

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**

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

This supplemental brief, filed pursuant to Rule 15.8 of the Rules of this Court, brings to the Court's attention a December 31, 2013 decision of the Tenth Circuit, *Eisenhour v. Weber County*, ___ F.3d ___, 2013 WL 6851133 (10th Cir. 2013). The decision illustrates the constitutional mischief that is created when the law requires a federal court, in the context of adjudicating a constitutional claim, to second-guess the subjective motives of executive officials for their legislative decisions.

In *Eisenhour*, the plaintiff, a long-time employee of a county court, alleged that the county commissioners *closed the court*, resulting in her termination, in retaliation for her publicly airing a sexual harassment claim against the county court judge. (The judge also lost his job as a result of the court closure.)

Like the respondent unions in the present case, the *Eisenhour* plaintiff framed her claim as a First Amendment "retaliation" case.¹ Both the District Court and the Tenth Circuit accepted the plaintiff's framework, thereby making the county commissioners' subjective motives a central factual issue in the case.

¹ The plaintiff also alleged claims under the Due Process and Equal Protection clauses of the Fourteenth Amendment, Title VII and a state whistleblower statute.

The District Court granted summary judgment to the defendants, but the Tenth Circuit reversed in part, concluding: 1) that the plaintiff's comments constituted speech on a matter of public concern, and 2) that a factual dispute existed as to whether the county commissioners closed the court for budgetary reasons or in retaliation for the plaintiff's speech. Specifically, the court of appeals stated:

[T]he evidence creates a genuine issue of fact about the legitimacy of the County's explanation for closing the Justice Court. The County states that it was not financially feasible to continue operating the Court. But Ms. Eisenhower presents evidence that when the County decided to close the Justice Court, it was still generating a net profit. And the County's budget projections for 2009 showed that the Justice Court again expected to generate a net profit. Indeed, the Defendants concede that the court earned \$127,000 in net income in 2009.

...

Because the speech involves a matter of public concern and the fact-finder could reasonably infer a retaliatory motive, the district court erred by granting summary judgment to the County on the First Amendment claim.

Id., 2013 WL 6851133 at *7.

The defendants do not appear to have challenged the plaintiff's framing of her claim as a First

Amendment retaliation case, and perhaps the Tenth Circuit would have decided the case differently had they done so. However, petitioners' purpose in bringing the Tenth Circuit's recent decision to this Court's attention is to show that the separation-of-power and federalism concerns petitioners discuss in their briefs are by no means isolated or limited to the facts and circumstances of the present case – as respondents would have this Court believe. Nor are the legal issues raised in the petition restricted to labor/management disputes involving layoffs implemented in accordance with collective bargaining agreements. Rather, as *Eisenhour* illustrates, they have far reaching implications for how federal courts evaluate the constitutionality of all manner of substantively legislative decisions by state and local government executive officials who are authorized under state law to make such decisions, as was Governor Rowland in this case. *See* Pet. 3.

Inarguably, a decision by county commissioners to *close a court* is a substantively legislative act under *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). The wisdom of that act is a matter for voters to decide at the ballot box, not for federal judges and juries to evaluate in the courtroom. The notion that county commissioners can be sued and subjected to intrusive discovery and a trial to determine their “true” motives for closing a court, and possibly subjected to personal financial liability if a judge or jury concludes that their motives were “retaliatory,” is absurd. That is why petitioners argue, based on *Bogan*, that a court

must evaluate substantively legislative acts by executive officials, be they county commissioners, mayors or governors, *objectively*.

Eisenhour also underscores petitioners' argument that the serious constitutional and practical concerns raised by requiring federal courts and juries to second-guess the subjective motives of executive officials for their legislative acts are not adequately addressed by affording those officials immunity, qualified or absolute. Immunity is only available to the officials as a defense to claims asserted against them in their *personal capacities*. Pet. 28-29. Imagine, then, if the plaintiff in *Eisenhour* had sued the county commissioners in their official capacities for a preliminary and permanent injunction to enjoin them from implementing their "retaliatory" decision to close the court. If the county commissioners' subjective motives are properly an element of the plaintiff's affirmative claim for relief under the First Amendment, then those officials – even though sued in their official capacities – remain subject to the burdens of litigation, including intrusive discovery into their "true" motives for their decision. The separation-of-powers and federalism concerns raised by judicial inquiry into the motives of executive branch officials also remain.

In sum, although respondents may well applaud the Tenth Circuit's decision and argue that it supports the Second Circuit's use of a motive-based framework in this case, the decision actually illustrates the serious constitutional mischief created by using such

a framework to evaluate substantively legislative decisions – *policy* decisions – by executive officials.

Respectfully submitted,

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