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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

RULES

REPLY BRIEF FOR PETITIONERS

Respondents' opposition to certiorari is built on two fundamental mischaracterizations of this case and a self-serving assertion. This reply brief corrects those mischaracterizations of facts and law and explains why their self-serving assertion cannot be credited.[1]

I. RESPONDENTS MISCHARACTERIZE THEIR FACTUAL CLAIMS.

Respondents describe their amended complaint as alleging, in essence, that Governor Rowland directed his staff to draw up a list containing the names of 2800 state employees who were card carrying, dues paying union members and then said to the staff, "fire them."[2] That is a gross mischaracterization of the claim respondents have pursued since February 2003.

Respondents' claim is that Governor Rowland *eliminated positions* in collective bargaining units

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[1] Respondents also engage in an unprofessional effort to distract this Court from the important questions presented by referring to Governor John Rowland's personal background and current occupation. Those matters are factually and legally irrelevant to the issues presented in the petition and, therefore, warrant no response.

[2] Although the Second Circuit's opinion repeatedly uses the term "fire" to describe Governor Rowland's layoff directive, the court of appeals' choice of that inflammatory term should not distract or mislead this Court.

and implemented the resultant layoffs and demotions *in strict compliance with the seniority and bumping provisions of Respondents' collective bargaining contracts* with the State of Connecticut. *See* Pet. 7-8, 10.

Because a state employee who is a member of a bargaining unit is not required to join the union (Pet. 4), the fact that layoffs were conducted in accordance with seniority and bumping provisions necessarily meant that employees who were in collective bargaining units but who had not joined the union were also laid off, a point respondents begrudgingly acknowledged in the Second Circuit:

> Plaintiffs do not dispute that the layoff decisions in the bargaining units were conducted in accordance with the seniority and bumping provisions of the union's collective bargaining agreements and that it may be that a small number of non-union employees were laid off.

See Letter from Respondents to the Second Circuit, (dated Sept. 7, 2013) at 4.[3]

Faced with the undisputed fact that Governor Rowland did nothing more than exercise a sovereign power that the State expressly reserves in all of its collective bargaining agreements, respondents claimed that he eliminated bargaining unit positions as a

[3] The letter is docketed in the Second Circuit as document no. 122 in appeal 13-3061-cv.

proxy for targeting card carrying, dues paying union members:

> It is plaintiffs' position that the defendants treated the bargaining units as a proxy for union membership and targeted unionized state employees for termination by limiting the layoffs to bargaining unit members – to the exclusion of management, temporary and confidential employees – as a way of pressuring the unions to make concessions; and that any non-union employees in the bargaining units that may have been laid off were inadvertent victims of defendants' targeting of unionized employees.

Id.

Thus, the question presented is *not* whether petitioners are entitled to qualified immunity from suit for allegedly "firing" union members because of anti-union animus or a desire to retaliate against the unions because they did not support Governor Rowland's 2002 reelection campaign. Instead, the question is whether respondents can defeat petitioners' qualified immunity defense by alleging that Governor Rowland had a "bad motive" when he exercised the State's sovereign power and contractual right to reduce the size of the unionized workforce through layoffs after respondents refused to grant concessions. The answer to that question necessarily turns on whether Governor Rowland's subjective motives are *legally relevant*.

By using a motive-based legal framework to analyze respondents' claim (*see* Pet. 23), the Second Circuit answered this question in the affirmative. For the reasons set forth in the petition, this Court should grant certiorari and reverse the Second Circuit, lest every layoff – particularly by an incumbent governor who is perceived as "anti-union" – become a motive-based constitutional tort.

II. RESPONDENTS MISCHARACTERIZE PETITIONERS' SUBJECTIVE MOTIVE ARGUMENT.

According to respondents, "petitioners base their Petition on their contention that the Second Circuit erroneously ruled that petitioners' motive was relevant to petitioner's legislative immunity defense." Opp. 12; *see also id.* at 25.

That characterization – and the entire argument in the opposition built on the characterization (Opp. 24-27) – bares no resemblance to the argument in the petition.

The petition does not ask this Court to decide whether the Second Circuit erred in rejecting petitioners' absolute legislative immunity defense. Pet. 11, n.5. Nor do petitioners describe the Second Circuit as having ruled that their subjective motives are relevant to their absolute legislative immunity defense. To the contrary, the Second Circuit correctly ruled in

SEBAC I[4] that an executive official's motives are not relevant to determining whether his actions are legislative in nature. Pet. App. 84.

Rather, the legal premise of the petition is this Court's holding in *Bogan v. Scott-Harris*, 523 U.S. 44, 56 (1998). That holding, which the Second Circuit followed in *SEBAC* I but ignored in *SEBAC* II,[5] is that *eliminating positions* from the public workforce is, in substance, a legislative act because it "may have prospective implications that reach well beyond the particular occupant of the office." Pet. 27 (quoting *Bogan*); *see also id.* at 23.

The argument that logically follows from the *Bogan* premise – and the reason why the Second Circuit's decision conflicts with *Bogan* – is that when a plaintiff challenges the constitutionality of an executive official's substantively legislative act, a court must review the act objectively, just as it would review legislation enacted by a legislative body objectively.

It is not enough to assert, as respondents repeatedly do, that a court is required to accept the allegations of a complaint as true for the purpose of a motion to dismiss. A court is *not* required to accept as

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[4] *State Empls. Bargaining Agent Coalition v. Rowland*, 494 F.3d 71 (2d Cir. 2007).

[5] *State Empls. Bargaining Agent Coalition v. Rowland*, 718 F.3d 126 (2d Cir. 2013).

true factual allegations that are *legally irrelevant* and thus immaterial. *E.g.*, Fed. R. Civ. P. 12(f).

If this Court agrees with petitioners that Governor Rowland's subjective motives for ordering a layoff are legally irrelevant to determining the constitutionality of his layoff directive, it necessarily follows that the allegations in the amended complaint concerning the governor's motives for issuing that directive are also irrelevant. And if they are irrelevant, the Second Circuit erred in rejecting petitioners' qualified immunity defense based on those allegations.

III. THE SECOND CIRCUIT RADICALLY EXPANDED THE SCOPE OF THIS COURT'S POLITICAL PATRONAGE CASES AND FUNDAMENTALLY ALTERED THE BALANCE OF POWER IN LABOR/MANAGEMENT RELATIONS.

A. The Second Circuit Expressly Acknowledged That Its Application Of *Elrod* And *Rutan* Was A Matter Of First Impression.

Respondents suggest that the Second Circuit did nothing remotely unusual when it applied this Court's political patronage decisions[6] to justify its conclusion that the stipulated facts – and the allegations of the amended complaint, accepted as true – established a

[6] *E.g.*, *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

First Amendment violation. Opp. 18. That suggestion flies in the face of the plain language of the Second Circuit's decision: the court of appeals expressly stated that it was deciding an issue of first impression. *See* Pet. App. 11.

If Governor Rowland had picked out a few specific state employees and fired them from existing positions, allegedly because they had joined a union or had engaged in union activities, the Second Circuit's application of the *Elrod*/*Rutan* legal framework might – and petitioners emphasize *might* – be possible to justify (although the *Pickering* paradigm, which includes a balancing test that is not part of the Court's patronage cases, would probably be a better fit.)[7] Or if he had a written policy, or even an unwritten yet established practice, of refusing to hire into existing government positions any person who was a card carrying, dues paying member of a labor union, the *Elrod*/*Rutan* framework might, again might, pertain.

These hypotheticals, however, do not remotely describe this case. The Second Circuit's admittedly novel application of the *Elrod*/*Rutan* framework to a layoff that respondents concede was authorized by a collective bargaining agreement is unprecedented and unjustifiable.

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[7] *See Pickering v. Bd. of Educ.*, 391 U.S. 536, 568 (1968).

B. The Second Circuit's Decision Alters The Balance Of Economic Power In Labor/ Management Relations.

Respondents also describe as "illusory" the "parade of horribles put forth by petitioners." Opp. 14. According to respondents, this case is a "one off," a case based on a unique set of stipulated facts that make this type of lawsuit "unlikely to ever occur again." *Id.* 36. Respondents are wrong.

First, respondents ignore the concerns of the Connecticut Association of Boards of Education and the Yankee Institute, both of which have filed amicus briefs in support of the petition.

Second, before he withdrew the petition for certiorari he had filed on behalf of the State of Connecticut, the Attorney General shared these same concerns, arguing that the Second Circuit's decision would "profoundly impair the legitimate management of government workforces." *See* Petition for a Writ of Certiorari (No. 13-480) at 30. The Attorney General wrote:

> The Second Circuit's constitutionalization of a classic labor-management dispute *seriously alters public labor relations*. . . . The extension of *Elrod*/*Rutan* will unnecessarily impede legitimate government actions in the often difficult and protracted negotiations involved in collective bargaining, exposing government employers to significant fiscal risk and judicial intrusion into government employment and budgetary matters.

Id. at 30 (emphasis supplied).

Third, respondents fail in their attempt to dismiss this case as factually unique and, therefore, as unlikely to affect labor/management relations. Far from describing a highly unusual set of acts by a sitting governor, the stipulation of facts, which largely tracks the allegations of the complaint (except those concerning Governor Rowland's motives), reflects an increasingly common event in state and local governments: an executive official using all lawful economic weapons at his or her disposal, including the threat of layoffs, to induce public employee unions to grant concessions to address a budget deficit.

C. Respondents' Arguments Require Federal Courts To Second-Guess Not Only The Subjective Motives Of Executive Officials For A Contractually Authorized Layoff, But Their Specific Budgetary Choices As Well.

In their argument that the Second Circuit's judgment is based on a unique set of facts unlikely to reoccur in the future, respondents point to several stipulations in particular. For example, they note the stipulations that there was no correlation between the amount of the concessions demanded and any savings from the layoffs; that the layoffs were not based on any calculation of which and how many job reductions were necessary to achieve the budgetary savings sought by the concessions; and that certain layoffs, such as those of individuals

holding federally-funded positions, had no effect on budgetary expenses. Opp. 31-32.

In pointing to these stipulations, respondents appear to argue that Governor Rowland's layoff directive is constitutionally infirm, not only because of his alleged anti-union animus and improper political motivations, but also because they don't agree with the specific choices he and his staff made about which positions to eliminate.

For the reasons set forth above, these facts are not unusual. More importantly, the question is not whether these facts are true (or must be accepted as true on a motion to dismiss), but whether, like the allegations concerning subjective motive, they are *legally relevant*. To treat these types of facts as legally relevant in a First Amendment "retaliation" case unavoidably requires federal courts and juries to second-guess budgetary choices that should be left to the discretion of elected officials, subject to review by the voters at the ballot box. In this particular case, treating these facts as legally relevant ultimately would require a judge or jury to go behind the list of positions that Governor Rowland ordered eliminated (Pet. 6-7), and determine *why* he selected those specific positions for elimination and whether he can justify his choices by reference to some indeterminate legal standard.

In *Borough of Duryea, PA v. Guarnieri*, 131 S.Ct. 2488 (2011), this Court noted the serious federalism and separation-of-powers concerns raised by

requiring federal courts to review the budgetary choices made by elected officials:

> This would occasion review of a host of collateral matters typically left to the discretion of public officials. Budget priorities, personnel decisions, and substantive policies might all be laid before the jury. This would raise serious federalism and separation-of-powers concerns.

131 S.Ct. at 2496.

As a general rule, constitutional provisions, like statutes, should be interpreted to avoid, rather than create, serious constitutional issues. Accordingly, this Court should reject respondents' proffered interpretation of the First Amendment.

IV. RESPONDENTS' ARGUMENT THAT THIS COURT SHOULD DENY THE PETITION BECAUSE THE JUDGMENT IS INTERLOCUTORY IGNORES THAT THE ISSUE ON APPEAL IS WHETHER PETITIONERS HAVE QUALIFIED IMMUNITY *FROM SUIT*.

Although this Court has at times expressed the view that it prefers to wait until a case has reached a final judgment before considering whether it merits Supreme Court review, that view does not pertain to cases, such as this one, which raise important questions about a defendant's entitlement to qualified immunity *from suit*. *E.g.*, *Ashcroft v. al-Kidd*, 131

S.Ct. 2074 (2011); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

Petitioners do not suggest that every case involving a district court's rejection of a government official's qualified immunity defense necessarily merits certiorari review in this Court, even though that rejection is subject to interlocutory review as of right in a court of appeals. Nevertheless, cases such as *Mitchell v. Forsyth*, *Iqbal* and *al-Kidd*, coupled with the very purpose of the qualified immunity doctrine, reveal the poverty of respondents' argument that petitioners "will suffer no prejudice from the denial of *certiorari* at this time" and will "not face undue burden in the District court in seeking to establish their entitlement to immunity. . . ." Opp. 23.

Relying on *Crawford-El v. Britton*, 523 U.S. 574 (1998), respondents assert that the District Court on remand can "issue orders narrowing discovery to the issues posed by the [immunity] defenses." Opp. 23. However, as petitioners already explained at length, by 2009, when this Court decided *Iqbal*, a majority of its members had lost confidence in the "careful-case-management" approach the Court endorsed eleven years earlier in *Crawford-El*. Pet. 35.

Moreover, after ten years of litigation, it is now clearer than ever that the central disputed factual issue in this case is Governor Rowland's subjective motive for ordering layoffs in 2002. Pet. 18. If his motives are legally relevant, as the Second Circuit held in *SEBAC* II, obtaining summary judgment on

his qualified immunity defense will be difficult, to say the least. "Because an official's state of mind is 'easy to allege and hard to disprove,' insubstantial claims that turn on improper intent may be less amendable to summary disposition than other types of claims against government officials." *Crawford-El*, 523 U.S. at 585. If they are not legally relevant, as petitioners contend, then a remand for further proceedings is pointless.

For these reasons, the interlocutory nature of the Second Circuit's ruling rejecting petitioners' qualified immunity defense stands as no obstacle to the grant of certiorari. To the contrary, the *purely legal* questions presented in this petition warrant review now, not years from now after petitioners have been forced to submit even to limited discovery, including videotaped depositions, forced to file a likely pointless summary judgment motion, forced to file yet another interlocutory appeal to the Second Circuit, and forced to file yet another petition for certiorari.

CONCLUSION

In *Crawford-El*, this Court granted certiorari to decide two questions, the second of which was:

> In a First Amendment retaliation case against a government official, is the official entitled to qualified immunity if she asserts a legitimate justification for her allegedly retaliatory act and that justification would

> have been a reasonable basis for the act, even if evidence – no matter how strong – shows the official's actual reason for the act was unconstitutional.

Crawford-El, 523 U.S. at 602 (Rehnquist, C.J., dissenting). The Court, however, did not decide the question. The Court also agreed to hear, but then ultimately declined to decide, a closely related question in the *Bivens* context. *See Siegert v. Gilley*, 500 U.S. 226 (1991).[8]

Petitioners respectfully ask this Court to agree to address the *Crawford-El* question now, at least with respect to a *specific category* of cases: those involving substantively legislative acts by executive officials.

Significantly, if the Court concludes that subjective motive is not an element of a plaintiff's constitutional claim in the relevant category of cases, it necessarily follows that the Second Circuit erred in applying the *Elrod/Rutan* framework to this case because that framework is motive-based. Pet. 23. Additionally, the relevance of motive aside, the Second Circuit's radical expansion of the scope and reach of a strict scrutiny framework – to cover contractually authorized layoffs in unionized workforces – is unprecedented and impossible to justify in that context.

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[8] Then Acting Solicitor General John G. Roberts, Jr. was the lead author of the government's brief in *Siegert*.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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