually and through their union, political candidates of their choice**.

(A150, ¶¶ 51, 58-60 [emphasis added]).

The Amended Complaint further alleges that petitioners intentionally singled out union members for termination because of petitioners' anti-union animus (A141, ¶¶ 45-46); and that the terminations violated the union members' and the unions' First and

Fourteenth Amendment rights of freedom of association (A142, ¶¶ 51-52).

Petitioners moved in the District Court for pre-discovery dismissal of respondents' individual capacity claims on three grounds: qualified immunity, absolute legislative immunity and sovereign immunity under the Eleventh Amendment (and defendants, in their official capacities, also sought dismissal of the official capacity claims on legislative immunity grounds). The District Court dismissed respondents' individual capacity claims on Eleventh Amendment grounds, holding that the individual capacity claims were barred by the Eleventh Amendment because the State would likely indemnify any judgment rendered against petitioners. (A120). The District Court found that factual disputes as to petitioners' motivation would bar pre-discovery dismissal of respondents' individual capacity claims on qualified immunity grounds, but ruled that the qualified immunity defense was moot because of its Eleventh Amendment ruling. (A122; *see* A22 n.14). The District Court also ruled that factual disputes as to whether defendants' executive branch actions constituted "legislative" action (pursuant to Connecticut statutes applicable to the actions of executive branch officials who purport to perform legislative budgetary tasks) precluded dismissal of respondents' official capacity claims on legislative immunity grounds. (A115-17).

Defendants (*i.e.*, the Governor and the Secretary in their official capacities) pursued an interlocutory appeal to the Second Circuit from the District Court's

denial of their legislative immunity defense as to respondents' official capacity claims. On July 20, 2007, the Second Circuit affirmed the District Court's ruling, holding that factual disputes as to whether defendants had acted in a legislative capacity, either substantively or procedurally, precluded a pre-discovery determination of the defense. (A85-89). The Second Circuit specifically held that, for purposes of determining legislative immunity, a state official's motive is legally irrelevant. (A84-85). Defendants did not seek review, either *en banc* or by this Court, of the Second Circuit's 2007 decision.

On remand to the District Court, defendants proposed that the parties litigate respondents' official capacity claims on a stipulated factual record.[1] In framing the stipulation, defendants sought to vindicate former Governor Rowland's contention that he had the broad power, as Governor, to terminate employees in the State's work force on the basis of protected associations (including union membership) and was wholly immune from constitutional constraints for such terminations. In particular, with respect to union membership, defendants stipulated that although the State's work force was over 25%

[1] The stipulation had the effect of avoiding a deposition of former Governor Rowland, who had resigned from office in 2004 in the midst of impeachment proceedings and who had pleaded guilty to a federal felony charge and been incarcerated for taking bribes and providing illegal benefits to his supporters. The former Governor is now a radio talk show host in Connecticut.

non-union and although many of the 12,500 non-union employees held positions identical to union positions (A193, ¶ 40), they had singled out employees for terminations based on union membership (A195, ¶ 53); that the terminations were not based on or correlated to any need for budgetary savings (A196, ¶¶ 58-59); that the terminations were not based on any evaluation of the staffing needs of the State's work force or any desired reduction in size or cost (A196, ¶¶ 57-58); and that it was defendants' legal position that

> in exercising their authority to manage the size of the State's work force, it is constitutionally permissible for them to single out union employees for lay-off and limit layoffs to unionized state employees. (A200, ¶ 76).

The parties filed cross-motions for summary judgment in the District Court on respondents' official capacity claims. On July 28, 2011, the District Court granted defendants' motion and denied respondents' motion. (A26).

Respondents appealed to the Second Circuit, challenging the District Court's summary judgment ruling on their official capacity claims and its earlier dismissal of their individual capacity claims. As to the individual capacity claims – the only claims at issue in the instant Petition – respondents argued that the District Court's ruling based on Eleventh Amendment sovereign immunity was in clear conflict with established case law from this Court and the Courts

of Appeals. In response, petitioners did not attempt to defend the rationale for dismissal of the individual capacity claims relied upon by the District Court. Instead, petitioners asserted an alternative ground for affirmance of the dismissal – a claimed right to qualified immunity. (A22).

On May 31, 2013, the Second Circuit issued its decision, which separately considered respondents' official capacity and individual capacity claims. With respect to the official capacity claims, the Second Circuit ruled, based upon the stipulated factual record, that defendants had violated respondents' First and Fourteenth Amendment rights to freedom of association by singling out union members for termination, without any compelling state interest. (A20-21).

With respect to the individual capacity claims, the Second Circuit ruled that the Eleventh Amendment does not apply to or bar individual capacity claims and reversed the District Court's dismissal of those claims on that ground. (A21-22).[2] The unanimous panel further rejected petitioners' reliance on qualified immunity as an alternative ground for affirmance of the dismissal of the individual capacity claims. The panel held that the allegations of respondents' Amended Complaint state an established claim of impermissible First Amendment retaliation based on respondents'

[2] Petitioners do not seek review of this holding.

political opposition to former Governor Rowland's reelection and that – at the pre-discovery stage – the allegations must be deemed to be true and preclude determination of that defense:

> The claims against defendants as individuals stand in a different procedural posture than those against defendants in their official capacities. As defendants did not join the stipulated set of facts in their individual capacities, and the dismissal of the defendants as individuals was granted on a Rule 12(b)(6) motion to dismiss the complaint, we must assume that the factual allegations of plaintiffs' amended complaint are true for the purposes of our qualified immunity inquiry. The amended complaint – as distinct from the stipulated facts agreed to by both sides for purposes of the summary judgment motion – asserts claims not addressed by the stipulation, alleging, among other things, that the 2003 firings were also motivated by Rowland's desire to retaliate against unions that had opposed him in the 2002 gubernatorial election. As noted above, at the time of defendants' actions it was clearly established that firing employees based "on political belief and association plainly constitute[d] an unconstitutional condition," unless the employer showed that he had "a vital interest in doing so." *Rutan* [*v. Republican Party of Illinois*, 497 U.S. 62,] 78 [(1990)]; *see also Vezzetti v. Pellegrini*, 22 F.3d 483, 486-87 (2d Cir. 1994) (holding that "First

> Amendment rights are violated when a person holding a nonpolicymaking position is dismissed from employment for political reasons"). As defendants have not proffered a vital interest in terminating employees as political retaliation, qualified immunity is unavailable at the pleading stage, which is as far as this litigation has progressed against defendants as individuals. (A23).

The panel was careful to "express no view on whether such immunity may prove applicable at a later stage of the litigation." (*Id*.).

Subsequent to the Second Circuit's ruling, Connecticut's Attorney General entered an appearance on behalf of Connecticut's current Governor and current Secretary, in their official capacities, and filed a petition for *certiorari* seeking review of the Second Circuit's ruling on the official capacity claims. Supreme Court No. 13-480. On December 12, 2013, that petition was withdrawn, and the parties are currently attempting to negotiate a global settlement of this action, including resolution of respondents' individual capacity claims, which the State has agreed to indemnify.

Petitioners, in their individual capacities, continue to be represented by their prior counsel. Petitioners have filed the instant Petition seeking review of the Second Circuit's ruling on respondents' individual capacity claims. Petitioners do not challenge the Second Circuit's holding that the Eleventh Amendment does not bar the individual

capacity claims; nor do petitioners dispute the panel's holding that respondents' allegations of termination based on their political activity and opposition to former Governor Rowland's reelection state an established claim of impermissible First Amendment retaliation for respondents' political activities.

Instead, petitioners base their Petition on their contention that the Second Circuit erroneously ruled that petitioners' motive was relevant to petitioners' legislative immunity defense. However, the Second Circuit made no such ruling. The legislative immunity defense was never raised as an issue in the 2013 appeal, and the Second Circuit expressly held – in its first decision in this action – that motive is legally irrelevant for purposes of determining a state official's entitlement to legislative immunity. (A84-85). That holding was not addressed (or challenged) in the 2013 appeal and remains the law of the case and the law of the Circuit.

Petitioners, upon being advised of the State's withdrawal of its petition and intended negotiation of settlement of all claims, have declined to withdraw their Petition. Neither petitioner has held any position in Connecticut state government for over eight years.

REASONS FOR DENYING THE WRIT

The decision below, reversing the dismissal of petitioners' individual capacity claims, does not conflict with any decision of this Court or any Court of Appeals, nor does it implicate a federal question that has not been decided by this Court. To the contrary, the decision applied the well-established rule that, in evaluating a state official's entitlement to qualified immunity at the pre-discovery stage, the allegations of the Complaint must be accepted as true. *Behrens v. Pelletier,* 516 U.S. 299, 309 (1996) ("At [the pre-discovery] stage, it is the defendant's conduct as alleged in the complaint that is scrutinized for 'objective legal reasonableness'"). Here, the Court of Appeals correctly ruled that the allegations in respondents' Amended Complaint – that petitioners terminated respondents' public employment in retaliation for respondents' political opposition to petitioner Rowland and support for his opponent in the 2002 gubernatorial election – state a well-established claim of impermissible First Amendment retaliation, precluding dismissal at the pre-discovery stage on grounds of qualified immunity. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 69 (1990) (First Amendment prohibits Governor, absent compelling state interest, from basing public employment decisions on employees' political affiliation or support for the party in power as to do so would "constrain[ ] [public employees] from joining, working for, or contributing to the political party and candidates of their own choice"); *Branti v. Finkel*, 445

U.S. 507, 517 (1980) (firing public employees based on political affiliation, absent compelling state interest, violates First Amendment).

The Court of Appeals' decision is, moreover, interlocutory in nature. The case may become moot as a result of the now ongoing settlement discussions between the State of Connecticut (the real party in interest) and respondents. If this case is not settled, the legal issues presented will be the subject of further consideration in the District Court and, if necessary, the Court of Appeals, after development of a factual record. *Crawford-El v. Britton*, 523 U.S. 574, 600 n.21 (1998) ("If the official seeks summary judgment on immunity grounds and the court denies the motion, the official can take an immediate interlocutory appeal, even if [he] has already so appealed a prior order"). Whether petitioners will ultimately be aggrieved by a decision on a full factual record and whether anything will ever need to be addressed by this Court is wholly speculative. *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) (denying *certiorari* "because the Court of Appeals remanded the case [and thus it is] not yet ripe for review").

And, finally, the parade of horribles put forth by petitioners as a reason for granting their Petition is illusory. Respondents' *official* capacity claims were decided on a highly particularized and unique stipulated factual record formulated by petitioners in an effort to vindicate the former Governor's legal position that his work force termination decisions

were wholly immune from constitutional constraints. But that stipulated factual record does not apply at all to petitioners' *individual* capacity claims. Moreover, it is impossible to believe that any official (in or outside of Connecticut) will ever agree to – or that any court will ever find – a similar set of facts, or that any future *bona fide* governmental work force reduction will be deterred by the Second Circuit's decision on the unique factual scenario presented below.

Accordingly, petitioners have not carried their burden of demonstrating "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The Court of Appeals' Application of *Rutan* to Respondents' Allegations of Political Retaliation Was Completely Consistent with Established Law.

In rejecting petitioners' claim to qualified immunity at this stage of the proceedings, the Second Circuit issued the narrow and wholly unremarkable ruling that a Complaint that alleges that public employees were terminated because of their political opposition to the reelection of a sitting governor and support for his opponent states an established claim for political retaliation in violation of the First and Fourteenth Amendments and cannot be dismissed, on grounds of qualified immunity, at the pre-discovery stage. This aspect of the Second Circuit's decision is not even remotely worthy of *certiorari*.

While respondents' official capacity claims were litigated on the basis of a stipulated factual record, petitioners declined to allow that stipulation to extend to respondents' individual capacity claims. (A22-23). Since the individual capacity claims had been dismissed by the District Court on a pre-discovery Motion to Dismiss, the determination of petitioners' entitlement to the defense of qualified immunity was controlled on appeal by the allegations of respondents' Amended Complaint which, for purposes of the appeal, were assumed to be true. *Behrens,* 516 U.S. at 309 (" . . . the legally relevant factors bearing upon the *Harlow* question will be different on summary judgment than on an earlier motion to dismiss. At that earlier stage, it is the defendant's conduct as alleged in the complaint that is scrutinized for 'objective legal reasonableness.' On summary judgment, however, the plaintiff can no longer rest on the pleadings, *see* Fed. Rule Civ. Proc. 56, and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* inquiry.").

Respondents' Amended Complaint expressly alleges in support of respondents' individual capacity claims that petitioners selected respondents for termination in retaliation for respondents' opposition to Governor Rowland's reelection and endorsement and support for his opponent in the election:

> 59. The Named Plaintiff[s] and the members of the plaintiff Affected Employees Class are all members of the endorsing unions.

> Defendants directed that all of the terminations at issue in this lawsuit be from members of the endorsing unions **in retaliation for the endorsing unions' political opposition to defendant Rowland and for their failure to support defendant Rowland in the 2002 gubernatorial race**.
>
> 60. As a result of the conduct of defendants as aforesaid, the Named Plaintiffs and the plaintiff Affected Employees Class have been **impermissibly penalized for exercising their First and Fourteenth Amendment rights to support, individually and through their union, political candidates of their choice**.

(A150, ¶¶ 59-60 [emphasis added]). The law is clear that these allegations present an established cause of action for First Amendment retaliation that survives a claim of qualified immunity.

A state official is not entitled to qualified immunity if his conduct "'violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Crawford-El*, 523 U.S. at 588, quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). A Government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, ___ U.S. ___,

131 S. Ct. 2074, 2083 (2011), quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). This Court does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.*

Such case precedent clearly existed at the time of the conduct at issue here. The law was clear long prior to 2002 that public employees cannot be terminated based upon their political associations or political activity in opposition to a party in power. This Court had repeatedly so held. *Rutan*, 497 U.S. at 69 (First Amendment prohibits Governor, absent compelling state interest, from basing public employment decisions on employees' political affiliation or support for the party in power as to do so would "constrain[ ] [public employees] from joining, working for, or contributing to the political party and candidates of their own choice"); *Branti*, 445 U.S. at 517 (firing public employee based on political affiliation, absent compelling state interest, violates First Amendment); *Elrod v. Burns*, 427 U.S. 347, 350 (1976) (plurality opinion) (discharge or threats to discharge public employees solely because they were not affiliated with or sponsored by party in power, absent compelling state interest, constituted an actionable violation of the First Amendment); *Keyishian v. Bd. of Regents of the University of the State of New York*, 385 U.S. 589 (1967) (absent compelling state interest, state law prohibiting hiring public school teachers who are members of the Communist Party violates teachers' First Amendment rights of free association).

The Second Circuit had also expressly so held on repeated occasions prior to the conduct at issue in this action. *See*, *e.g.*, *Vezzetti v. Pellegrini*, 22 F.3d 483 (2d Cir. 1994) (termination of non-policymaking employee based on political affiliation infringes First Amendment rights); *Lieberman v. Reisman*, 857 F.2d 896 (2d Cir. 1988) (adverse employment action because of public employee's political affiliation violates First Amendment). The other Courts of Appeals were in accord. *Acosta-Orozco v. Rodriguez-De-Rivera*, 132 F.3d 97 (1st Cir. 1997); *Robertson v. Fiore*, 62 F.3d 596 (3d Cir. 1995); *Sales v. Grant*, 158 F.3d 768 (4th Cir. 1998); *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984); *Hoard v. Sizemore*, 198 F.3d 205 (6th Cir. 1999); *Mitchell v. Randolph*, 215 F.3d 753 (7th Cir. 2000); *Horton v. Taylor*, 767 F.2d 471 (8th Cir. 1985); *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989); *Mason v. Oklahoma Turnpike Auth.*, 115 F.3d 1442 (10th Cir. 1997); *Brett v. Jefferson County*, 123 F.3d 1429 (11th Cir. 1997).

The Second Circuit's holding that the allegations of respondents' Amended Complaint state an established cause of action for First Amendment political retaliation sufficient to preclude dismissal on qualified immunity grounds and must be deemed true at the motion to dismiss stage is, thus, perfectly consistent with existing law. No reason – let alone any compelling reason – exists to review that decision.

II. Petitioners Have Not Established Extraordinary Inconvenience or Embarrassment Necessary to Justify Review of the Second Circuit's Interlocutory Ruling.

Even if issues presented by this case might, on a fully developed record, warrant this Court's review, *certiorari* is plainly not warranted at this time.

The Second Circuit's decision remanded respondents' individual capacity claims to the District Court for development of a factual record, and the panel was careful to "express no view on whether [qualified] immunity may prove applicable at a later stage of the litigation." (A23). The Second Circuit's decision on petitioners' initial appeal in 2007 also left open, pending development of a factual record, whether petitioners are entitled to absolute legislative immunity on respondents' claims. (A85-89).

There has been no discovery with respect to either of petitioners' asserted immunity defenses or on the merits of respondents' individual capacity allegations. There has been no determination in the District Court, based on a factual record, of petitioners' entitlement to either immunity or to the sufficiency of respondents' claims. No final judgment has entered in the District Court, and a full range of outcomes in the District Court is possible – including settlement, pretrial disposition in petitioners' favor on legislative or qualified immunity grounds, or a

verdict for respondents or petitioners after trial. Should petitioners fail to prevail on their immunity defenses on pretrial summary judgment in the District Court once a factual record is developed, further interlocutory review by the Second Circuit prior to trial is permissible and likely. *See Crawford-El*, 523 U.S. at 600 n.21 ("If the official seeks summary judgment on immunity grounds and the court denies the motion, the official can take an immediate interlocutory appeal, even if [he] has already so appealed a prior order").

Moreover, as noted at the outset, the State of Connecticut has withdrawn its petition for *certiorari* and indicated its willingness to engage in settlement discussions with respondents, including settlement of respondents' individual capacity claims against petitioners. Such settlement would, of course, render this case moot. *Lake Coal Co., Inc.*, 474 U.S. at 120 (rejecting parties' motion to decide the questions presented in the petition for writ of *certiorari* since settlement of action rendered case moot). And, if the case does not settle, and instead proceeds to a final judgment in the District Court and Court of Appeals, this Court can then consider whether to grant combined review of the official capacity and individual capacity rulings.

While this Court can, of course, choose to review the case at this time, the Court has long noted that "except in extraordinary cases, the writ is not to be issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *accord*

American Construction Co. v. Jacksonville, T. & K. R. Co., 148 U.S. 372, 384 (1893) ("This court should not issue a writ of *certiorari* to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."); *Brotherhood of Locomotive Firemen*, 389 U.S. at 328 (denying *certiorari* "because the Court of Appeals remanded the case [and thus it is] not yet ripe for review").

As Justice Scalia has stated in concurring in the denial of *certiorari* sought in a civil rights case where, as here, the court of appeals reversed a district court judgment for the state officials and remanded for further proceedings:

> We generally await final judgment in the lower courts before exercising our certiorari jurisdiction. [citations omitted]. I think it prudent to take that course here. Our action does not, of course, preclude [the State of Virginia] from raising the same issues in a later petition, after final judgment has been rendered.

Virginia Military Institute v. United States, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for writ of *certiorari*). Indeed, the Court subsequently granted *certiorari after entry of final judgment* in the *Virginia Military Institute* case. *United States v. Virginia*, 518 U.S. 515 (1996).

This prudential rule is particularly applicable here. Petitioners will suffer no prejudice from the denial of *certiorari* at this time. Petitioners will be entitled to seek *certiorari* pretrial should the District Court and the Court of Appeals deny qualified immunity on a developed factual record. Moreover, they will be fully entitled, in a later petition, to seek this Court's review of any issues decided in earlier appeals in the action. *See Major League Baseball Players Association v. Garvey*, 532 U.S. 504, 508 n.1 (2001) ("we have authority to consider questions determined in earlier stages of the litigation where *certiorari* is sought from the most recent of the judgments of the Court of Appeals"); *accord Virginia Military Institute*, 508 U.S. at 946.

Equally important, petitioners will not face undue burden in the District Court in seeking to establish their entitlement to immunity, as the District Court is fully authorized, as appropriate, to issue orders narrowing discovery to the issues posed by the defenses. *Crawford-El*, 523 U.S. at 599-600 (court may "give priority to discovery concerning issues that bear upon the . . . immunity defense, . . . since that defense should be resolved as early as possible").

There is plainly no reason to expend this Court's resources reviewing legal issues that will be more fully developed factually in the lower courts and that may become moot – either by settlement or by the outcome of further proceedings below if settlement is not reached.

III. None of the Other Issues Asserted by Petitioners Is Actually Presented by the Decision Below or, Even If Presented, Would Warrant Granting the Writ.

Apparently recognizing that the Court of Appeals' decision on the individual capacity claims does not present any issue worthy of review (let alone review at this time), petitioners argue that *certiorari* should be granted for reasons not presented to, addressed by, or relevant to the Court of Appeals' decision.

A. The Second Circuit Did Not Rule That Motive Is Relevant to the Defense of Legislative Immunity, Nor Is Its Holding in This Case Inconsistent with *Bogan* or *Consumers Union*.

Petitioners argue that *certiorari* is warranted because the Second Circuit improperly imported consideration of motive into evaluation of petitioners' *legislative* action:

> If for no other reason, this Court should grant this petition to address that ruling and hold that subjective motives are legally irrelevant to the constitutionality of *legislative* action by executive officials.

(Pet. at 17 [emphasis supplied]).[3] Petitioners devote two separate legal arguments (I and III), comprising over 19 pages of printed text, to this contention.

Petitioners' argument that the Second Circuit has ruled that their motives are relevant to their entitlement to legislative immunity (assuming their conduct is ultimately found to be legislative in nature) is categorically incorrect. Petitioners did not raise the defense of legislative immunity as an alternative ground for affirming the dismissal of respondents' individual capacity claims in the current appeal. The legislative immunity defense was, however, addressed by the Second Circuit in its decision on defendants' first appeal – an interlocutory appeal from the denial of defendants' motion to dismiss on grounds, *inter alia*, of legislative immunity. (A65-90).

On defendants' prior appeal, the Second Circuit held that defendants' entitlement to the defense of absolute legislative immunity turned on resolution of disputed facts concerning their adherence to Connecticut statutes applicable to the actions of executive branch officials who purport to perform legislative budgetary tasks. (A85-89). In its ruling, the Second Circuit expressly held that a state official's motive is legally irrelevant to the defense of legislative immunity:

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[3] *See also* Pet. at 14 n.6 ["This petition focuses on why motive-based constitutional torts in general have no application to cases involving legislative action by executive officials."].

> It has been well-settled since the Supreme Court's decision in *Bogan* that courts may not consider a defendant's motives when assessing the legislative nature *vel non* of his actions. *Bogan* [*v. Scott-Harris*], 523 U.S. [44,] 54-55 [(1998)]. . . .
>
> [T]he Supreme Court in *Bogan* held that questions concerning the defendants' motives were wholly irrelevant to its determination of whether they were entitled to legislative immunity. *See id*. The Court concluded that the relevant question was "whether, *stripped of all considerations of intent and motive*, petitioner's acts were legislative." *Id*. (emphasis added). . . .
>
> Neither a showing of "good faith" nor an inquiry into defendants' subjective "reasons" addresses the relevant issue of whether the "nature of the act[s]" that gave rise to the alleged harm was legislative or executive. *Id*. at 54. (A84).

Thus, consistent with *Bogan,* if, on remand in the District Court, petitioners establish that their challenged conduct was legislative in nature, they will be entitled to dismissal of respondents' individual capacity claims irrespective of their subjective motives.

The Second Circuit's unequivocal endorsement of the holding in *Bogan* in the first appeal completely belies petitioners' 14 page argument in their Petition that the Second Circuit's decision conflicts with *Bogan* or *Supreme Court of Virginia v. Consumers*

Union of United States, Inc., 446 U.S. 719 (1980). (Pet. at 23-37). This ground of the Petition presents nothing worthy of review.

B. The Second Circuit Did Not Hold That There Was, For Purposes of Determining Qualified Immunity, an Established First Amendment Right Against Retaliation for Union Membership, But Such a Holding Would Not Have Been Improper.

Petitioners ignore the allegations of political retaliation in respondents' Amended Complaint and argue that the Second Circuit improperly extended the *Rutan* doctrine to apply to terminations ordered in retaliation for union membership. (Pet. at 20). The panel's discussion of qualified immunity was, however, specifically limited to respondents' allegations of *political* retaliation:

> The amended complaint – as distinct from the stipulated facts agreed to by both sides for purposes of the summary judgment motion – asserts claims not addressed by the stipulation, alleging, among other things, that the 2003 firings were also motivated by **Rowland's desire to retaliate against unions that had opposed him in the 2002 gubernatorial election**. As noted above, at the time of defendants' actions it was clearly established that firing employees based "on political belief and association plainly constitute[d] an unconstitutional

> condition," unless the employer showed that he had "a vital interest in doing so." *Rutan*, 497 U.S. at 78; *see also Vezzetti v. Pellegrini*, 22 F.3d 483, 486-87 (2d Cir. 1994) (holding that "First Amendment rights are violated when a person holding a nonpolicymaking position is dismissed from employment for political reasons"). As defendants have not proffered a vital interest in terminating employees as **political retaliation**, qualified immunity is unavailable at the pleading stage, which is as far as this litigation has progressed against defendants as individuals. (A23 [emphasis added]).

As the above paragraph reflects, nothing in the panel's ruling holds that there was, in 2002, an established First Amendment right to be free of retaliation for union membership.

Such a holding would not, however, have been novel or certworthy, as the Courts of Appeals had uniformly held prior to 2002 that the First Amendment forbids retaliation based on union membership or union activity. *See*, *e.g.*, *Clue v. Johnson*, 179 F.3d 57, 60-61 (2d Cir. 1999) ("There is no doubt that retaliation against public employees solely for their union activities violates the First Amendment"); *Boddie v. City of Columbus*, 989 F.2d 745, 749 (5th Cir. 1993) ("[T]he first amendment is violated by state action whose purpose is either to intimidate public employees from joining a union or from taking an active part in its affairs or to retaliate against those who do. Such protected First

Amendment rights flow to unions as well as to their members."); *Hanover Twp. Fed'n of Teachers v. Hanover Cmty. Sch. Corp.*, 457 F.2d 456, 460 (7th Cir. 1972) ("a discharge because of union membership [violates] the general constitutional right of free association" as there is "no reason to distinguish a union from any other association"); *Am. Fed'n of State, Cnty., & Mun. Emps. v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969) (city could not fire employees because they joined a labor union as "[u]nion membership is protected by the right of association under the First and Fourteenth Amendments"); *Lontine v. VanCleave*, 483 F.2d 966, 967-68 (10th Cir. 1973) (public employee had "a First Amendment right to participate and retain membership in a union [and] could not be suspended or dismissed for the exercise of his constitutional rights").[4]

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[4] It should be noted that respondents do not agree with petitioners' underlying argument that union membership and activity do not involve issues of political belief. As petitioners themselves acknowledge, they "do not deny that unions and their members engage in political activity." (Pet. at 22). This Court has recognized that unions engage directly in the political process and have a protected First Amendment right to do so. *Citizens United v. Federal Election Commission*, 558 U.S. 310, 349 (2010) ("political speech is 'indispensable to decisionmaking in a democracy' [and] the worth of speech 'does not depend upon the identity of its source, whether corporation, association, union or individual' "). The Court has held in union cases that " '[f]ree discussion concerning the conditions in industry and the causes of labor disputes [is] indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.' " *Thomas v. Collins*,

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Thus, while the Second Circuit did not actually so hold, nothing in a ruling that government officials were, in 2002, prohibited by the First and Fourteenth Amendments from retaliating against public employees based on the protected associational status of union membership would be novel or remotely worthy of this Court's review.

C. Petitioners' Contention That the Second Circuit's Decision Will Interfere with the Governor's Ability to Manage the State's Work Force Is Baseless.

Petitioners argue that review is warranted because the Second Circuit's decision will disrupt the State's ability to manage the size and cost of its work force and will prevent a Governor from utilizing the threat of layoffs as an effective tool during labor negotiations. This argument is directed to the Second Circuit's ruling on respondents' official capacity claims as to which petitioners – who have held no position in state government for over eight years – have no standing. Nonetheless, it should properly be noted that petitioners' rhetorical arguments misstate

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323 U.S. 516, 532 (1945), quoting *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940). Public sector unions play a particularly important role in the political process since "a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox v. Serv. Emps. Int'l Union, Local 1000*, ___ U.S. ___, 132 S. Ct. 2277, 2289 (2012).

the Second Circuit's ruling and the factual bases on which the opinion was predicated.

Respondents' official capacity claims were decided by the Second Circuit on the basis of a highly-particularized stipulation of facts entered into for tactical reasons by the prior Administration and petitioners' counsel. In that stipulation, defendants (in their official capacity) explicitly abandoned any contention that the layoffs were ordered to deal with Connecticut's FY 2003 budget deficit or achieve the savings sought by rejected concessions demands.[5]

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[5] Thus, although petitioners now argue that Governor Rowland ordered the layoffs because of the Connecticut FY 2003 budget crisis to obtain budget savings that the unions refused to provide through contract concessions, defendants *stipulated* that this is *not* a case in which work force layoffs were ordered to obtain the budgetary savings that the rejected concessions would have achieved:

> 1. There was no correlation between the amount of the concessions demanded by Rowland and any savings from the terminations. (A194, ¶ 59).
>
> 2. The terminations were not based on any calculation of which and how many job reductions were necessary to achieve the budgetary savings sought by the concessions. (A194, ¶ 58).
>
> 3. Many of the terminations had absolutely no effect on budgetary expenses. (A195, ¶ 62). For example, defendants terminated the employment of union employees whose positions were fully funded by private industry or the federal government. (A195, ¶ 65). Many of the layoffs cost the State money in advance payment of accrued vacation and sick pay. (A195, ¶ 66). Many of the ordered layoffs were not

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Defendants further abandoned any contention that the layoffs were based on any evaluation of the staffing needs of the State's work force or a desire to reduce work force costs.[6] Instead, defendants sought to vindicate former Governor Rowland's contention that a Governor is wholly immune from judicial review of work force management decisions, including

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even scheduled to take effect during the applicable budget year. (A195, ¶ 63).

4. Governor Rowland's "Balanced Budget Plan" – required by Connecticut statute to set forth the measures the Governor seeks to implement to meet a budget deficit – did *not* include the layoffs as one of the measures to eliminate the budget deficit. (A199, ¶¶ 71-72).

5. On repeated occasions, arbitrators considering grievances by employees who contended that there was no economic necessity to warrant their layoffs determined, after hearings, that the layoffs were improper in that there was no economic necessity for the layoffs. (A198-99, ¶ 70).

[6] Defendants *stipulated* that this is *not* a case in which work force layoffs were ordered based on an evaluation of the staffing needs of the State's work force or based on a general desire to reduce the cost of the work by reducing the size of the work force:

1. The layoffs were not based on any evaluations by OPM of the staffing needs of each agency for the performance of the agency's functions. (A194, ¶ 57).

2. The decisions about which and how many union workers were to be terminated were not based upon any analysis of the staffing needs of the State's work force or savings that could be achieved through terminations of non-union employees. (A193-94, ¶¶ 49, 57-58).

constitutional constraints on terminations based on protected associations. (A200, ¶ 76).

Consistent with these stipulated facts (and with defendants' contention that there was no First Amendment constraint on the governor's right to target union employees for termination (A200, ¶ 76)), defendants offered *no* evidence in the District Court or in the Second Circuit to support a contention that the layoffs were ordered to achieve the savings sought in the contract concessions or that the layoffs were ordered as part of an overall plan to reduce the size (or cost) of the work force.

Petitioners' argument that the Second Circuit's decision will interfere with the Governor's lawful use of the threat of layoffs to achieve labor concessions further ignores that respondents expressly conceded in their Brief to the Second Circuit that the Governor has the authority to order layoffs where the unions refuse to grant concessions or where the Governor determines that work force savings are desirable:

> Plaintiffs acknowledge that defendants have the right to manage the size of the State's work force and may make decisions to lay off state employees based upon constitutionally-neutral determinations as to the work force needs and budgetary factors. In the face of economic necessity, defendants undeniably have the right to implement neutral layoffs of state employees – without regard to union membership or other protected

> classifications – in order to alleviate a financial crisis. (Appellants' Brief at 43).

The Second Circuit's decision expressly affirms the State's authority to manage the size and expense of the State's work force consistent with the above concession:

> Plaintiffs concede that defendants have the right to manage the size of the State's work force, and may lay off employees based on constitutionally-neutral determinations of work force needs and budgetary constraints. (A10).

No Connecticut Governor has, before or since 2002, sought to order layoffs limited solely to union employees. In 1991, Governor Weicker ordered and implemented layoffs of unionized *and* non-unionized employees before a concessions agreement with the unions was reached. In 2011, Governor Malloy issued layoff notices for union *and* non-union employees that were rescinded when a concessions agreement was reached. In both instances, the layoff notices were issued in a manner consistent with the Second Circuit's decision and were clearly constitutionally valid under the Second Circuit's holding because the layoff decisions were based on the need for savings and did not discriminate on the basis of union membership. As Governor Malloy's July 15, 2011 Balanced Budget Plan made clear, the potential savings resulting from his layoff decisions in 2011 were specifically designed to help balance the budget.

(*See* www.ct.gov/opm/lib/opm/budget/2012_midterm/budget_balancing_plan_July_15). By contrast, petitioners *stipulated* that Governor Rowland's December 6, 2002 Balanced Budget Plan did *not* include savings from *any* of the layoffs in the measures to balance the budget. (A199, ¶ 72). And, the unions did not challenge the constitutionality of the layoffs in either 1991 or 2011.

Respondents are aware of no other instance in which a state official (in or outside of Connecticut) has stipulated that layoffs were ordered without regard to the savings they would produce and without regard to the staffing needs of a state's work force (A193-94, ¶¶ 49, 57-59); were limited solely and intentionally to unionized employees (A194-96, ¶¶ 44, 51, 53-54), in a work force that had over 12,000 non-union employees, many holding positions identical to those held by union employees (A193, ¶ 40); and offered no evidence to support any justification for limiting the terminations to union employees. It is difficult to believe that any other state official will ever enter into a similar set of stipulations or that the conduct stipulated to by petitioners will ever occur again. And, of course, petitioners refused to enter into such stipulations with respect to respondents' individual claims.

In sum, the fact scenario underlying the official capacity decision below was based upon highly unique (and unusual) stipulated facts that are not applicable to determination of respondents' individual capacity claims, that have never occurred before, and

are unlikely to ever occur again, thus further obviating the need for this Court's review. *See*, *e.g.*, *Curry v. Baker*, 479 U.S. 1301, 1302 (1986) (Powell, J., denying application to stay mandate pending decision on *certiorari*, where case was unlikely to recur and the lack of conflict among the circuits made grant of *certiorari* unlikely).

D. The Second Circuit Did Not Erroneously Apply Strict Scrutiny.

As the final ground of their Petition, petitioners challenge the Second Circuit's application of the strict scrutiny standard to its evaluation of respondents' official capacity claims, which are, of course, not before the Court. Petitioners – who do not dispute that strict scrutiny is appropriately applied where, as is the gravamen of the individual capacity claims in respondents' Amended Complaint, a governor intentionally "punished the respondents simply . . . because they did not vote for him" (Pet. at 41) – hold no state office and again have no standing to challenge this aspect of the Second Circuit's ruling.

The panel's holding was, in any event, fully consistent with this Court's precedent. As this Court has explicitly stated:

> [I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing freedom to association is subject to the closest scrutiny.

NAACP v. State of Alabama ex rel. Patterson, 357 U.S. 449, 460-61 (1958).

The law is well-established that this principle applies with full force when the state seeks to take adverse action against public employees based upon a protected First Amendment association. *Rutan*, 497 U.S. at 76; *Keyishian*, 385 U.S. at 602. This principle applies to membership in political parties, *Rutan*, 497 U.S. at 76 (Governor may not base public employee hiring decisions on membership in Republican Party absent a compelling state interest implemented in the least restrictive manner); religious groups, *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (strict scrutiny applied to requirement of affirmation of belief in God as qualification for public office); advocacy organizations, *Shelton v. McKinley*, 174 F. Supp. 351, 358-59 (E.D. Ark. 1959) (three-judge panel) (strict scrutiny applied to state law prohibiting hiring members of the NAACP as public school teachers), *rev'd as to other issues sub nom. Shelton v. Tucker*, 364 U.S. 479 (1960); and even to subversive organizations. *Keyishian*, 385 U.S. at 602 (strict scrutiny applied to state law prohibiting hiring public school teachers who are members of the Communist Party).

This ground of the Petition presents nothing worthy of review.

CONCLUSION

Petitioners have not established any reasons – let alone any compelling reasons – for this Court to grant the Petition. Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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