No. _____

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

PETITION FOR A WRIT 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* act 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 any valid basis to challenge the layoff directive as a breach of the layoff provisions of the collective bargaining contracts or as a statutory unfair labor practice, the unions "constitutionalized" the labor dispute by challenging the directive as a First Amendment violation. Specifically, they alleged 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?

2. Did the Second Circuit err in requiring strict scrutiny of a governor's decision to reduce the size of

QUESTIONS PRESENTED – Continued

a state's unionized workforce by falsely analogizing that decision to firing state employees based on their political party affiliation?

PARTIES TO THE PROCEEDING

Petitioners John G. Rowland and Marc S. Ryan were defendants/appellees in the court below. Respondent State Employees Bargaining Agent Coalition ("SEBAC") was a plaintiff/appellant in the court below.[1] In addition to SEBAC, the following entities and individuals were plaintiffs/appellants in the court of appeals and are respondents herein: Connecticut Association of Prosecutors; Congress of Connecticut Community Colleges, SEIU, AFL-CIO; Judicial Marshals, Int'l Brotherhood of Police Officers; Connecticut State University American Assoc. of University Professors; Protective Svc. Coalition, IAFF, AFL-CIO; Nat'l Ass'n. of Government Employees, AFL-CIO; Connecticut State Employees Association, SEIU, AFL-CIO; Connecticut Employees Union Independent, SEIU, AFL-CIO, District 1199; New England Health Care Employees Union, SEIU AFL-CIO; Council 4, Amer. Federation of State, County, Municipal Employees AFL-CIO; Denise A. Bouffard, Ind. & O/B/O All Others Similarly Situated; Geneva M. Hedgecock, Ind. & O/B/O All Others Similarly Situated; Dennis P. Heffernan, Ind. & O/B/O All Others Similarly Situated; William D. Hill, Ind. & O/B/O All Others Similarly Situated; Marcelle Y. Pichanick, Ind. & O/B/O All Others Similarly Situated; American

[1] The State of Connecticut is filing a separate petition on behalf of the petitioners in their official capacities.

PARTIES TO THE PROCEEDING – Continued

Federation of School Administrators, Local 61, AFL-CIO; Connecticut State Police Union; Connecticut Federation of Education & Professors Employees AFT, AFL-CIO.

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PETITION FOR A WRIT OF CERTIORARI

John G. Rowland and Marc S. Ryan, in their individual capacities, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Second Circuit ("*SEBAC* I") is reported at 494 F.3d 71 (2d Cir. 2007) and reproduced in the appendix hereto ("App.") at App. 48-104. The Second Circuit's decision following remand of the case to the District Court for the District of Connecticut ("*SEBAC* II") is reported at 718 F.3d 126 (2d Cir. 2013) and is reproduced at App. 1-24. The District Court's opinions are unreported and are reproduced at App. 26-47, 105-24.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2013. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 10, Clause 1 of the Constitution provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; remit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of

> any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

A. The Parties.

At all relevant times, petitioners John Rowland and Marc Ryan were, respectively, the governor of the State of Connecticut and the Secretary of the Office of Policy and Management ("OPM"), the budgetary agency for the executive branch. Their official responsibilities included managing the State's workforce and negotiating the terms of collective bargaining agreements. App. 139 (Amended Complaint ("Compl.") ¶ 37); *id*. at 191 (Joint Local Rule 56 Statement ("LR56") ¶ 35). At all relevant times they acted in furtherance of their functions as Executive Branch officers. *Id.* at 139, 191.

Respondent State Employees Bargaining Agent Coalition ("SEBAC") is a coalition of 13 unions and is authorized to bargain with the State over health and pension benefits on behalf of all unionized employees.

The 13 unions represent employees in different collective bargaining units[2] and bargain over other terms and conditions of employment on behalf of the employees they represent. The five individually named respondents are members of a class of approximately 2,800 employees who were members of a bargaining unit represented by one of the respondent unions. App. 128 (Compl. ¶ 3); *id.* at 181-89 (LR56 ¶¶ 1-23).

Employees holding positions covered by bargaining agreements are not required to join the union. Employees who do not join the union must pay the union an administrative fee in lieu of dues. App. 193 (LR56, ¶ 40); *id.* at 211 (Art. 6).

Regardless of formal union membership, a union represents *every* employee in a bargaining unit, and all bargaining unit members are subject to their respective union's collective bargaining agreement with the State. *Id.* at 206 (Art. 1, sec. 1).

B. The State Of Connecticut Responds To A Budget Crisis.

In 2002, the State faced a budget crisis of uncertain duration. *See State Empls. Bargaining Agent Coalition v. Rowland*, 494 F.3d 71, 78 (2007) (*SEBAC* I) (taking judicial notice of state's budget crisis); App.

[2] A "bargaining unit" is a group of employees covered by the same collective bargaining agreement and represented by the same bargaining agent, *i.e.*, the same union.

55-56. Because the State could not alter the terms of the respondents' collective bargaining contracts unilaterally, Governor Rowland asked the respondents to agree to changes concerning salaries and benefits. Specifically, he sought approximately $450 million in *long-term* concessions. *Id.* at 140 (Compl. ¶ 39); *id.* at 192-93 (LR56 ¶¶ 37-39). The governor advised the respondents that if they did not agree to the requested concessions he would reduce staffing levels by eliminating approximately 3,000 positions covered by collective bargaining agreements. *Id.* at 140 (Compl. ¶¶ 141-42); *id.* at 193-96 (LR56 ¶ 41, 47-48, 51, 54-56).

The State faced no such constraints with respect to management employees, who do not have collective bargaining rights. Thus, the State did not require their assent to freeze their salaries. Consequently, the State could obtain budgetary savings from such employees without their agreement and without having to terminate their employment.[3]

The respondents refused to agree to the requested concessions. App. 140 (Compl. ¶ 42); *id.* at 194 (LR56 ¶ 46).

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[3] The stipulation does not address the issue of a wage freeze. As for the individual capacity claims, which the stipulation does not govern, the evidence will show that the State imposed a freeze. http://www.cga.ct.gov/OFA/Documents/year/BB/2003BB-20020600_FY%2003%20Connecticut%20Budget%20Revisions.pdf (first paragraph of page 4 of 481).

Faced with the respondents' refusal to meet the State's demands, Governor Rowland exercised the State's sovereign power to reduce the size of its workforce. Each bargaining agreement includes a "Management Rights" provision which reflects the State's reservation of this sovereign power. The typical clause provides:

> Except as otherwise limited by an express provision of this Agreement, the State reserves and retains, whether exercised or not, all the lawful and customary rights, powers and prerogatives of public management. *Such rights include but are not limited to . . . the relief from duty of its employees because of lack of work or for other legitimate reasons*.

App. 210 (Article 5) (emphasis supplied).[4]

Governor Rowland instructed the State agencies to reduce staffing levels by making specified reductions in the number of positions in each bargaining unit represented by a union that refused to grant concessions. App. 194-96 (LR56 ¶ 47-48, 51, 54-55). (For illustrative purposes only, the Department of Motor Vehicles eliminated ten Clerk-Typist, 13 Secretary

[4] Federal agencies have comparable management rights. *See* 5 U.S.C. § 7106(a) ("[N]othing in this chapter shall affect the authority of any management official of any agency – (1) to determine the mission, budget, organization, *number of employees* . . . of the agency; and (2) . . . to hire, assign, direct, *layoff*, and retain employees in the agency. . . .") (Emphasis supplied). *See Dept. of the Treasury, Internal Revenue Service v. FLRA*, 494 U.S. 922 (1990) (discussing § 7106(a)).

Level II and eight Information Technology Specialist positions, the Department of Revenue Services eliminated nine Data Analyst Level I, etc.)

When bargaining unit positions are eliminated, determining which employees are laid off is based on seniority and bumping rights. Each collective bargaining contract contains provisions governing the order of layoffs based on those rights. For example, Article 11 of respondent AFSCME's contract provides:

> **Section 1: Layoff by Seniority.** In the event of a reduction of the work force, employees shall be laid off by seniority with the least senior employee being laid off first. Layoff shall be by class and sub-title.
>
> * * *
>
> **Section 2: Bumping.** An employee in a class affected by layoff may, at his/her option, bump the least senior employee in his/her facility in a job in which he/she formerly held permanent status or the least senior employee in the same classification in the employee's agency, providing he/she has more seniority than the least senior employee affected.

App. 222.

The respondents conceded below that Governor Rowland implemented the layoffs in accordance with the seniority and bumping provisions of their collective bargaining agreements. For example, the respondents' motion for class certification states:

> The 2,800 terminations ordered by the defendants set off a domino effect of consequences within the state employee workforce. *Because of seniority and bumping provisions in the union's collective bargaining agreements* with the State, some of the workers who received notice of terminations were, instead, transferred or demoted to other State positions – resulting in the transfer, demotion or termination of more junior union employees.

Memorandum of Law In Support of Motion for Class Certification (July 24, 2009) at 3 (emphasis supplied).

The respondents contended that Governor Rowland used bargaining unit membership as a *proxy* for union membership and characterized bargaining unit members who had not joined the union, yet who were still laid off through the foregoing seniority and bumping process, as "inadvertent victims" of the governor's alleged targeting of union members.

C. The Respondents Sue The Governor For Ordering Layoffs, Claiming He Retaliated Against Them Because They Did Not Support His Reelection Campaign And Because Of Anti-Union Animus.

Lacking any valid basis to challenge the layoff directive or its implementation as a breach of contract or as an unfair labor practice, the respondents commenced this civil rights action on behalf of themselves and approximately 2,800 other employees

who were bumped, demoted or laid off. App. 134-35 (Compl. ¶ 24).

The ten-count Amended Complaint mainly alleged a First Amendment retaliation claim, along with Equal Protection Clause, substantive due process and Contract Clause claims. The respondents accurately described the wrongdoing alleged in their Complaint as involving "misconduct by the defendants *in the process of collective bargaining with state unions.*" Memorandum of Law in Opposition to Motion to Dismiss (Apr. 3, 2003) at 20 (emphasis supplied). The respondents alleged, in conclusory fashion, the petitioners' subjective motives for ordering the layoffs: they were "intentionally directed solely against state union members because of their state union membership," were "motivated by impermissible anti-union animus," and were in retaliation for the unions endorsing Governor Rowland's "political opposition" during the 2002 gubernatorial race. App. 141, 145-46 (Compl. ¶¶ 45-46 of Count 1 and ¶ 59 of Count 2). The respondents sought reinstatement and money damages.

The petitioners moved in their individual and official capacities to dismiss the Amended Complaint based on, *inter alia*, absolute legislative, qualified and Eleventh Amendment immunity. With respect to their qualified immunity defense, the petitioners argued that the court was required to evaluate Governor Rowland's actions objectively, *i.e.*, without reference to his allegedly improper motives. *See* Motion to Dismiss (Feb. 24, 2003) at 23-26. For their absolute

legislative immunity defense, petitioners relied on *Bogan v. Scott-Harris*, 523 U.S. 44 (1988), in which this Court affirmed that state and municipal executive branch officials enjoy absolute immunity for their legislative actions, which include the *elimination* of positions in the workforce.

The respondents agreed that the State had eliminated job positions, not simply fired individuals from existing positions. Memorandum of Law in Opposition to Motion to Dismiss (Apr. 3, 2003) at 24 ("[D]efendants argue that their decision to *eliminate* plaintiffs' positions" are protected.) *Id.* at 25 ("Plaintiffs have *specifically alleged* that defendants *eliminated* union jobs. . . .").

The district court dismissed the individual capacity claims on Eleventh Amendment grounds, App. 120, and therefore deemed the petitioners' qualified immunity defense moot. *Id.* at 122. The court declined to dismiss the official capacity claims based on absolute legislative immunity because it believed such immunity was available only if the petitioners' actions were both "substantively" and "procedurally" legislative. Although the court believed the former requirement had been satisfied, *id.* at 115-16, it could not determine from the record whether the latter requirement had also been met. *Id.* at 116-17.

On interlocutory appeal, the Second Circuit agreed in *SEBAC* I *that eliminating positions was a substantively legislative act*, App. 87, but concluded (albeit incorrectly) that it could not ascertain from

the pleadings whether the State eliminated positions or, instead, terminated 2,800 specific individuals while leaving the positions open. *Id.* at 88.

D. The District Court Grants The State Summary Judgment. The Second Circuit Reverses And Grants Summary Judgment To The Respondents.

On remand, the respondents initiated an aggressive discovery campaign, which included noticing the deposition of Governor M. Jodi Rell (Governor Rowland's Lt. Governor, who succeeded him in office). The respondents made clear that the noticed depositions were just the tip of the iceberg.

Rather than spend years and tens, if not hundreds, of thousands of dollars on discovery battles over the respondents' efforts to depose the highest ranking officials in the State about Governor Rowland's subjective motives for ordering the layoff, the parties, at the State's suggestion, negotiated a stipulation of facts to serve as the basis of cross-motions for summary judgment on the official capacity claims. App. 180-202.[5]

Consistent with the allegations of the Amended Complaint and their repeated representations in the

[5] As part of the negotiations, the State agreed not to pursue its absolute legislative immunity defense. The petitioners remain free to assert that defense if the individual capacity claims are ultimately remanded to the district court for trial.

district court, the respondents stipulated *that Governor Rowland ordered the elimination of positions*, not the firing of specific individuals from existing positions. App. 194-96 (LR56 ¶ 47-48, 51, 54-55).

In support of their motion for partial summary judgment on liability, the respondents argued that the record established a First Amendment retaliation claim based on *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and its successor cases. In response, and in support of its own cross-motion for summary judgment, the State argued that the *Pickering* paradigm did not apply because an executive official's subjective motives – which are central to a *Pickering* claim – are legally irrelevant to the constitutionality of the official's *legislative* acts. The State argued that such acts must be evaluated objectively – just like traditional legislation. Alternatively, the State argued that even if the *Pickering* framework applied, the respondents' claims failed because their conduct at the bargaining table in rejecting the State's concession demands did not constitute speech or association on a matter of public concern, a threshold requirement for establishing a *Pickering* claim.

The district court ignored the State's argument that the *Pickering* framework did not apply to legislative action. Nevertheless, it granted the State summary judgment because "the [respondents] have failed to persuade the court that their union association, in and of itself, raises a matter of public concern," App. 42, a threshold requirement for a *Pickering* claim. The court also found that because

union employees had collective bargaining agreements, while non-union management employees did not have the right to collectively bargain and therefore had no collective bargaining rights, statutory or otherwise, the two groups of employees were not "similarly situated" and, therefore, the plaintiffs' Equal Protection Clause claim failed. *Id.* at 44-47. The court also dismissed the respondents' Contract Clause claim. *Id.* at 42-44.

The respondents appealed to the Second Circuit and continued to advance their First Amendment retaliation claim based on the *Pickering* paradigm. The respondents also introduced an alternate argument based on *Elrod v. Burns*, 427 U.S. 347 (1976) and *Rutan v. Republican Party of Illinois et al.*, 497 U.S. 62 (1990), contending that eliminating positions covered by collective bargaining agreements was legally indistinguishable from hiring or firing someone because of their political party affiliation. They further argued that Governor Rowland's directive to reduce agency staffing levels was subject to strict scrutiny because it did not eliminate non-union managerial positions as well.

The respondents also appealed the district court's earlier dismissal of their claims against the petitioners in their personal capacities.

In opposition to the appeal, the petitioners, now arguing in both their official and individual capacities, renewed their two-pronged attack on the respondents' claims. They argued that motive-based tort claims

cannot be used to challenge the legislative acts of executive officials and, alternatively, that the respondents' *Pickering* and *Elrod/Rutan* claims failed for other reasons, even if motive is relevant.[6] The petitioners also renewed their qualified immunity defense.

The Second Circuit declined to address the respondents' Equal Protection Clause and Contract Clause claims. *SEBAC* II, 718 F.3d 126 (2013); App. 21, n.13. Like the district court, the court also declined to address the petitioners' argument that legislative acts of executive officials should be evaluated objectively. However, the court stated that "the case is better conceptualized under *Rutan*," rather than *Pickering*. *Id.* at 20, n.13.

Purporting to apply *Rutan*, the Second Circuit accepted the respondents' argument that, for First Amendment purposes, a state's policy decision to reduce the size of its public workforce by eliminating positions covered by collective bargaining agreements, in full compliance with the layoff provisions of those agreements, is legally equivalent to hiring and firing specific individuals based solely on their political party affiliation. Based on this false equivalence, the Second

[6] This petition focuses on why motive-based constitutional torts in general have no application to cases involving legislative action by executive officials. The State of Connecticut's petition addresses the alternative reasons why the respondents' claims fail, even accepting as legally relevant the sole motive to which the State stipulated: the governor issued the layoff directive *because the respondents would not agree to concessions*.

Circuit held that when a state eliminates positions in bargaining units, its actions are subject to strict scrutiny, App. 16, which it said the State failed to satisfy. *Id.* at 17-21.

With respect to the claims against the petitioners personally, the Second Circuit concluded that the district court erred in dismissing them on Eleventh Amendment grounds. App. 22. Because subjective motive remained an element of the respondents' affirmative claims even under the *Elrod*/*Rutan* framework that the court used to analyze the official capacity claims, it also rejected the petitioners' qualified immunity defense, which they had raised as an alternative ground for affirming the dismissal of the individual capacity claims. *Id.* at 22-23. Looking to the Amended Complaint (because the stipulated facts did not apply to those claims), the court noted the allegation that "the 2003 firings were also motivated by Rowland's desire to retaliate against unions that had opposed him in the 2002 gubernatorial election." *Id.* at 23. Applying the *Elrod*/*Rutan* strict scrutiny standard to the allegations of the complaint, the court held that "qualified immunity is unavailable at the pleading stage" because the petitioners had not proffered a "vital interest in terminating employees as political retaliation. . . ." *Id.*

Accordingly, the Second Circuit reversed the district court and directed that partial summary judgment on liability enter for the respondents on the official capacity claims. App. 24. The court remanded the case for further proceedings to determine the

appropriate equitable remedies. The court also reinstated the claims against the petitioners personally and remanded them for further proceedings on liability and damages. *Id.*

REASONS FOR GRANTING THE PETITION

I. THE PETITION RAISES IMPORTANT ISSUES CONCERNING QUALIFIED IMMUNITY AND MANAGEMENT/LABOR RELATIONS IN THE PUBLIC SECTOR.

Across the country, elected officials at all levels of government have faced significant budget deficits. Because labor costs often represent a large part of the budget, many elected officials have responded to those deficits by giving public employee unions a choice: Agree to wage and benefit concessions under their collective bargaining agreements or face layoffs.

A state cannot change the terms of a collective bargaining agreement unilaterally. Consequently, the sovereign power to reduce the size and cost of the public workforce through layoffs – *a management prerogative that states expressly reserve in their union contracts* – is one of the few "economic weapons"[7] that

[7] *E.g.*, *American Ship Bldg. Co. v. N.L.R.B.*, 380 U.S. 300, 310-11 (1965) (federal labor law permits employers to use economic weapon of layoffs as means to put economic pressure on unions in collective bargaining); *N.L.R.B. v. Brown*, 380 U.S. 278, 283 (1965) (employer's use of economic weapons against union does not violate NLRA).

a state can lawfully use when bargaining with employee unions over labor costs.

Faced with a budget crisis, Governor Rowland used that economic weapon and implemented the layoffs in compliance with the layoff provisions of the respondents' collective bargaining contracts. According to the Second Circuit, however, his actions violated the First Amendment because his subjective motives were constitutionally impure.

By accepting Governor Rowland's alleged anti-union subjective motives as a legitimate element of the respondents' First Amendment claims, the Second Circuit's decision renders the petitioners' qualified immunity defense meaningless, exposing them in their personal capacities not only to the burdens of litigation, but to potentially crippling financial liability. 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. The growth in motive-based constitutional torts must be reined in.

The Second Circuit's decision also renders layoffs, and thus the threat of layoffs, useless as legitimate tools for applying economic pressure to public employee unions during labor negotiations. It thereby fundamentally alters the historic and delicate balance of power between labor and management in the public sector. If it stands, the decision will undermine the ability of every governor, mayor, first selectman,

board of education and school superintendant, chief justice and court administrator to negotiate effectively with a unionized workforce in their respective branches of government.[8]

The decision alters the delicate balance of power in two ways. First, as noted above, it transforms a state's objectively lawful policy decision to reduce the size of its workforce – *in compliance with the layoff provisions of applicable collective bargaining contracts* – into a motive-based constitutional tort. Indeed, the respondents describe their case in precisely those terms. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss (Apr. 3, 2003) at 39 (This case "involv[es] motive-based constitutional torts."). According to the Second Circuit, a union can sue a governor *personally* and force him or her and other high-ranking executive officials and their staffs to submit to the burdens of litigation, including videotaped depositions, to determine whether the governor's subjective motives for exercising a state's sovereign and contractual layoff power were legitimate or whether his or her "true" motivations

[8] Although this case involves state executive officials, the Second Circuit's decision similarly restricts federal executive officials. Federal officials also engage in substantively legislative activity. For example, under the Second Circuit's decision, the Secretary of Homeland Security could be sued personally for violating the First Amendment if she eliminated unionized border patrol agent positions. Her subjective motives for such a decision are no more relevant in a *Bivens* action than are the motives of the state executive officials in this section 1983 action.

were anti-union animus and/or a desire to retaliate against unions for partisan political reasons. If the union persuades a jury that constitutionally impermissible motives were in play, the objectively valid layoff becomes a meritorious First Amendment claim, thereby transforming that amendment into exactly what this Court has said it is not: a substitute for labor relations laws. *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464 (1979). It is also difficult, if not impossible, to reconcile the court of appeals' decision with this Court's serious concerns about motive-based constitutional torts, as reflected in, *inter alia*, *Bogan*, *Crawford-El v. Britton*, 523 U.S. 574 (1998) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Second, the Second Circuit's ruling subjects a state's policy decision to reduce the size of its unionized workforce to strict scrutiny, a standard a state apparently cannot meet unless it also terminates management employees proportionally, *even though such employees have no collective bargaining rights and, therefore, costs can be reduced by other means*.

The Second Circuit's acquiescence to the respondents' motive-based constitutional tort framework and its application of strict scrutiny to the State's layoff directive both flow from the court's radical distortion of this Court's decisions in *Elrod* and *Rutan*. Those cases hold that a government employer cannot make decisions concerning the hiring or firing of specific employees based solely on their political party affiliation. They are factually and legally inapposite

to this case. Yet, the Second Circuit accepted the respondents' argument that a state's decision to reduce the size of its workforce by eliminating positions in collective bargaining units is legally equivalent to firing a person from an existing position solely because he is a Democrat or Republican.

For all of these reasons the petition for a writ of certiorari should be granted.

II. *ELROD* AND *RUTAN* DO NOT CONTROL A STATE'S DECISION TO REDUCE THE SIZE OF ITS WORKFORCE BY ELIMINATING POSITIONS COVERED BY COLLECTIVE BARGAINING CONTRACTS.

The Second Circuit's decision rests on the mistaken proposition that a state's decision to reduce the size of its public workforce by eliminating positions covered by collective bargaining agreements – in compliance with the layoff provisions of those agreements – is legally indistinguishable from firing specific individuals based solely on their political party affiliation. That false equivalence is only possible by distorting *Elrod* and *Rutan* beyond recognition. The petitioners are unaware of a single case anywhere in the country that has construed *Elrod* and *Rutan* as did the Second Circuit. In fact, the court of appeals

acknowledged that its decision was one of first impression.[9] App. 11.

In *Elrod* and *Branti v. Finkel*, 445 U.S. 507 (1980), this Court held that the First Amendment forbids government officials to discharge public employees solely for not being members of the political party in power unless party affiliation is an appropriate requirement for the position involved. In *Rutan*, the Court extended that holding to forbid using party affiliation as a basis for promotion, transfer, recall and hiring decisions. Simply put, a government employer cannot fire a person solely because he is a Democrat in order it give the job to a Republican, and vice versa. This Court so held because it viewed patronage practices as "tantamount to coerced belief" and reaffirmed that "political belief and association constitute the core of those activities protected by the First Amendment." 497 U.S. at 69 (internal quotations omitted). Accordingly, this Court applied strict scrutiny to assess the constitutionality of such practices. *Id.* at 74.

Nothing in *Elrod*, *Branti* or *Rutan* supports the Second Circuit's position that a government coerces political belief when it reduces the size of its workforce by eliminating positions covered by collective

[9] Given this acknowledgment, the court of appeals' rejection of the petitioners' qualified immunity defense is remarkable. By definition, if an issue is one of first impression, the law cannot be "clearly established" for qualified immunity purposes.

bargaining contracts, particularly when it implements the layoffs in accord with the layoff provisions of those contracts. Nor does such a decision require any person to affiliate against his will with a particular organization to obtain or maintain state employment.

The petitioners do not deny that unions and their members engage in political activity. However, collective bargaining relationships are principally *economic* in nature.[10] Unlike labor unions, *Democrats and Republicans do not have collective bargaining agreements with their government employers*. When a state reduces the size of its unionized workforce through layoffs, particularly after a union rejects the state's concession demands during a budget crisis, the state is not coercing union members to adopt certain political beliefs, nor is it punishing them for the political activities of their union. Rather, it is exercising a sovereign power expressly reserved in all collective bargaining agreements.

Indeed, the notion that a union can sue a governor and allege that his or her exercise of that power violates the First Amendment, is so fundamentally inconsistent with a state's express reservation of the power in its collective bargaining contracts that the

[10] Connecticut law defines an "employee organization" as "any lawful association, *labor organization*, federation or council having as its *primary purpose the improvement of wages, hours and other conditions of employment* among state employees." Conn. Gen. Stat. § 50-270(d) (emphasis supplied).

respondents should be deemed to have contractually waived their First Amendment claims.

III. BY ACCEPTING THE RESPONDENTS' FRAMING OF THEIR CLAIM AS A MOTIVE-BASED CONSTITUTIONAL TORT, THE SECOND CIRCUIT'S DECISION CONFLICTS WITH *BOGAN* AND *CONSUMERS UNION*.

The Second Circuit's reliance on *Elrod* and *Rutan* is also misguided for a deeper reason: Those cases employ a motive-based framework[11] that has no application to a case involving *legislative* acts by executive officials – and *Bogan* holds that eliminating positions in the public workforce is such an act. 523 U.S. at 53-54. *Indeed, the petitioners contend that any motive-based framework is inapplicable to a case involving legislative or policymaking acts.* The respondents' reliance on, and the Second Circuit's acceptance of, a motive-based framework for evaluating Governor Rowland's layoff directive is the legal equivalent of trying to force a square peg into a round hole.

Whether the Second Circuit erred in accepting the respondents' motive-based framework for their claims is relevant, of course, to the merits of the official capacity claims. *But it is also relevant, indeed integral, to resolution of the petitioners' qualified immunity defense*.

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[11] *Crawford-El*, 523 U.S. at 585 (describing this Court's political patronage cases as involving motive-based claims).

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court established an objective standard for qualified immunity: "A defense of qualified immunity cannot be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated." *Crawford-El*, 523 U.S. at 588 (explaining *Harlow* standard). However, "although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's case." *Id.* at 589. If so, the motive or knowledge element of the plaintiff's affirmative claim makes obtaining summary disposition of a qualified immunity defense difficult, if not impossible, a dilemma the Court explored at length in *Crawford-El* and again more recently in *Iqbal*.

Removing motive as an element of a plaintiff's affirmative claim fundamentally changes the nature of the qualified immunity analysis. If motive is not properly an element of a plaintiff's claim, the qualified immunity analysis remains purely objective. See, e.g., Ashcroft v. al-Kidd, 131 S.Ct. 2074, 2085 (2011) (holding that "objectively reasonable arrest . . . pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive" and that the former attorney general had qualified immunity because his actions, viewed objectively, did not violate clearly established law). Thus, instead of asking whether the law was clearly established in 2002 that it was unconstitutional for a governor to lay off union workers in retaliation for the unions'

failure to support his reelection campaign – the question the Second Circuit effectively posed (App. 23)[12] – the question it should have asked (and the question the petitioners posed for qualified immunity purposes) is whether, excluding any consideration of subjective motive, it was clearly unconstitutional in 2002 for a governor to exercise a state's sovereign power and express contractual right to reduce the size of its unionized workforce through layoffs implemented in compliance with collective bargaining agreements. The answer to the properly framed question is an unequivocal "no." No case in the country suggests to the contrary.

The petitioners have argued throughout these proceedings – in both their official and individual capacities – that Governor Rowland's directive to state agencies to reduce staffing levels by eliminating positions should, indeed must, be evaluated objectively, notwithstanding the respondents' desire to make the governor's alleged motives central to their affirmative case. Both the district court and the court of appeals responded to this argument with deafening

[12] The Second Circuit's decision effectively creates two classes of elected executive officials: those who receive the endorsement of public sector unions and those who do not. Executive officials in the latter class (like Governor Rowland), as well as the states they represent, face a substantially increased risk of personal and official liability when they exercise a state's sovereign power to reduce the size of its workforce, even when they comply fastidiously with the layoff provisions of applicable collective bargaining contracts.

silence. Had they addressed and accepted it, this case would have been conclusively resolved on a Rule 12(b)(6) or summary judgment motion nearly ten years ago. The official capacity claims would have been dismissed on their merits because the governor's actions were objectively lawful, and the individual capacity claims would have been dismissed on qualified immunity grounds. Instead, the petitioners face many more years of litigation, including depositions and trial.

A. The Court's Precedents Compel Objective Review Of Legislative Action By Executive Officials.

The proposition that a court must evaluate an executive official's legislative and policymaking acts objectively flows legally and logically from a long line of decisions in which this Court has firmly rejected inquiry into the subjective motives behind legislative action. Since 1810, when it decided *Fletcher v. Peck*, 10 U.S. 87, the Court has consistently opposed judicial inquiry into legislators' motives. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("The holding of this court in *Fletcher v. Peck* [ ] that it was not consonant with our scheme of government for a court to inquire in the motives of legislators has remained unquestioned."). *See also United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (refusing to strike down legislation claimed to violate First Amendment based on allegation of improper legislative motive to suppress speech); *accord Wisconsin Educ. Ass'n Council,*

et al. v. Walker, 705 F.3d 640, 652 (7th Cir. 2013) (following *O'Brien* and rejecting argument that facially valid statute restricting union rights violated First Amendment because of anti-union animus of Wisconsin legislators).

The Court's more recent decisions in *Bogan* and *Supreme Court of VA v. Consumers Union of United States, Inc.*, 446 U.S. 719 (1980), extend this long-standing judicial antipathy to inquiry into legislators' motives into the realms of executive and judicial officials *when those officials engage in legislative acts.* Both cases confirm that officials outside of traditional legislative bodies, *e.g.*, governors, mayors, first selectmen, even judges and court administrators, can engage in conduct that is legislative in nature. *Bogan*, 523 U.S. at 55 (citing *Consumers Union*). Quoting *Tenney*, *Bogan* further explains that, "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it. The privilege of absolute immunity would be of little value if legislators could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Id.* at 54-55. Finally, and of particular significance here, *Bogan* holds that the elimination of a position, as opposed to the hiring or firing of a particular employee into or from an existing position, is a legislative act because it "may have prospective implications that reach well beyond the particular occupant of the office." *Id.* at 56.

If judicial inquiry into the motives of executive and judicial officials for their legislative acts is foreclosed when they are sued in their personal capacities for money damages, as *Bogan* and *Consumers Union* hold, inquiry into their motives should also be forbidden when they are sued in their official capacities for such acts. To hold otherwise would subject such officials to the burdens of litigation, including intrusive discovery into their motives *even if they have immunity from suit in their individual capacities*.

To illustrate, consider the facts of *Bogan*. The plaintiff alleged that the mayor of Fall River, Massachusetts, along with other defendants, proposed and enacted an ordinance eliminating her department, of which she was the sole employee, because of racial animus and in retaliation for exercising her First Amendment right to file a complaint against a colleague. This Court held that the mayor had absolute legislative immunity against the plaintiff's individual capacity suit for money damages because the elimination of her position was a legislative act. 523 U.S. at 55-56.

Suppose, however, the plaintiff had sued the mayor in his official capacity and had asked a court, on the same legal and factual grounds, to declare the ordinance unconstitutional and enjoin the mayor from enforcing it before it took effect? As *Consumers Union* makes clear, absolute legislative immunity is not available in official capacity suits seeking declaratory and injunctive relief barring the enforcement of an executive or judicial official's allegedly

unconstitutional act, even if it is legislative in nature. 446 U.S. at 736. Thus, a court considering the *Bogan* plaintiff's hypothetical official capacity claims for declaratory and injunctive relief would still have been required to determine the proper legal framework for evaluating the constitutionality of the ordinance.

Given the substantively legislative nature of the act at issue in *Bogan*, the petitioners contend that a court would be required to evaluate that act objectively. Moreover, the objective review requirement applies regardless of whether the defendants had absolute legislative immunity from a claim for money damages. Although the immunity and objective standard of review issues are interrelated, they are not interdependent. *E.g.*, *Kensington Volunteer Fire Dept., Inc. v. Montgomery County, Maryland*, 684 F.3d 462, 469 (4th Cir. 2012) (whether a party is immune from suit is a different question from whether a court may rely on alleged improper motives to strike down an otherwise valid legislative act). The substantively legislative nature of the executive official's act, not its formal or procedural character, determines the objective nature of the judicial review. Accordingly, if the plaintiff in *Bogan* had attempted to characterize her official capacity claim as a motive-based constitutional tort in an effort to obtain declaratory and injunctive relief barring enforcement of the ordinance, a court would have been required to reject that characterization.

Justice (then Judge) Alito employed a similar analysis in *Nicholas v. Pennsylvania State University*,

227 F.3d 133 (3d Cir. 2000). In evaluating a plaintiff's substantive due process claim, he explained that "it is crucial to keep in mind the distinction between legislative acts and non-legislative acts." *Id.* at 139. While legislative acts obviously include laws, they also include "broad executive regulations" and he stated that such regulations *should be reviewed objectively* when subject to a constitutional challenge. *Id. Accord Homar v. Gilbert*, 89 F.3d 1009, 1027 (3d Cir. 1996) (Alito, J., concurring and dissenting in part).

Extending Justice Alito's reasoning, a decision to fire an individual from her position for disciplinary reasons, while leaving the position open to be refilled, is a personnel decision, *i.e.*, a non-legislative or administrative act. By contrast, a governor's broad directive to the heads of state agencies to reduce the size of the state's workforce by eliminating positions entirely is a legislative act. As such, it must be evaluated objectively when challenged as unconstitutional – for both individual and official capacity claims. The elements of the affirmative claim are the same, whether asserted against a governor in his official or in his individual capacity.

B. Strong Policy Reasons Support Reviewing Legislative Action By Executive Officials Objectively.

The sound policy reasons that led this Court to extend absolute legislative immunity to judges and to state and municipal executive officials when they act

in a legislative capacity also support the argument that Governor Rowland's policy decision must be evaluated objectively when resolving *both* the official *and* individual capacity claims. As noted, even though state and local officials do not face personal liability in official capacity suits, making their motives an element of a plaintiff's claim in such suits when their legislative acts are challenged will still subject the officials to the burdens of litigation, including intrusive discovery about the "true" motives behind their legislative decisions. This may chill their willingness to make the important policymaking decisions they were elected to make, particularly decisions implicating budgetary priorities, and may even chill their desire to run for office. *Harlow*, 457 U.S. at 817. *See also Crawford-El*, 523 U.S. at 609 ("[I]nquiries into the subjective state of mind of government officials are peculiarly disruptive of effective government and the threat of such inquiries will in some instances cause conscientious officials to shrink from making difficult choices.") (Rehnquist, C.J., dissenting).

1. Separation of Powers and Federalism Concerns.

This Court has also held that judicial inquiry into the subjective motives of executive officials for the purely administrative act of discharging or disciplining a specific employee raises serious federalism and separation of powers concerns. *Borough of Duryea, PA v. Guarnieri*, 131 S.Ct. 2488, 2496 (2011); *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006); *see also Vill. of*

Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977) ("Judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government"). The Second Circuit ignored those concerns, which increase exponentially when, as here, a plaintiff seeks to inquire into the motives of executive officials for their legislative decisions.

Allowing inquiry into motives in cases such as this one also turns federal courts and juries into the ultimate arbiters of legislative, *i.e.*, policy decisions. *See Bogan*, 523 U.S. at 56 (local ordinance eliminating position "bore all the hallmarks of traditional legislation" because it "reflected a discretionary, policymaking decision implicating the budgetary priorities of the city. . . ."). Judgment calls about the wisdom of such policy decisions should be reserved to the voters unless they are objectively arbitrary, that is, unless they cannot survive rational basis review. *See, e.g.*, *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Assoc.*, 426 U.S. 482, 492 n.4, 495-96 (1976) (rejecting due process claim based on alleged anti-union animus and explaining that elected members of school board, not a judge, should make policy decision whether to terminate illegally striking teachers); *Mandel v. Allen*, 81 F.3d 478, 482 (4th Cir. 1996) (rejecting claim that elimination of positions without hearing violated Due Process Clause and stating that decision to abolish position for reasons of efficiency and economy is "solely within the judgment and discretion" of elected officials, who may

expand or contract the overall size of government "as the times and the voters demand").[13]

2. Avoiding the Burdens and Disruptions of Litigation.

This Court's decisions in *Crawford-El* and *Iqbal* also provide strong policy reasons to evaluate the legislative acts and policymaking decisions of executive officials objectively when they are sued in their individual and/or official capacities. In both cases the Court had to balance two competing interests: 1) a plaintiff's right to legal redress for injuries caused by an executive official's motive-based constitutional tort, and 2) the qualified immunity doctrine, which is intended to free such officials from the concerns of litigation, including avoidance of disruptive discovery, particularly regarding subjective motives. *Iqbal*, 556 U.S. at 685.

In *Crawford-El*, the Court rejected the D.C. Circuit's proposal for balancing those interests – imposition of a clear and convincing evidence standard for motive-based constitutional torts. Still, five members held that "[w]hen a plaintiff files a complaint against a public official alleging a claim that requires proof of

[13] Although *Mandel* is factually distinguishable, the Fourth Circuit's conclusion that eliminating positions is solely within the discretion of elected officials conflicts with the Second Circuit's holding that the exercise of such discretion is subject to strict scrutiny when positions in collective bargaining units are eliminated.

wrongful motive, the trial court *must exercise its discretion in a way that protects the substance of the qualified immunity defense*. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El*, 523 U.S. at 597-98 (emphasis supplied).

However, four justices deemed reliance on a trial court's discretion to control discovery to be inadequate protection for the qualified immunity doctrine. Justices Scalia and Thomas would have adopted a bright-line rule barring a plaintiff from admitting proof of a constitutionally impermissible subjective motive if the defendant established an objectively valid reason for his act. *Id.* at 611-12 (Scalia, J., dissenting). This proposal followed from their shared position "that *no* 'intent-based' constitutional tort would have been actionable under the § 1983 that Congress enacted." *Id.* at 612 (emphasis in original). The respondents' claim in the present case would not survive under this rule.

Chief Justice Rehnquist and Justice O'Connor would not have gone quite so far, but still would have held that "when a plaintiff alleges that an official's action was taken with an unconstitutional or otherwise unlawful motive, the defendant will be entitled to immunity and immediate dismissal of the suit if he can offer a lawful reason for his action and the plaintiff cannot establish, through objective evidence, that the offered reason is actually pretext." *Id.* at 605 (Rehnquist, C.J., dissenting). (Notably, Justice (then Judge) Ginsburg, writing for the court of appeals in

Martin v. D.C. Metropolitan Police Dept., 812 F.2d 1425, 1435 (D.C. Cir. 1987), adopted a similar rule requiring a plaintiff to submit *direct* evidence of an executive official's unconstitutional motive.) The claims in the present case would not have survived under the rule Chief Justice Rehnquist, Justice O'Connor and Justice Ginsburg proposed either.

The policy reasons supporting these twin proposals have even greater force where, as here, the challenged executive official's act is substantively legislative and, therefore, constitutes policymaking.

It is significant that when the Court decided *Iqbal* in 2009, a majority of its members had lost confidence in the "careful-case-management" approach the Court endorsed eleven years earlier in *Crawford-El*. *Iqbal*, 556 U.S. at 685. In lieu of that approach, *Iqbal* held that to plead a knowledge or motive-based constitutional claim capable of surviving a Rule 12(b)(6) motion to dismiss, a plaintiff must do more than make conclusory allegations concerning motive and knowledge in his complaint.[14]

This petition, however, is not about whether the respondents' allegations of improper motive are conclusory (although they are). It is about whether they are *legally relevant*. It is about whether the law

[14] The district court dismissed the individual capacity claims against the petitioners in 2006, *i.e.*, well before this Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Iqbal*.

permits a plaintiff to use legal alchemy to transmute an executive official's legislative act into a motive-based constitutional tort.[15] Although *Crawford-El* and *Iqbal* do not address that question directly, the policy concerns animating those cases weigh heavily in favor of answering the question in the negative, lest every act of policymaking by executive officials become a potential motive-based constitutional tort. "It is not a tort for government to govern." *Dalehite v. U.S.*, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting). Just as an unduly permissive application of general civil pleading standards undermines the fundamental policies that qualified immunity serves, so too are those policies threatened when courts allow plaintiffs, through creative pleading, to characterize objectively lawful legislative and policy decisions of executive officials as motive-based constitutional torts.

The petitioners recognize that the rule they propose may, in some instances, bar a person injured by an executive official's unconstitutionally motivated but objectively lawful legislative act from recovering damages. As Judge Learned Hand explained, there is a sound policy reason for this rule:

> It does indeed go without saying that an official who is in fact guilty of using his powers to vent his spleen upon others . . . should not escape liability for the injuries he may so

[15] *See Crawford-El*, 523 U.S. at 504 ("Any minimally competent attorney . . . can convert any adverse decision into a motive-based tort.") (Rehnquist, C.J., dissenting).

> cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative.

Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) (cited in *Crawford-El*, 523 U.S. at 609 n.3) (Rehnquist, C.J., dissenting).

Significantly, as the district court properly noted in its summary judgment ruling, App. 47, the absence of a *constitutional* remedy in this case does not necessarily imply that other remedies were unavailable to the respondents under the State's robust labor laws or the parties' collective bargaining contracts. Conversely, the absence of other remedies does not compel judicial recognition of a constitutional one.

In sum, the Second Circuit's decision conflicts with a long line of cases, particularly *Consumers Union* and *Bogan*, in which this Court has forbid judicial inquiry into the subjective motives behind the legislative actions of *all* officials, not just traditional legislators.

IV. VIEWED OBJECTIVELY, THE STATE'S LAY-OFF DECISION EASILY SATISFIES RATIONAL BASIS REVIEW.

Evaluated objectively, Governor Rowland's policy decision to reduce the size of the State's workforce by eliminating positions in bargaining units did not abridge the respondents' First Amendment rights to join a union, to associate as members of a union, or to engage in union activity. The respondents remained free to do all of those things. The governor merely held the respondents to the terms of their collective bargaining agreements, which guarantee their wages and benefits, but which do not give them job security beyond that expressly granted by the agreements and which expressly contemplate reductions in force and the manner of their implementation. Consequently, the layoff directive should have been evaluated under rational basis review. Because the State had a rational reason to reduce the size of the public workforce through layoffs – reducing the cost of government and saving taxpayer money – the directive passes constitutional muster.

The Second Circuit's contrary strict scrutiny holding cannot be reconciled with this Court's decisions applying rational basis review to government actions that allegedly discriminated against unions *as a class*.[16] *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S.

[16] The Amended Complaint alleges that the petitioners "acted on grounds generally applicable to the class" to which the respondents belong – union membership. App. 135-36 (Compl. ¶ 26).

353 (2009); *Lyng v. Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, et al.*, 485 U.S. 360 (1988); *City of Charlotte v. Local 660, Intern. Ass'n of Firefighters*, 426 U.S. 283 (1976).

In *City of Charlotte*, the Court reviewed a union's claim that a city's informal practice of refusing to withhold union dues from the paychecks of union members who agreed to a checkoff violated the Equal Protection Clause because the city routinely withheld monies from paychecks for various non-union organizations. The Court held that the "respondents' status as union members" did not "entitle them to special treatment under the Equal Protection Clause" and, therefore, "the city's practice must meet only a relatively relaxed standard of reasonableness in order to survive constitutional scrutiny." 426 U.S. at 286. In short, this Court held that *union membership is not a suspect class*. The Court then concluded that the city's informal practice readily passed constitutional muster under rational basis review.

Significantly, that the Court evaluated the constitutionality of the City's informal practice objectively supports the arguments in Part III.A., *supra*. If subjective motive is legally relevant, a case like *City of Charlotte* could easily be recast as a motive-based tort in which the city's informal practice was attributed to city officials' alleged anti-union motives.

The Court's subsequent decisions in *Lyng* and *Ysursa* similarly hold that legislative action that allegedly discriminates against unions and their members as a class is subject to rational basis review unless it directly infringes on their First Amendment associational or speech rights. The Court held in *Lyng* that a provision of the federal Food Stamp Act denying a household eligibility for food stamps if a member of the household was on strike did not infringe on union members' associational rights. *Lyng*, 485 U.S. at 366-69. Nor did the statute "coerce" political beliefs or require union members "to participate in political activities or support political views with which they disagree." *Id.* at 369. The same things are true of Governor Rowland's layoff directive.

Similarly, in *Ysursa* the Court held that a union's challenge to an Idaho law prohibiting payroll deductions for union political activities was only subject to rational basis review because the law did not infringe on the union's First Amendment speech rights. The Court explained that although the First Amendment prohibits states from infringing on union activities and speech, it does not impose on government any obligation to aid or subsidize union activities and speech. 555 U.S. at 358. That observation applies *a fortiori* to this case.

Although the parties cited *City of Charlotte* and *Ysursa* in their Second Circuit briefs, with the petitioners relying heavily on *City of Charlotte* for the proposition that union membership is not a suspect class and that Governor Rowland's directive should

be evaluated under rational basis review, the court of appeals' decision does not mention these cases, much less attempt to distinguish them.

The Second Circuit interpreted the State's stipulation that Governor Rowland eliminated positions in bargaining units "because the unions would not accept the State's concession demands" as tantamount to an admission that the governor punished the respondents simply for being union members or because they did not vote for him – even though the petitioners did not stipulate to such motives and no one knows how the individuals who were laid off or demoted actually voted. Imputing a punitive motive to the governor is the only way the court's strict scrutiny holding makes any sense. Because subjective motive is irrelevant, however, the Second Circuit erred in applying strict scrutiny to Governor Rowland's layoff directive.

CONCLUSION

This Court has repeatedly "stressed the importance of deciding qualified immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). More than ten years after the plaintiffs filed this lawsuit in February 2003, that defense remains unresolved and the petitioners face years more of litigation because of the Second Circuit's qualified immunity ruling. Yet, in all the years of litigation the respondents have failed to present a single case, from any jurisdiction, holding that a governor's objectively lawful decision to reduce the size of a state's workforce, in compliance with the layoff provisions of the state's collective bargaining agreements, violated the First Amendment if anti-union animus or a desire to exact political retribution subjectively motivated the governor's decision. *See Ashcroft v. al-Kidd*, 131 S.Ct. at 2083 ("At the time of al-Kidd's arrest, not a single judicial opinion held that pretext could render an objectively reasonable arrest . . . unconstitutional."). Accordingly, the Second Circuit should have affirmed the dismissal of the individual capacity claims against the petitioners on qualified immunity grounds. Its contrary ruling based on the plaintiffs' *legally irrelevant* (not to mention conclusory) allegations of anti-union animus and political retaliation cannot be sustained.

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

Respectfully submitted,

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October 11, 2013

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: August 27, 2012 Decided: May 31, 2013)

Docket No. 11-3061-cv

STATE EMP BARGAINING AGENT COALITION, IND & O/B/O ALL OF ITS MEMBERS, CONNECTICUT ASSOCIATION OF PROSECUTORS, CONGRESS OF CT COMMUNITY COLLEGES, SEIU, AFLCIO, JUDICIAL MARSHALS, INTL BROTHERHOOD OF POLICE OFFICERS, CONNECTICUT STATE UNIVERSITY AMERICAN ASSOC. OF UNIVERSITY PROFESSORS, PROTECTIVE SVC COALITION, IAFF, AFLCIO, NATIONAL ASSN OF GOVT. EMP., AFLCIO, CONNECTICUT STATE EMPLOYEES ASSOCIATION, SEIU, AFL-CIO, CONNECTICUT EMPLOYEES UNION INDEPENDENT, SEIU, AFLCIO, DISTRICT 1199, NEW ENGLAND HEALTH CARE EMPLOYEES UNION, SEIU, AFL-CIO, COUNCIL 4, AMER FEDERATION OF STATE, COUNTY, MUNICIPAL EMP, AFL-CIO, DENISE A. BOUFFARD, IND & O/B/O ALL OTHERS SIMILARLY SITUATED, GENEVA M. HEDGECOCK, IND & O/B/O ALL OTHERS SIMILARLY SITUATED, DENNIS P. HEFFERNAN, IND & O/B/O ALL OTHERS SIMILARLY SITUATED, WILLIAM D. HILL, IND & O/B/O ALL OTHERS SIMILARLY SITUATED, MARCELLE Y. PICHANICK, IND & O/B/O ALL OTHERS SIMILARLY SITUATED, AMERICAN FEDERATION OF SCHOOL ADMINISTRATORS, LOCAL 61, AFLCIO, CONNECTICUT STATE POLICE UNION, CONNECTICUT FEDERATION OF EDUCATION & PROFESSORS EMPLOYEES AFT, AFL-CIO,

Plaintiffs-Appellants,

UNIVERSITY OF CONNECTICUT,
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

Plaintiff,

v.

JOHN G. ROWLAND, I/O AS GOV. OF THE STATE OF CONNECTICUT, MARC S. RYAN, I/O AS SEC OF OFC OF POLICY & MANAGEMENT OF STATE OF CONNECTICUT,

Defendants-Appellees.*

Before:

RAGGI, LYNCH and CHIN, *Circuit Judges*.

Plaintiffs-appellants appeal from a decision of the United States District Court for the District of Connecticut (Alfred V. Covello, *Judge*) granting summary judgment for defendants and dismissing plaintiffs' federal constitutional law claims. We conclude that plaintiffs have made out a claim that defendants violated their First Amendment right to freedom of association by targeting union employees for firing based on their union membership. We therefore REVERSE the district court's grant of summary judgment to defendants and REMAND to the district court with instructions to GRANT summary judgment to plaintiffs on their First Amendment claim

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* The Clerk of the Court is directed to amend the official caption in the case to conform to the caption listed above.

and to craft appropriate equitable relief. We also REVERSE the district court's dismissal on the pleadings of plaintiffs' claims against defendants in their individual capacities and REMAND those claims for further proceedings consistent with this opinion.

DAVID S. GOLUB (Jonathan M. Levine, *on the brief*), Silver Golub & Teitell LLP, Stamford, Connecticut, *for Plaintiffs-Appellants*.

DANIEL JOSHUA KLAU (Bernard E. Jacques, *on the brief*), McElroy, Deutsch, Mulvaney & Carpenter, LLP, Hartford, Connecticut, *for Defendants-Appellees*.

GERARD E. LYNCH, *Circuit Judge*:

Plaintiffs-appellants, labor organizations and state employees, brought this action in the United States District Court for the District of Connecticut (Alfred V. Covello, *Judge*), contending that defendants-appellees state officials violated their First Amendment right to freedom of association by discriminatorily laying off only union members when reducing the state's work force. The district court granted summary judgment to defendants in their official capacities based on a stipulated factual record and dismissed plaintiffs' claims; the court also dismissed plaintiffs' claims against defendants as individuals on the pleadings (defendants not having joined the stipulation in their individual capacities). We conclude

that, on the stipulated facts, defendants violated plaintiffs' rights by targeting union employees for firing based on their union membership. We therefore REVERSE the district court's grant of summary judgment to defendants and REMAND to the district court with instructions to GRANT summary judgment to plaintiffs on their First Amendment claim and to craft appropriate equitable relief. We also REVERSE the district court's dismissal on the pleadings of plaintiffs' claims against defendants in their individual capacities and REMAND those claims for further proceedings consistent with this opinion.

BACKGROUND

I. Facts

The following facts are drawn from the parties' Joint Rule 56 Statement, in which defendants, in their official capacities, and plaintiffs stipulated to certain undisputed material facts.[1] Defendants did not stipulate to any of these facts in their individual capacities.

Plaintiff-appellant State Employees Bargaining Agent Coalition ("SEBAC") is a coalition of thirteen state public employee unions representing approximately

[1] The parties were offered the opportunity at oral argument to submit further stipulations. As they could not agree on any further stipulations, we consider only the Joint Rule 56 Statement.

40,000 Connecticut state employees.[2] SEBAC has been designated by Connecticut's Board of Labor Relations as the exclusive bargaining agent for its constituent unions for the purpose of negotiating and entering into a collective bargaining agreement ("CBA") covering certain terms of employment, including health care and pension benefits. In 1997, SEBAC entered into a long-term CBA with Connecticut covering all of its constituent unions. The constituent unions also had separate, union-specific CBAs that covered other terms of employment. All of those CBAs were in effect in November-December 2002 and were scheduled to be in effect for a period of years thereafter.

At all times relevant to the complaint, defendant-appellee John G. Rowland was Governor of Connecticut, and defendant-appellee Marc S. Ryan was Secretary of Connecticut's Office of Policy and Management. Rowland and Ryan ("defendants") are sued in both their official and individual capacities. Defendants had responsibility under Connecticut law for managing Connecticut's work force and negotiating CBAs with state employees.

In November 2002, defendants met with SEBAC and its constituent unions (together with the individual plaintiffs, "plaintiffs") and sought approximately

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[2] In addition to SEBAC, plaintiffs-appellants include twelve of its thirteen constituent unions, and five former state employees and union members who were terminated by defendants in 2003.

$450 million in long-term concessions under plaintiffs' CBAs. At that time, the State of Connecticut employed approximately 50,000 individuals. Approximately 37,500 (75%) of these employees were members of SEBAC constituent unions, and approximately 12,500 (25%) were not union members.[3] Defendants advised plaintiffs that unless they agreed to these concessions, defendants would fire approximately 3000 unionized state employees. Although all state employees receive the same health care and pension benefits, defendants "intentionally directed their demands for health care and pension concessions (and their corresponding threats of termination if the concessions were not granted) solely to state union employees." Joint Local Rule 56(a)1 & 2 Statement ¶ 44.

Plaintiffs did not agree to all of the proposed concessions, but instead offered alternative concessions.[4] In December 2002, defendants ordered the firing of approximately 2800 unionized state employees. These firings were effectuated in 2003 (the "2003 firings") and were limited to unionized state employees. No non-union workers were fired. While the fired employees were told that they were being laid off due to economic necessity caused by the state's fiscal year 2003 budget deficit, the firings in fact "had minimal

[3] State employees are not required to belong to a union, and non-unionized employees occupy both non-management and management positions.

[4] Under Connecticut law, plaintiffs had a statutory right to refuse the proposed concessions. *See* Conn. Gen. Stat. § 5-272(c).

effect" on the state's fiscal year 2003 expenses,[5] and "were ordered as a means of trying to compel the plaintiff unions to agree to the concessions demanded." *Id.* ¶ 67. Defendants advised plaintiffs that the 2003 firings would be rescinded if plaintiffs agreed to the proposed concessions.

II. Procedural History

Plaintiffs filed the instant action in Connecticut district court in February 2003 seeking damages against defendants in their personal capacities and injunctive relief against defendants in their official capacities. Plaintiffs filed an amended complaint in May 2003, alleging that the 2003 firings violated their rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution, as well as the Contract Clause.

Defendants moved to dismiss the amended complaint on, inter alia, legislative immunity and Eleventh Amendment sovereign immunity grounds. The district court held that: (1) sovereign immunity

[5] Indeed, some of the fired employees could not be fired until after the end of the 2003 fiscal year, or were in positions funded by private industry. Further, the financial concessions offered by plaintiffs for the 2003 fiscal year exceeded by millions of dollars the budget savings realized from the challenged firings. Moreover, it appears uncontested that whatever savings were accomplished by the 2003 firings could have been achieved by layoffs that affected union members and non-union employees equally.

barred plaintiffs' claims for money damages, but not plaintiffs' claims for injunctive relief; and (2) further discovery was required to determine whether legislative immunity would bar plaintiffs' claims for injunctive relief. *State Emps. Bargaining Agent Coal. v. Rowland*, No. 03 Civ. 221, 2006 WL 141645 (D. Conn. Jan. 18, 2006). Defendants filed an interlocutory appeal.

On appeal, we largely affirmed the district court's holdings and sent the case back to the district court for discovery. *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71 (2d Cir. 2007). Plaintiffs then moved for reconsideration of the dismissal of the claims against defendants in their individual capacities, which the district court denied as untimely. Plaintiffs were granted class certification in March 2010.

In June 2010, the parties cross-moved for summary judgment as to liability, agreeing to brief remedial questions only after the resolution of liability issues. Plaintiffs sought summary judgment on the following claims: (1) that defendants violated plaintiffs' right to free association by (a) conditioning plaintiffs' right to continued public employment on their waiver of their right to join a union, (b) retaliating against plaintiffs for engaging in union activity and asserting union rights, and (c) targeting plaintiffs for layoff based on their union membership; (2) that defendants violated the Contract Clause by (a) conditioning plaintiffs' right to continued public employment on plaintiffs' waiver of their legislatively-approved contract rights under the CBA, and (b)

retaliating against plaintiffs for refusing to give up these rights by ordering layoffs of plaintiffs in an effort to compel such a waiver; and (3) that defendants violated the Equal Protection Clause by targeting plaintiffs for layoffs based on their union membership.[6] Defendants moved for summary judgment on all claims, arguing that the district court should reject plaintiffs' "effort to transform a labor dispute into a constitutional case." Defs.' Mot. for Summ. J. 1 (emphasis omitted). As noted above, the parties submitted a Joint Rule 56 Statement, and stipulated that the facts therein would govern the cross-motions for summary judgment.

In June 2011 the district court denied plaintiffs' motion for summary judgment, granted defendants summary judgment, and entered judgment in favor of defendants. Plaintiffs now appeal: (1) the dismissal of their claims against defendants in their individual capacities; (2) the denial of their motion for reconsideration of this dismissal; and (3) the grant of summary judgment to defendants.

DISCUSSION

We review a district court's grant of summary judgment de novo, *see Nagle v. Marron*, 663 F.3d 100, 104-05 (2d Cir. 2011), and will affirm only if, construing

[6] Although plaintiffs' complaint also asserted substantive due process claims, plaintiffs did not seek summary judgment on these claims and have since abandoned them.

the evidence in the light most favorable to the non-moving party, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a). Here, there are no disputed issues of fact, as the parties expressly stipulated to the above facts as the basis for adjudicating the summary judgment motions.

I. First Amendment Claim

Plaintiffs allege that defendants violated their First Amendment right to freedom of association by targeting union employees for termination based on their union membership. 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. But plaintiffs argue that defendants cannot "single out members of a constitutionally protected group for termination unless defendants can establish a compelling interest for doing so, and that they utilized the least restrictive means to accomplish those ends," which they argue defendants have not done. Appellants' Br. 43 (citation omitted).

The right to free association is "a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960); *see also Smith v. Ark. State Highway Emps.*, 441 U.S. 463, 464 (1979) (noting that First Amendment protects the

right of an individual to associate with others). "The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so." *Smith*, 441 U.S. at 465.

Included in this right to free association is the right of employees to associate in unions. *See Thomas v. Collins*, 323 U.S. 516, 534 (1945) (holding that the "rights of assembly and discussion" of a union and its members are protected by the First Amendment); *see also Smith*, 441 U.S. at 466 (holding that the First Amendment does not impose an affirmative obligation on government to recognize and bargain with a union, but suggesting that reasoning might be different if government had "tak[en] steps to prohibit or discourage union membership or association"). We ourselves have stated that it cannot "be questioned that the First Amendment's protection of speech and associational rights extends to labor union activities." *Conn. State Fed'n of Teachers v. Bd. of Educ. Members*, 538 F.2d 471, 478 (2d Cir. 1976); *see also Int'l Longshoremen's Ass'n v. Waterfront Comm'n of N.Y. Harbor*, 642 F.2d 666, 670 (2d Cir. 1981) ("The First Amendment's protection of the right of association extends to labor union activities.").

However, we have never articulated a standard for determining whether, and under what circumstances, a public entity's employment decisions violate this right to associate in unions. With respect to a public employee's right to associate with political parties, the Supreme Court stated in *Rutan v. Republican*

Party of Illinois that government employers may not "condition [ ] hiring decisions on political belief and association . . . unless the government has a vital interest in doing so." 497 U.S. 62, 78 (1990); *see also Branti v. Finkel*, 445 U.S. 507, 520 (1980) (holding that termination of public defenders because they were not affiliated with Democratic Party violated First Amendment); *Elrod v. Burns*, 427 U.S. 347, 372-73 (1976) (holding that public employees who alleged they were discharged because they were not members of sheriff's political party stated a First Amendment claim); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 609-10 (1967) (invalidating state university system's prohibition on membership in Communist Party). The Supreme Court was concerned that the government would "wield[ ] its power to interfere with its employees' freedom to believe and associate," *Rutan*, 497 U.S. at 76, and noted that "conditioning public employment on the provision of support for the favored political party 'unquestionably inhibits protected belief and association,'" *id.* at 69, quoting *Elrod*, 427 U.S. at 359. It therefore held that hiring based on political party affiliation was subject to strict scrutiny and must be "narrowly tailored to further vital government interests." *Rutan*, 497 U.S. at 74; *see also Branti*, 445 U.S. at 515-16 (requiring "an overriding interest of vital importance" to fire a public employee solely for his private beliefs (citation and internal quotation marks omitted)).

Conditioning public employment on union membership, no less than on political association, inhibits

protected association and interferes with government employees' freedom to associate. It is therefore subject to the same strict scrutiny, and may be done only "in the most compelling circumstances." *Rutan*, 497 U.S. at 76. The Supreme Court suggested as much (albeit in dicta) in *Smith*, when it contrasted the state's refusal to recognize and bargain with a union, which did not implicate the First Amendment, with "taking steps to prohibit or discourage union membership or association," which would likely infringe on First Amendment rights. 441 U.S. at 466 ("Far from taking steps to prohibit or discourage union membership or association, all that the Commission has done in its challenged conduct is simply to ignore the union. That it is free to do."); *see also Collins*, 323 U.S. at 532 (holding that government regulation of unions "must not trespass upon the domain set apart for free speech and free assembly").

Defendants argue that "[i]n terms of their impact on core political beliefs and association, layoffs based on union membership are not even remotely comparable to layoffs and hiring decisions based on political party affiliation." Appellees' Br. 42. But "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political," *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 223 (1967), and the Supreme Court's First Amendment jurisprudence has not distinguished between political parties and other associations. In *NAACP v. Alabama ex rel. Patterson*, the Supreme Court held that "state action which may

have the effect of curtailing the freedom to associate is subject to the closest scrutiny," and that it is "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." 357 U.S. 449, 460-61 (1958).

Labor unions are well within this protection. As the Supreme Court has stated, "the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP." *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 8 (1964). Labor unions advocate the economic interest of their members, and historically, unions and their members have also been associated with political advocacy. Not only do unions engage directly in partisan electoral politics,[7] but labor unions have been predicated on ideas of worker solidarity that are as much political as economic.[8] Opposition

[7] This is particularly true of public employee unions. Since the wages of public employees bear directly on the overtly political issue of state budgets, including the appropriate levels of public expenditure and taxation, the "economic" advocacy of public employee unions touches directly on matters of political concern. *Cf. Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2289 (2012) (recognizing that "a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences").

[8] Indeed, there is evidence that unions favor certain parties over others. *See*, *e.g.*, Thomas L. Brunell, *The Relationship Between Political Parties and Interest Groups: Explaining Patterns of PAC Contributions to Candidates for Congress*, 58 POL. RES. Q. 681, 687 (2005) (concluding that labor groups "direct substantially higher proportions of their money" to Democratic candidates).

to labor unions, similarly, has at times been based not only on the perceived economic interests of employers, consumers, and workers, but on the perception that unions advocate radical political ideas.[9]

Defendants cite *Elrod*'s assertion that "political belief and association constitute the core of those activities protected by the First Amendment," 427 U.S. at 356, as indicating that political association is different from union association. But in union cases, the Supreme Court has emphasized 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.'" *Collins*, 323 U.S. at 532, quoting *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940). Further, even if the *Rutan/Elrod* rule extended only to political organizations, which we have noted above it does not, it would not be easy to classify public-sector unions as falling outside the universe of political organizations, given the Supreme Court's recognition that their collective bargaining positions necessarily "have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289. Indeed, *Knox* effectively precludes defendants from arguing that cases holding it unconstitutional to fire or refuse to hire union

[9] *See*, *e.g.*, *Fiske v. Kansas*, 274 U.S. 380 (1927) (reversing conviction of organizer of the Industrial Workers of the World for criminal syndicalism, based on references to class struggle in the union's constitution).

members are distinguishable because defendants here acted not out of hostility to union membership per se, but as a tactic to put pressure on the union in labor negotiations. As *Knox* recognizes, a public employee union's positions on wages effectively *are* positions on public policy. Defendants' attempt to place this case outside the *Rutan* line of cases is therefore unavailing.

Given the well-established principle that union activity is protected by the First Amendment, and the applicability of the reasoning in the political patronage cases to union membership, we hold that *Rutan*'s heightened scrutiny requirement applies to employment decisions based on union membership.[10] As

[10] Other circuits have also recognized a First Amendment cause of action for firings based on union membership. In an opinion cited favorably by the Supreme Court in *Smith*, 441 U.S. at 464-65, the Seventh Circuit stated that "the courts . . . have accepted a general proposition that public employees cannot be discharged for engaging in 'union activities,' " and held that "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." *Hanover Twp. Fed'n of Teachers v. Hanover Cmty. Sch. Corp.*, 457 F.2d 456, 460 (7th Cir. 1972); *see also McLaughlin v. Tilendis*, 398 F.2d 287, 289 (7th Cir. 1968) ("Unless there is some illegal intent, an individual's right to form and join a union is protected by the First Amendment."). The Eighth and Tenth Circuits have also acknowledged such a cause of action. *See Lontine v. VanCleave*, 483 F.2d 966, 967-68 (10th Cir. 1973) (holding that sheriff's deputy 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"); *Am. Fed'n of State, Cnty., & Mun. Emps. v. Woodward*, 406 F.2d 137, 139

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defendants concede that they intentionally fired only union members in 2003,[11] we now examine whether the terminations were "narrowly tailored to further vital government interests."[12] *Rutan*, 497 U.S. at 74.

Defendants argue that the State needed to reduce the cost of its work force, and that since plaintiffs refused the proposed CBA concessions defendants were forced to lay off union workers to do so. But the stipulated facts make clear that the 2003 firings were not tailored to reduce the cost of the State's work force. To

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(8th Cir. 1969) (holding that 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").

[11] Defendants, perhaps recognizing the difficulty of their legal position, attempted at oral argument to parse the stipulation as not conceding that they laid off only union members. However, the stipulation clearly and unambiguously acknowledges that "[t]he terminations . . . were limited to unionized state employees." Joint Local Rule 56(a) 1 & 2 Statement ¶ 53.

[12] Defendants argue as a preliminary matter that the targeting claim "as argued on appeal bears virtually no resemblance to the claim as presented below," where it was "a minor factual variation on the retaliation theme." Appellees' Br. 39. To the extent that defendants make a waiver argument, it is without merit, as plaintiffs clearly made the targeting claim in the summary judgment briefing below. Plaintiffs' motion for partial summary judgment argued that "[e]ven if not motivated by an impermissible intention to compel concessions of plaintiffs' collectively-bargained contract rights, defendants still violated plaintiffs' First Amendment rights by making layoff determinations based solely on the employees' union membership," and cited cases such as *Woodward* and *Tilendis* in support. Mem. in Supp. of Pls.' Mot. for Partial Summ. J. 29-30.

the contrary, defendants have stipulated that the 2003 firings "had minimal effect on the State's [fiscal year 2003] expenses," and that the savings realized from the 2003 firings did not correlate to the concessions requested from the unions. Joint Local Rule 56(a) 1 & 2 Statement ¶ 67. Indeed, the 2003 firings were not included in Rowland's "Balanced Budget Plan," which was issued at the same time that the layoffs were ordered, with the purpose of eliminating the State's budget deficit. *Id.* ¶ 72.

More importantly, defendants have not shown why the State's fiscal health required firing only *union members*, rather than implementing membership-neutral layoffs. Defendants have stipulated that all state employees, whether or not they belong to unions, receive the same health care and pension benefits. Nothing in the stipulation provides any support for an argument that union members cost more, provided fewer services, or were distinguishable from their non-union coworkers in any way other than their membership itself. Defendants chose to accomplish whatever cost savings were achieved by firing only employees who were union members, as opposed to targeting the least valuable or most expensive workers. Thus, layoffs predicated on union membership could not differentially affect the savings to be achieved, or the efficiency of the state's work force.

Defendants' best argument is that the 2003 firings were meant to compel the unions to agree to concessions, which in turn would reduce the long-term costs of state government, arguably a vital

government interest. But while plaintiffs have stipulated that the 2003 firings were "based on Rowland's determination of what it would take to compel the plaintiff Unions to agree to the demanded concessions," Joint Local Rule 56(a) 1 & 2 Statement ¶ 49, defendants have offered no evidence of narrow tailoring. State officials may certainly bargain hard with state employees. Indeed, as recognized in *Smith*, a state need not recognize or bargain collectively with employee unions at all. 441 U.S. at 466. But for a state to fire union members – and union members alone – in the hope of ultimately achieving economic concessions is little different from refusing to hire union members in the first place. Unquestionably, layoffs applied generally without discriminating against union members would also have brought dramatic pressure on SEBAC, by terminating the employment of workers on whose behalf the unions were negotiating; this is particularly so in that 75% of such layoffs could be expected to fall on union members, who made up that proportion of the work force. But such layoffs, in contrast to the ones here challenged, would not have penalized employees because of their union membership. As the Supreme Court noted in *Elrod*, "conditioning the retention of public employment on the employee's" association with a certain group "must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." 427 U.S. at 363. Defendants have made no

such showing here to justify terminating only union employees.

As plaintiffs have shown that defendants fired employees based on their union membership without narrowly tailoring the terminations to a vital government interest, plaintiffs were entitled to summary judgment on their First Amendment targeting claims. Because defendants are liable under plaintiffs' targeting theory, we need not reach plaintiffs' alternative First Amendment retaliation theory.[13] We thus

[13] Plaintiffs also allege that their termination was in retaliation for their speech on matters of public concern, proscribed by *Pickering v. Board of Education*, 391 U.S. 563 (1968). We believe that the case is better conceptualized under *Rutan*. We have noted that "for the *Pickering* line of cases to apply, there must be an expression of views." *Morin v. Tormey*, 626 F.3d 40, 43 (2d Cir. 2010). Plaintiffs have not identified any expression of views by the laid-off workers, but instead allege that defendants retaliated against them because they refused defendants' proposed concessions. Similar to the plaintiff in *Morin*, plaintiffs here "did not initiate the expression of any views, nor did [they] volunteer comments on any issues, whether of public or private citizen concern. [They] just said, 'No.'" *Id.* at 44. "In short, the issue in this case is whether [plaintiffs] could be retaliated against based on" their union "affiliation (or non-affiliation), not whether [they] could be retaliated against based on any protected speech," and the case is therefore "plainly governed by the *Elrod/Branti/Rutan* trilogy." *Id.*; *see also McEvoy v. Spencer*, 124 F.3d 92, 98 (2d Cir. 1997) (distinguishing cases in which a public employer takes adverse action against an employee on the basis of the employee's political affiliation, which is governed by the *Elrod/Branti/Rutan* line of cases, from those in which the basis for adverse action was the employee's speech, which are governed by the *Pickering* line of cases).

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reverse the district court's grant of summary judgment to defendants, and remand with instructions to the district court to grant summary judgment to plaintiffs on liability and craft appropriate equitable relief.

II. Dismissal of Defendants In Their Individual Capacities

Plaintiffs also appeal the district court's dismissal on sovereign immunity grounds of their claims against defendants in their individual capacities. While acknowledging that the Eleventh Amendment generally does not bar claims for monetary damages against state officials in their individual capacities, the district court nonetheless held that plaintiffs' claims were barred because the action, "though nominally against the Governor and the Secretary of OPM," was in reality a suit against the State, as a damages award would cause "the loss of substantial public resources." *Rowland*, 2006 WL 141645, at *5.

The district court erred. Where a complaint "specifically seeks damages from [ ] defendants in their individual capacities[,] . . . the mere fact that the state may reimburse them does not make the state

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As defendants are liable under *Rutan*, we need not decide whether they might also be liable under *Pickering*. For the same reason, we need not address plaintiffs' arguments that the 2003 firings also violated the Equal Protection Clause of the Fourteenth Amendment and the Contract Clause.

the real party in interest." *Berman Enters., Inc. v. Jorling*, 3 F.3d 602, 606 (2d Cir. 1993). That is true even if the award is quite large, as we noted in *Huang v. Johnson*, where the plaintiffs sought a $50 million award. 251 F.3d 65, 70 (2d Cir. 2001) (holding that the fact that defendants "might not be able to pay [the award] on their own [did] not transform the claim into one against [defendants] in their official capacities"). We therefore hold that the claims for monetary damages against the defendants in their individual capacities are not barred by the Eleventh Amendment.

Defendants argue that even if sovereign immunity is unavailable, the dismissal should still be upheld on qualified immunity grounds.[14] "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutor[y] or constitutional rights of which a reasonable person would have known." *Fabrikant v. French*, 691 F.3d 193, 212 (2d Cir. 2012), quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation marks omitted).

The claims against defendants as individuals stand in a different procedural posture than those against defendants in their official capacities. As

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[14] The district court did not rule on qualified immunity, as the issue was mooted by its sovereign immunity ruling. *Rowland*, 2006 WL 141645, at *5.

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*, 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. We express no view on whether such immunity may prove applicable at a later stage of the litigation.

CONCLUSION

Accordingly, for the reasons stated above, we reverse the district court's grant of summary judgment to defendants in their official capacities, and direct that summary judgment on liability be awarded to plaintiffs. We also reverse the district court's dismissal of defendants in their individual capacities. The case is remanded to the district court to craft appropriate equitable relief, and for other proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE EMPLOYEES BARGAINING AGENT COALITION, et al., plaintiffs,	:	CIVIL NO: 3:03CV221 (AVC)
v.	:	
JOHN G. ROWLAND, et al., defendants.	:	

JUDGMENT

This action having come before the court for consideration of the parties' motions for summary judgment, and

The court having considered the motions and the full record of the case, including applicable principles of law, and having granted the defendants' motion for summary judgment on July 1, 2011, it is hereby,

ORDERED, ADJUDGED and DECREED that the judgment be and is hereby entered in favor of the defendants.

Dated at Hartford, Connecticut, this 13th day of July 2011.

ROBIN TABORA, Clerk

By: /s/
Renee Alexander
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE EMPLOYEES BARGAINING AGENT COALITION, et al.,	:	
plaintiffs,	:	CIVIL NO: 3:03CV221 (AVC)
v.	:	
JOHN G. ROWLAND, et al.,	:	
defendants.	:	

RULING ON THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT

(Filed Jul. 1, 2011)

This is an action seeking a declaratory judgment and injunctive relief in connection with a labor dispute.[1] The complaint alleges violation of the plaintiffs' rights as guaranteed under the First and Fourteenth Amendments to the U.S. Constitution and Article I section 10 of the U.S. Constitution. The action is brought pursuant to 42 U.S.C. § 1983.

The plaintiffs have filed the within motion for summary judgment, arguing that based on the parties' joint stipulated facts, there is no dispute that their

[1] In their cross motions for summary judgment, the parties request declaratory judgment only. The plaintiffs state that they "have agreed that the issue of remedy will be considered in subsequent proceedings . . . "

constitutional rights were violated, and therefore, that they are entitled to judgment as a matter of law.[2]

The defendants have also filed a motion for summary judgment. They argue that the plaintiffs' constitutional claims are without merit, and that they are, therefore, entitled to judgment as a matter of law.

The issue is whether the defendants violated the plaintiffs' rights as guaranteed under the U.S. Constitution. For the reasons that follow, the plaintiffs' motion for summary judgment is denied, and the defendants' motion for summary judgment is granted.

FACTS

The parties have submitted a joint local rule 56(a)1 & 2 statement of facts and stipulate that the facts contained therein govern the within cross-motions for summary judgment. By way of background, the plaintiff, State Employees Bargaining Agent Coalition ("SEBAC"), is a coalition of 13 state employee unions that represents about 40,000 Connecticut state employees. The plaintiffs include SEBAC and twelve of its thirteen constituent unions.

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[2] The amended complaint, dated May 27, 2003, alleges ten causes of action. The court previously dismissed counts one through four, and the plaintiffs withdrew claims six and eight. The plaintiffs "are not pursuing the substantive due process claims." Therefore, the only remaining claims for relief are those numbered five and seven, alleging violation of the First Amendment right to freedom of association, and the Equal Protection Clause and Contract Clause components of claims nine and ten.

Prior to November and December 2002, SEBAC and each of the twelve unions entered into multi-year collective bargaining agreements with the State of Connecticut that covered health care, pension benefits, and other terms and conditions of employment. The Connecticut legislature approved the agreements. These agreements served as the operative collective bargaining agreements between the unions and the state during the time period at issue.

The five individual plaintiffs include: Denise Bouffard, a former support enforcement officer with the Connecticut Judicial Branch; Marcelle Groves, a former management analyst for the Connecticut Department of Environmental Protection; Geneva Hedgecock, a former secretary with the Connecticut Department of Social Services; Dennis Heffernan, a former store keeper for the Connecticut Department of Administrative Services; and William Hill, a former drug and alcohol rehabilitation counselor for the Connecticut Department of Mental Health and Addiction Services. The individual plaintiffs received lay-off notices in either December 2002 or January 2003. All notices were effective immediately except for Hill, whose lay-off became effective in the summer of 2003. At the time of the notices, each plaintiff belonged to a constituent union of SEBAC. Their union memberships continue through the present.[3]

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[3] In paragraph 23 of their stipulated facts, the parties state that the "[p]laintiffs further bring this action on behalf of the [c]lass established by this [c]ourt's March 9, 2010 [r]uling certifying this action as a class action." In its March 9, 2010

(Continued on following page)

The defendants, John Rowland and Marc Ryan, are sued in their official capacities only. From November 2002 through July 1, 2004, Rowland served as Governor of the State of Connecticut. From November 2002 through the end of December 2004, Ryan served as Secretary of the Office of Policy and Management of the State of Connecticut.[4]

The following is a verbatim account as contained in the parties' joint stipulation of facts:

"In November 2002, shortly after Rowland was re-elected as Governor, he determined to seek long-term changes to the plaintiff unions' collective bargaining agreements. . . . Rowland (and at Rowland's direction, Ryan) sought hundreds of millions of

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ruling, this court recognized that the defendants' stipulation met all the requirements under Federal Rule of Civil Procedure 23 and concluded that "because the plaintiffs at this time are seeking only injunctive and declaratory relief, certification as a Rule 23(b)(2) class is warranted." Although a First Amendment retaliation claim can be appropriate in a class action context, *see Elrod v. Burns*, 427 U.S. 347 (1976), here, the court only certified the class on the basis of the requested injunctive and declaratory relief. Therefore, with respect to the plaintiffs' within motion for summary judgment, in which the parties state that "remedy will be considered in subsequent proceedings," the class is not a proper plaintiff.

[4] Subsequent to Rowland, M. Jodi Rell served as Governor of the State of Connecticut. During Rell's tenure, Brenda L. Sicsio and Robert Genuario each served as Secretary of the Office of Policy and Management. Elected in 2010, Dannel P. Malloy is the current Governor of the State of Connecticut. Ben Barnes is the current Secretary of the Office of Policy and Management.

dollars (initially, approximately $450 million) in long-term (i.e., extending for the life of the agreements) concessions to the vested contract benefits covered by the unions' legislatively-approved collective bargaining agreements with the state, including changes applicable in years subsequent to Fiscal Year ("FY") 2003 to the health care and pension benefits provided for and vested by the SEBAC agreement."

"At all times relevant to this lawsuit, the State of Connecticut's work force has consisted of unionized and non-unionized employees. State employees are not required to belong to a union. Non-unionized employees occupy non-management and management, as well as temporary positions, and hold the same non-management positions as unionized employees. In November 2002, there were approximately 50,000 employees in the State's work force. Approximately 37,500 (75%) of these employees were members of state unions, and approximately 12,500 (25%) were non-unionized."

"In November 2002, Rowland and Ryan met with leaders of SEBAC and the other plaintiff unions and advised the union leaders that unless the unions agreed to modify their collective bargaining agreements to grant the State hundreds of millions of dollars in future annual concessions, they would terminate, through purposed [sic] layoffs, the employment of approximately 3,000 unionized state employees. The collective bargaining agreements as to which Rowland (and, at Rowland's direction, Ryan) sought concessions from SEBAC and the other plaintiff

Unions in November 2002 had been approved by the Connecticut General Assembly pursuant to Conn Gen Stats 5-278(b). The plaintiff unions had a statutory right, pursuant to Conn. Gen. Stat. 5-2727(c) to decline to agree to the collective bargaining agreement concessions sought by Rowland and Ryan."

"Although the state work force has both union and non-union members, and although all state employees receive the same health care and pension benefits, Rowland (and, at Rowland's direction, Ryan) intentionally directed their demands for health care and pension concessions (and their corresponding threats of termination if the concessions were not granted) solely to state union employees."

"In response to Rowland's and Ryan's demands, SEBAC and the other plaintiff [u]nions offered financial concessions that would have provided tens of millions of dollars of savings to the State of Connecticut in FY 2003. When SEBAC and the plaintiff unions declined to agree to all of the concessions demanded by Rowland, Rowland ordered Ryan to cause the employment of approximately 2,800 unionized state employees to be terminated, and Ryan caused [the Office and Policy Management] to implement Rowland's instructions as directed. . . . Rowland ordered the elimination of union positions and the termination of union employees to try to compel the plaintiffs to agree to the demanded concessions. The decision to order reductions in each bargaining unit was based on Rowland's determination of what it would take to compel the plaintiff Unions to agree to

the demanded concessions. Rowland advised the plaintiff Unions and their members in December 2002 that the terminations of union employees would be rescinded if the plaintiff Unions agreed to the long-term collective bargaining agreement concessions he sought."

"Rowland directed Ryan to target union workers (*i.e.*, to order the elimination of union positions and termination of union employees) because the plaintiff unions did not agree to the long-term concessions in their vested collective bargaining agreements that Rowland had demanded. Ryan complied with Rowland's instruction."

"On August 7, 2003, Secretary Ryan publicly stated, truthfully, that defendants 'did target union workers, because we got no concessions.'" The terminations ordered by Rowland and effectuated by Ryan [and the Office of Policy and Management] in December 2002 were limited to unionized state employees. In December 2002, Rowland instructed Ryan to cause [the Office of Policy and Management] to instruct the State's agency heads to reduce agency staffing based upon specified reductions of the numbers of employees in each bargaining unit of unions that refused to grant concessions. . . ."

"The instructions provided by [the Office of Policy and Management] to State of Connecticut agency heads were not based on any evaluations by [the Office of Policy and Management] of the staffing needs of each agency with respect to whether union or

non-union employees in the agency were needed for the performance of the agency's functions or the savings that could be realized by reducing non-union employee staffing."

"Rowland and Ryan did not determine which and how many job reductions to order in December 2002 based on any calculation of which and how many job reductions were necessary to achieve the savings in FY 2003 sought by Roland [sic] and Ryan in their demand to the plaintiff Unions for collective bargaining agreement concessions."

"The savings realized in FY 2003 from the unionized work force reductions Governor Rowland ordered in early December 2002 did not correlate to the amount of the concessions he demanded for FY 2003, and governor Rowland understood that no such correlation existed when they caused the reductions to be ordered."

"[The Office of Policy and Management] instructed the agency heads that with respect to employees in their worker test period or working in training classes, all of those working test period employees and trainees with a bargaining unit title as their target class were to be separated from state service, but no such instructions were given with respect to such employees who did not have a bargaining unit title as their target class. The employment of the [i]ndividual [p]laintiffs (other than Hill) was terminated in January 2003 pursuant to [the Office of Policy and Management's] implementation of Ryan's instructions as

ordered by Rowland. Many of the terminations ordered by Governor Rowland had no effect on the State's FY 03 budget deficit. . . ."

"The reductions ordered by Governor Rowland had minimal effect on the State's FY 03 expenses and were ordered as a means of trying to compel the plaintiff unions to agree to the concessions demanded by Governor Rowland. The financial concessions offered by SEBAC and the plaintiff Unions for FY 2003 exceeded by millions of dollars any FY 2003 budget savings realized by the State from the job terminations at issue in this lawsuit. The permanent state employees whose job terminations are at issue in this lawsuit received written notices from the State notifying them that they were being laid off due to economic necessity caused by the State of Connecticut's FY 2003 budget deficit."

"On at least three occasions, at arbitration hearings to consider grievances by employees who contended that there was no economic necessity to warrant their layoffs, it was determined by the arbitrators, after hearing, that that [sic] the layoffs were improper in that the State of Connecticut had failed to establish any economic necessity for the layoffs. On December 6, 2002, Governor Rowland announced a "Balanced Budget Plan," a proposal setting forth actions to eliminate Connecticut's FY 2003 budget deficit. The job terminations at issue in this lawsuit were not included in Governor Rowland's Balanced Budget Plan as one of the actions to eliminate Connecticut's FY 2003 budget deficit. Rowland and Ryan

were acting under color of state law when they engaged in the conduct described above."

STANDARD

A motion for summary judgment may be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is appropriate if, after discovery, the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "The burden is on the moving party 'to demonstrate the absence of any material factual issue genuinely in dispute.'" *Am. Int'l Group, Inc. v. London Am. Int'l Corp.*, 644 F.2d 348, 351 (2d Cir. 1981) (quoting *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975)).

A dispute concerning a material fact is genuine "'if evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must view all inferences and ambiguities in a light most favorable to the nonmoving party. *See Bryant v. Maffucci*, 923 F. 2d 979, 982 (2d Cir. 1991). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Id.*

DISCUSSION

I. First Amendment Claim

The plaintiffs first argue that the defendants retaliated against them "for asserting their union rights in an effort to compel relinquishment of union rights," and that such conduct violated the plaintiffs' First Amendment rights to freedom of association. Specifically, they argue that their "insistence on preserving their collective bargaining rights is plainly a matter of public concern." The plaintiffs argue that the defendants made "layoff determinations based solely on the employees' union membership" in violation of the First Amendment, and that their "association status as union members . . . is clearly a matter of public concern."

The defendants respond that "the First Amendment does not protect the self-interested economic activities of a union in the context of a labor dispute." Specifically, the defendants argue that "in a vernacular sense" collective bargaining negotiations may be matters of public concern, "[b]ut in a *legal* sense, it is demonstrably false." The defendants further contend that "matters [considered] 'quintessentially employment matters' are not matters of public concern and do not enjoy constitutional protection." In addition, the defendants state that "[t]he only motive to which [they] have stipulated is that Governor Rowland

ordered layoffs because the unions refused to accede to his demands for concessions."[5]

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of *speech* . . . or the right of the people peaceably to *assemble.*"[6] U.S. Const. amend. I. (emphasis added). "Although freedom of expressive 'association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and

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[5] The defendants also argue that by entering into collective bargaining agreements, the plaintiffs waived their First Amendment rights. Specifically, they argue that the "Management Rights" provision of the plaintiffs' collective bargaining agreements give the State "*unfettered* discretion to reduce the size of its work force through layoffs." The plaintiffs respond that there is nothing in the collective bargaining agreements "that can be meaningfully construed as an intentional and knowing relinquishment of union employees' First Amendment rights."

The law does not presume the waiver of constitutional rights. *See D.H. Overmyer v. Frick Co.*, 405 U.S. 174, 185 (1972). The Supreme Court has stated that "a waiver of constitutional rights in any context must, at the very least, be clear." *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *see also Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80 (1998). The waiver must be made knowingly, voluntarily, and intelligently. *D.H. Overmyer Co.*, 405 U.S. at 185, 187. The defendants do not cite to a specific provision in the agreement that expressly provides a waiver and, therefore, the court concludes that the plaintiffs have not waived their First Amendment rights. *See Ciambriello v. County of Nassau*, 292 F.3d 307, 322 (2d Cir. 2002).

[6] The First Amendment has been applied against state action by the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925); *see also Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

petition.'" *Piscottano v. Murphy*, 511 F.3d 247, 268 (2d Cir. 2007) (quoting *Healy v. James*, 408 U.S. 169, 181 (1972)). The First Amendment "thus prohibits a state, as sovereign, from abridging an individual's 'right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. *Boy Scouts of America v. Dale*, 530 U.S. 640, 647 (2000) (quoting *Roberts v. United States Jaycees* 468 U.S. 609, 622 (1984)).

Courts have repeatedly recognized that "'public employees do not surrender all their First Amendment rights by reason of their employment.'" *Maglietti v. Nicholson*, 517 F. Supp. 2d 624, 633 (D. Conn. Sept. 29, 2007) (quoting *Garcetti v. Ceballos*, 547 U.S. 410 (2006)). In *Pickering v. Bd. Of Educ.*, the Supreme Court recognized that,

> [t]he problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through it employees.

Pickering v. Bd. Of Educ., 391 U.S. 563, 568 (1968)). "The *Pickering* test thus poses two questions . . . : (1) whether the employee's speech as a citizen was on a matter of public concern, and if so, (2) whether the employer has shown that the employee's interest in expressing himself on that matter is outweighed by injury that the speech could cause to the employer's operations." *Piscottano*, 511 F.3d at 268 (citing

Garcetti, 511 U.S. at 668). In analyzing the public concern requirement, the court must ask "whether the public employee spoke 'as a citizen upon matters of public concern' or 'as an employee upon matters of personal interest.'" *Maglietti*, 517 F. Supp. 2d at 633-34 (quoting *Connick v. Myers*, 461 U.S. 138, 147 (1983)).[7]

"The issue whether the subject of an employee's speech or expressive conduct is a matter of public concern is a threshold question." *Id.* "The Second Circuit has held that the requirement that speech be on a 'matter of public concern' also applies to associational conduct in claims asserting a violation of the First Amendment right to freedom of association." *Maglietti*, 517 F. Supp. 2d at 633 (quoting *Cobb v. Pozzi*, 363 F.3d 89, 102 (2d Cir. 2004)). Courts have recognized that the "public concern" test "is difficult to apply in the context of an association claim." *Id.* at 633 (citing *Balton v. City of Milwaukee*, 133 F.3d 1036, 1039 (7th Cir. 1998)).

With respect to unions, the second circuit has stated that "[t]here is no doubt that retaliation against public employees solely for their union **activities** violates the First Amendment." *Clue v. Johnson*,

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[7] In *Connick*, the Court further stated that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick v. Myers*, 461 U.S. 138, 146 (1983).

179 F.3d 57, 61 (2d Cir. 1999) (recognizing union official's constitutional right to be free from retaliation for the official's activites [sic] on behalf of transit authority union's minority faction) (emphasis added). However, the court went on to recognize that,

> [t]here may well be intraunion disputes that do not raise enough of a public concern to trigger First Amendment protection. And there undoubtedly exist intraunion conflicts that manifestly raise matters of public concern because the faction's activity would be tantamount to core union activity.

Id.[8] In *Cobb*, the second circuit declined to decide the question "whether union membership alone touches on a matter of public concern and therefore provides a proper basis for a First Amendment retaliation claim." *Cobb*, 363 F.3d at 107 (declining to address the issue where the plaintiffs failed to provide sufficient evidence that their union membership was a "motivating factor in the defendants' decision to discipline [them].").

The cases recognizing a First Amendment right to freedom of association with respect to unions did so in the context of outward union activity and/or

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[8] The court did not conduct the balancing test set forth in *Pickering*, in concluding that union activity raises a pubic [sic] concern. The Supreme Court's "public concern" balancing requirement is rendered a hollow statement when courts simply make a declaration that something meets the public interest requirement without engaging in the requisite analysis.

communications, such as handing out pamphlets, lodging complaints, or the like. *See Clue v. Johnson*, 179 F.3d 57, 61 (2d Cir. 1999) (recognizing a First Amendment right where the plaintiff union officials "hand[ed] out leaflets and flyers . . . distribut[ed] a newsletter . . . " and sought "signatures on a petition. . . ."); *Boals v. Gray*, 775 F.2d 686, 693 (6th Cir. 1985) (stating that retaliation for the plaintiff's "membership in and support of a union states a valid First Amendment claim," where the plaintiff was active in supporting the union and encouraged others to join it, but concluding that the plaintiff failed to provide evidence that his suspension was related to his union membership).

In this case, by contrast, the plaintiffs' First Amendment claim rests solely on the fact of their union membership. There was no quintessential "union activity" or efforts of any plaintiff to further such activity. In addition, unions are created for the benefit of their members in order to extract from employers the most favorable salary, working conditions, benefits, etc. The essence of a union does not have as its central concern matters of interest to the public in general. The court recognizes that "activities on behalf of a union faction that necessarily entail a substantial criticism of management raise matters of public concern under *Connick*," *Clue*, 179 F.3d at 61. The facts of this case, however, do not include activities sufficient to raise a public concern in order to trigger First Amendment protection pursuant to *Pickering* and *Connick*. Although "[u]nion **organizing**

is clearly the type of associational activity directed at 'political and social changes' that government censorship might chill . . . 'an employee's speech, activity or association, merely because it is union-related, does not touch on a matter of public concern as a matter of law.'" *Maglietti v. Nicholson*, 517 F. Supp. 2d 624, 635 (D. Conn. Sept. 29, 2007) (quoting *Boals v. Gray*, 775 F.2d 686, 693 (6th Cir. 1985) (emphasis added)). A blanket determination that membership in a union, in and of itself, warrants First Amendment protection would compromise the state's ability, "as an employer, in promoting the efficiency of the public services it performs through it employees." *Pickering v. Bd. Of Educ.*, 391 U.S. 563, 568 (1968)).

The plaintiffs have failed to persuade the court that their union association, in and of itself, raises a matter of public concern and is the type of "speech" or "assembly" that warrants constitutional protection. Therefore, the defendants' motion for summary judgment with respect to this claim is granted and the plaintiffs' motion is denied.

II. Contract Clause

The plaintiffs argue, inter alia, that "based on defendants' admissions, their conduct impermissibly conditioned the continued public employment of the members of the plaintiff [u]nions on a waiver of their

Contracts Clause right to insist upon performance of their legislatively-approved contracts."[9]

The defendants respond that the "Contract Clause does not prohibit a state from giving unions a *choice* between concessions or layoffs." The defendants argue, inter alia, that "the [p]laintiffs successfully bargained for certain terms and conditions of employment[;]" and "[a] quid pro quo of that bargain was the [p]laintiffs' assent to the State's reservation of its inherent management right to control the size and cost of the workforce through layoffs."[10]

The Contract Clause of the U.S. Constitution provides that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts." U.S. Const. art. I, § 10, c. 1. Courts "must attempt to reconcile the strictures of the Contract Clause with the essential attributes of sovereign power. . . ." *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 20 (1977) (internal citations and quotations omitted). In order to accomplish this, courts first ask "whether the state law has . . . operated as a substantial impairment of a contractual relationship." *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983).

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[9] They further argue that "[u]nder [*Perry v. Sindermann*, 408 U.S. 593 (1972)], defendants' conduct violated plaintiffs' Contracts Clause rights. In *Perry*, however, the plaintiff did not allege a violation of the Contract Clause. Therefore, the court concludes it is not applicable to this claim.

[10] The defendants further state that the cases that the plaintiffs cite are irrelevant as "[t]his case does not involve an involuntary furlough of state employees, a wage freeze or a pay lag."

The plaintiffs here have not challenged any law enacted by the Connecticut legislature, *see*, *e.g.*, *Condell v. Bress*, 983 F.2d 415 (2d Cir. 1993), or any other legislative action, *see*, *e.g.*, *Donohue v. Paterson*, 715 F. Supp. 2d 306 (N.D.N.Y. May 28, 2010). Instead, the plaintiffs point to Rowland and Ryan's act of ordering "the elimination of union positions and the terminations of union employees because the unions did not agree to the collective bargaining agreement concessions demanded by Rowland."

The court concludes that such conduct does not amount to a "state law" and, therefore, does not fall within the meaning of the Contract Clause. Accordingly, Article I, section 10, of the Constitution does not provide a basis for the claims in this case. The plaintiffs' motion for summary judgment with respect to the Contract Clause claim is, therefore, denied, and the defendants' motion for summary judgment with respect to that claim is granted.

III. Equal Protection Clause

The plaintiffs finally "assert that [the] defendants' intentional targeting of union employees for layoffs violated [the] plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment." Specifically, the plaintiffs cite the stipulated fact that the defendants "'may distinguish among state employees in making layoff decisions based solely upon state employees' status as union members, and have done so here as the basis for mass layoffs in the state workforce.'"

In response, the defendants argue, inter alia, that the plaintiffs have failed to "first establish that the two classes at issue are similarly situated." Specifically, the defendants state that with respect to the two classes at issue here, the union and non-union employees, the difference between them "could not be clearer [as] . . . [u]nion members have collective bargaining agreements with the state [and] non-union, managerial employees do not."

"The Equal Protection Clause requires that the government treat all similarly situated people alike." *Harlen Associates v. Inc. Vill. Of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001). Thus, "to successfully assert an equal protection challenge, petitioners must first establish that the two classes at issue are similarly situated."[11] *Yuen Jin v. Mukasey*, 538 F.3d 143, 158 (2d Cir. 2008). "[A] court can properly grant summary judgment where it is clear that no reasonable jury could find the similarly situated prong met." *Harlen Associates v. Inc. Vill. Of Mineola*, 273 F.3d 494, 499 n.2 (2d Cir. 2001). The plaintiffs must show that they

[11] "[T]he prototypical equal protection claim involves discrimination against people based on their membership in a vulnerable class." *Harlen Associates*, 273 F.3d at 499. "Although union members are not a suspect class, the Supreme Court has held that discrimination based on union membership must satisfy the rational basis test to survive scrutiny under the Equal Protection Clause." *Bond v. Bd. of Ed. of the City of New York*, No. 97 CV 1337, 1999 WL 151702, at *4 (E.D.N.Y. March 17, 1999) (citing *City of Charlotte v. Local 660, International Assoc. of Firefighters*, 426 U.S. 283, 286 (1976)); *see Cobb v. Pozzi*, 363 F.3d 89, 110 (2d Cir. 2004).

are "similarly situated in all material respects to the individuals with whom [they] seek[ ] to compare [themselves]." *Graham v. Long Island Railroad*, 230 F.3d 34, 39 (2d Cir. 2000). The second circuit has explained that "all material respects" means that "there should be an objectively identifiable basis for comparability." *Id.* at 40.

The parties' stipulated facts state that "each of the plaintiff Unions was designated by the State of Connecticut Board of Labor Relations as the representative and exclusive bargaining agent of its members for the purpose, inter alia, of negotiating and entering into collective bargaining agreements covering terms of employment on behalf of its members." The union employees are subject to specific employment terms applicable only to union members and receive representation to negotiate these employment terms on their behalf. There is no evidence that non-union employees were subject to such terms of employment or received such representation. Although "[n]on-unionized employees occupy non-management and management, as well as temporary positions, and hold the same non-management positions as unionized employees[,]" and "all state employees receive the same health care and pension benefits," these facts are not sufficient to establish that the two classes of employees are "similarly situated in all material respects . . . " *Graham v. Long Island Railroad*, 230 F.3d 34, 39 (2d Cir. 2000).

The court concludes that the plaintiffs have failed to show that the union and non-union employees

were similarly situated for the purposes of prosecuting an equal protection claim. The plaintiffs' motion for summary judgment in this respect is denied and the defendants' motion for summary judgment is granted.

This opinion does not address nor does it determine the merits of other avenues of redress available to the plaintiffs or other defenses available to the defendants. It simply determines that the facts as agreed upon by the parties do not constitute a violation of the U.S. Constitution. Since this disposes of the issues outstanding in this matter, the case is ordered dismissed.

CONCLUSION

Based on the foregoing, the plaintiffs' motion for summary judgment (document no. 232) is **DENIED** and the defendant's motion for summary judgment (document no. 236) is **GRANTED**.

It is so ordered, this 29th day of June 2011, at Hartford, Connecticut.

/s/ Alfred V. Covello, USDJ
Alfred V. Covello, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: November 8, 2006 Decided: July 10, 2007)

Docket No. 06-0616-cv

STATE EMPLOYEES BARGAINING AGENT COALITION, individually, and on behalf of all its members, AMERICAN FEDERATION OF SCHOOL ADMINISTRATION, LOCAL 61, AFL-CIO, CONNECTICUT ASSOCIATION OF PROSECUTORS, PROTECTIVE SERVICE COALITION, IAFF, AFL-CIO, JUDICIAL MARSHALS, INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, AFL-CIO, CONNECTICUT STATE POLICE UNION, CONGRESS OF CONNECTICUT COMMUNITY COLLEGES, SEIU, AFL-CIO, CONNECTICUT STATE UNIVERSITY AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, UNIV. OF CT, AMERICAN ASSN. OF UNIV. PROF., CT EMP. UNION INDEPENDENT, SEIU, AFL-CIO, CT FEDERATION OF ED. & PROF. EMP. AFT, AFL-CIO, District 1199, CT NEW ENGLAND HEALTH CARE EMPLOYEES UNION, SEIU, AFL-CIO, COUNCIL 4, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMP., AFL-CIO, DENISE A. BOUFFARD, GENEVA M. HEDGECOCK, DENNIS P. HEFFERMAN, WILLIAM D. HILL, and MARCELLE Y. PICHANICK,

Plaintiffs-Appellees,

v.

JOHN G. ROWLAND, I/O as Governor of the State of Connecticut, and MARC S. RYAN, I/O as Sec. of Ofc. of Policy & Mgmt. of State of CT,

Defendants-Appellants.

Before: FEINBERG, LEVAL, and CABRANES, *Circuit Judges*.

Interlocutory appeal from an order of the United States District Court for the District of Connecticut (Alfred V. Covello, *Judge*) denying defendants' motion to dismiss plaintiffs' amended complaint pursuant to the doctrines of absolute legislative immunity and Eleventh Amendment sovereign immunity. The District Court concluded that (1) sovereign immunity barred all of plaintiffs' claims for money damages brought against defendant state officials in their personal capacities; (2) sovereign immunity did not bar plaintiffs' claims for injunctive relief brought against these defendants in their official capacities; and (3) further discovery was required to determine whether legislative immunity would bar all of plaintiffs' claims. Defendants appeal the District Court's order insofar as it held that plaintiffs' claims for reinstatement and other forms of injunctive relief were not barred under the doctrines of legislative immunity and Eleventh Amendment sovereign immunity.

We dismiss the appeal for lack of jurisdiction insofar as it challenges the District Court's denial of legislative immunity to defendant state officials with respect to plaintiffs' claims seeking reinstatement to their previous positions; we affirm the District Court's decision insofar as it denied legislative immunity with respect to plaintiffs' claims seeking placement into *other*, existing positions, and insofar as it held that plaintiffs' claims for injunctive relief were not barred by the Eleventh Amendment.

ALLEN B. TAYLOR (Albert Zakarian, Victoria Woodin Chavey, and Douglas W. Bartinik, on the brief), Day Berry & Howard LLP, Hartford, CT, *for Defendants-Appellants*.

DAVID S. GOLUB (Jonathan M. Levine and Craig N. Yankwitt, on the brief), Silver Golub & Teitell LLP, Stamford, CT, *for Plaintiff-Appellees*.

JOSÉ A. CABRANES, *Circuit Judge*:

The question presented in this interlocutory appeal is whether absolute legislative immunity and Eleventh Amendment sovereign immunity should bar plaintiffs' claims arising from the allegedly unlawful termination of their state employment by executive branch officials of the State of Connecticut. In particular, we consider arguments by defendants John G. Rowland ("Rowland"), former Governor of the State of Connecticut, and Mark S. Ryan ("Ryan"), former Secretary of the Office of Policy & Management of the State of Connecticut ("OPM") (collectively, "defendants"), that the United States District Court for the District of Connecticut (Alfred V. Covello, *Judge*) erred when it denied defendants' motion seeking dismissal of plaintiffs' complaint under the doctrines of absolute legislative immunity and Eleventh Amendment sovereign immunity.

State Employees Bargaining Agent Coalition ("SEBAC"), along with twelve of thirteen unions comprising SEBAC and five individually named union

members, on behalf of a putative class of similarly-situated plaintiffs (jointly, "plaintiffs"), filed the instant action in January 2003 seeking damages against defendants in their personal capacities, and injunctive relief against defendants in their official capacities. They filed an amended complaint in May 2003. Plaintiffs' amended complaint alleged constitutional violations arising from the termination of approximately 3,000 unionized state employees beginning in November 2002, assertedly carried out by defendants in retaliation for the employees' political affiliations and union membership. Plaintiffs' claims for injunctive relief sought reinstatement to their previous positions, or to other positions in the state workforce, and an array of other forms of relief, including a prohibition against retaliating against plaintiffs.

Defendants moved to dismiss plaintiffs' amended complaint under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6), arguing, *inter alia*, that plaintiffs' claims were barred on legislative immunity and Eleventh Amendment sovereign immunity grounds.[1] The District Court decided, in response to defendants' motion, that (1) sovereign immunity barred all of

[1] Defendants also moved to dismiss plaintiffs' claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. That motion was denied by the District Court in its entirety, *see State Employees Bargaining Agent Coalition v. Rowland*, Civ. No. 3:03CV221 (AVC), 2006 WL 141645, at *6 (D.Conn. Jan. 18, 2006) (hereinafter, "*Dist. Ct. Op.*"), and is not before us on the instant appeal.

plaintiffs' claims for money damages; (2) further discovery was required to determine whether legislative immunity would bar plaintiffs' claims for injunctive relief; and (3) sovereign immunity did not bar plaintiffs' claims for injunctive relief. On appeal, defendants challenge the District Court's order insofar as it held that legislative immunity and sovereign immunity did not at this time bar plaintiffs' claims for injunctive relief.[2]

We agree with the District Court that defendants are not entitled to legislative immunity at this stage in the litigation, although we do so on somewhat different grounds than those relied upon by the District Court. We hold, as a threshold matter, that legislative immunity may bar not only claims for damages, but also certain claims seeking injunctive relief against state officials in their official capacities.

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[2] As plaintiffs note in their brief, although the District Court found that plaintiffs' claims for money damages were barred pursuant to Eleventh Amendment sovereign immunity, the District Court did not explicitly "dismiss" these claims, nor did it "grant" defendants' motion to the extent it sought dismissal of the claims. *See* Appellees' Br. at 51. Nevertheless, it is apparent from the District Court's order that defendants' motion was effectively granted insofar as it sought dismissal of plaintiffs' claims for money damages due to lack of subject matter jurisdiction under the Eleventh Amendment. *See Dist. Ct. Op.*, 2006 WL 141645, at *5 (deeming such claims "barred by the Eleventh Amendment"). There is no final judgment from which plaintiffs can appeal this decision. *See Kamerling v. Massanari*, 295 F.3d 206, 212-13 (2d Cir. 2002). Accordingly, the only claims before us on this interlocutory appeal are those for injunctive relief brought against defendants in their official capacities.

Nevertheless, we agree with the District Court's holding that discovery is necessary to assess whether legislative immunity may bar any of plaintiffs' claims for reinstatement to their previous positions. Defendants will be entitled to legislative immunity from these claims if the District Court properly concludes, after discovery, (1) that when committing the alleged violations, defendants were acting in their "legislative" capacities under the test set forth in *Bogan v. Scott-Harris*, 523 U.S. 44, 54-56 (1998); and (2) that granting the requested relief would enjoin defendants in their "perform[ance of] legislative functions," *id.* at 55.[3] We further conclude, as a matter of law, that defendants are not entitled to legislative immunity from plaintiffs' claims seeking placement into *other*, existing positions in the state workforce, because granting this relief would not enjoin defendants in their performance of legislative functions.

As to defendants' argument that sovereign immunity bars plaintiffs' claims for injunctive relief, we affirm the District Court's denial of defendants' motion to dismiss on that basis. In particular, we affirm the District Court's conclusion that the injunctive

[3] We recognize that defendants no longer occupy state office. Although we use the phrase "defendants" throughout this opinion when discussing plaintiffs' official-capacity claims for injunctive relief, we note that any relief that is ultimately granted by the District Court against defendants in their official capacities would apply not to Rowland and Ryan, but to the current Governor and Secretary of the Office of Policy Management of the State of Connecticut.

relief sought by plaintiffs falls within the exception to sovereign immunity set forth in *Ex parte Young*, 209 U.S. 123 (1908), notwithstanding defendants' arguments that plaintiffs allege no ongoing violation that can be remedied by an injunctive order of the District Court.

I. BACKGROUND

A. Factual Allegations

We set forth below the relevant facts as alleged in plaintiffs' amended complaint and as discussed by the District Court. Because the case comes to us after the denial of a motion to dismiss, we accept as true the facts as they are alleged in the amended complaint, as supplemented by undisputed facts that are matters of public record. *See Almonte v. City of Long Beach*, 478 F.3d 100, 104 & n.2 (2d Cir. 2007).[4]

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[4] The District Court viewed defendants' motion to dismiss on legislative immunity and sovereign immunity grounds as challenging only the District Court's subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1), rather than as challenging the legal sufficiency of the amended complaint under Fed. R. Civ. P. 12(b)(6). *See Dist. Ct. Op.*, 2006 WL 141645, at *2. The distinction is significant: while we must accept all factual allegations in a complaint as true when adjudicating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), *see*, *e.g.*, *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 250 (2d Cir. 2001), we have held that, in adjudicating a motion to dismiss for lack of subject-matter jurisdiction, a district court may resolve disputed factual issues by reference to evidence outside the pleadings, including affidavits. *See*, *e.g.*, *Antares Aircraft, L.P. v. Fed. Rep. of Nigeria*,

(Continued on following page)

In December 2002, defendants Rowland and Ryan announced the termination of the employment of approximately 3,000 unionized Connecticut state workers. As noted by the District Court, the State of

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948 F.2d 90, 96 (2d Cir. 1991). *But see Jaghory v. N.Y. State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997) (holding that, when reviewing dismissal under Fed. R. Civ. P. 12(b)(6) *or* 12(b)(1), "the court must accept all factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff").

It is well-settled that legislative immunity is not a jurisdictional bar, but is rather a personal defense that may be asserted to challenge the sufficiency of a complaint under Rule 12(b)(6). *See Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 71-72 (2d Cir. 1992) (reviewing denial of motion to dismiss on legislative immunity grounds under Fed. R. Civ. P. 12(b)(6)). Therefore, we conclude that the District Court improperly construed defendants' motion to dismiss plaintiffs' claims on legislative immunity grounds under Rule 12(b)(1), as opposed to Rule 12(b)(6). We construe this aspect of defendants' motion under the standards applicable to Rule 12(b)(6) for the purposes of this appeal.

However, we need not decide whether the District Court correctly reviewed defendants' motion to dismiss on sovereign immunity grounds as a challenge to the District Court's subject-matter jurisdiction, nor need we consider the related question of whether facts outside plaintiffs' amended complaint could be considered for the purposes of resolving the motion. *Cf. Wisc. Dep't of Corr. v. Schacht*, 524 U.S. 381, 391 (1998) (stating that the question of whether "Eleventh Amendment immunity is a matter of subject matter jurisdiction" is one that "we have not decided"); *Woods v. Rondout Valley Central Sch. Dist. Bd of Educ.*, 466 F.3d 232, 237-39 (2d Cir. 2006) (discussing ambiguities in Supreme Court's treatment of Eleventh Amendment sovereign immunity defense). This is so because, as explained *post*, even assuming *arguendo* the version of the facts urged by defendants, they are not entitled to sovereign immunity with respect to the instant claims.

Connecticut was facing a budget crisis at the time the dismissals were ordered. *See State Employees Bargaining Agent Coalition v. Rowland*, Civ. No. 3:03CV221 (AVC), 2006 WL 141645, at *1 (D.Conn. Jan.18, 2006) (hereinafter, "*Dist. Ct. Op.*"). Accordingly, we briefly review Connecticut law governing modifications to the state budget process before setting forth plaintiffs' allegations.

Under Connecticut's constitution and statutory law, the Governor and the state legislature share responsibilities for administering the state budget. The Governor is required by law to present a budget plan to the General Assembly every two years. *See* Conn. Gen. Stat. §§ 4-72, 4-73. Each state agency must submit to the Governor, through the Secretary of OPM, a requisition for a quarterly allotment of funds. *See id.* § 4-85(a). The Governor may deny the request for funds if he determines that a change in circumstances since the adoption of the budget requires a modification. *See id.* § 4-85(b)(1). Before any modification goes into effect, the Governor must file a report with the joint standing committee of the General Assembly charged with responsibility for budget appropriations. The report must describe the change in circumstances requiring budget reductions. If a deficit of more than one percent of the state's general fund of appropriations is projected, the Governor must also devise and implement a plan to prevent a budget deficit. *See id.* § 4-85(b)(2).

Plaintiffs filed the instant action in January 2003, approximately two months after the terminations

began to take effect. They filed an amended complaint in May 2003, at a time when the terminations allegedly "continued to be implemented and [were] scheduled to continue in the future." Plaintiffs do not refer to Connecticut's budget crisis in their amended complaint. Instead, plaintiffs allege that defendants terminated the plaintiff employees because of anti-union animus and in retaliation for several plaintiff unions' failure to support defendant Rowland in his re-election campaign. In particular, plaintiffs allege that, in November 2002, shortly after Rowland was re-elected Governor, Rowland and Ryan sought changes to the collective bargaining agreements previously reached between the plaintiff unions and the State of Connecticut. Defendants demanded that the unions grant concessions in the form of reduced health care and pension benefits, totaling over $450 million annually. Defendants allegedly threatened that if the unions did not agree to the concessions, defendants would terminate the employment of unionized state workers.

When plaintiffs refused to agree to the proposed concessions, defendants allegedly "carried out their prior threats" and announced that they would terminate approximately 3,000 unionized state employees. *Id.* ¶ 42. The terminations began to take effect on November 18, 2002, with defendants allegedly "intentionally singl[ing] out only union members for termination." *Id.* ¶ 44. According to plaintiffs, "[a]ll of the state union employees selected for termination [were] members of the endorsing unions that supported

defendant Rowland's opponent in the 2002 gubernatorial race and opposed defendant Rowland's reelection." *Id.* ¶ 58. In contrast, defendants did not fire any employees belonging to the only state employee union that supported Rowland during his 2002 reelection campaign, the Connecticut State Police Union. Plaintiffs further allege that "[t]he Connecticut General Assembly did not participate in demanding that [plaintiffs] agree to $450 million in contract concessions, did not participate in threatening termination of union members . . . and was not involved in determining whether any (and, if so, which) state union employees would be terminated when the demands were not granted." *Id.* ¶ 49.

On the basis of the foregoing allegations, plaintiffs claim that "defendants Rowland and Ryan, in their official capacities . . . violated and will in the future violate the rights of [plaintiff employees] to support, individually and through their union, political candidates of their choice, without reprisal, as guaranteed by the First and Fourteenth Amendment rights to freedom of political speech and freedom of political association, in violation of 42 U.S.C. § 1983." *Id.* ¶ 61. They further assert that "because plaintiffs have asserted their rights under the [bargaining agreement], as protected by the Fifth Amendment to the United States Constitution and by the Contract Clause of the United States Constitution, defendants have penalized and/or sought to penalize [plaintiffs] by depriving them, or threatening to deprive them, of their right to continued public employment and/or to

benefits arising out of their public employment." *Id.* ¶ 59. Plaintiffs claim that they "have suffered and will in the future suffer irreparable harm as a result of defendants' conduct." *Id.* ¶ 62.

Plaintiffs' amended complaint seeks compensatory and punitive money damages from defendants in their personal capacities. Plaintiffs also seek injunctive relief in the form of an order (1) "compelling defendants . . . in their official capacities, to reinstate [individual plaintiffs] to their former positions with the State of Connecticut or such other position as the Court deems appropriate, with full and appropriate restoration of seniority and benefits"; (2) "enjoining defendants, in their official capacities, from ordering further terminations of members of the plaintiff Unions on account of their participation in or support of constitutionally-protected union activities"; and (3) preventing defendants from "penalizing," "retaliating against," or "undermining" plaintiffs for their refusal to grant concessions and for their failure to support defendant Rowland's re-election campaign. *Id.* at 31-32.

B. District Court Proceedings

The case was originally assigned to Judge Alvin W. Thompson. On July 7, 2003, defendants filed a motion to dismiss the amended complaint. In their motion to dismiss, defendants asserted, *inter alia*, that (1) plaintiffs' claims were barred by the doctrine of absolute legislative immunity; (2) plaintiffs' claims

were barred by the doctrine of sovereign immunity; and (3) defendants were entitled to qualified immunity with respect to plaintiffs' claims for money damages. In November 2005, while defendants' motion to dismiss was still pending, the case was reassigned to Judge Covello, who denied defendants' long-pending motion to dismiss in an opinion dated January 18, 2006.

In its opinion, the District Court held that "discovery is required before the court can determine whether the defendants are entitled to the defense" of legislative immunity. *Dist. Ct. Op.*, 2006 WL 141645, at *3. The District Court relied on the Supreme Court's decision in *Bogan* in concluding that, in order for absolute legislative immunity to apply to defendants' acts, the acts in question must be both "(1) substantively legislative, *i.e.*, acts that involve policy making," and "(2) procedurally legislative, *i.e.*, passed by means of established legislative procedures." *Id.*; *see also Bogan*, 523 U.S. at 49 (holding that legislative immunity applied to a city council member's voting on an ordinance that eliminated plaintiff's job position, mayor's proposal of the job elimination, and the mayor's signing the ordinance into law). Applying these requirements to the instant case, the District Court concluded that defendants' "eliminat[ion] of some 3,000 union jobs through executive order" was "substantively legislative because it reflected a discretionary, policymaking decision implicating the state's budgetary priorities and its services to constituents." *Dist. Ct. Op.*, 2006 WL 141645, at *3. Nevertheless, the District Court concluded that before defendants

could successfully invoke legislative immunity, discovery was required to determine if defendants' actions were procedurally legislative. In particular, the Court concluded that "although the record . . . supports a finding that the state faced a budget crisis in the fall of 2002, there is no evidence to support a finding that there existed a projected budget deficit of more than one percent, or that Governor Rowland was acting pursuant to Conn. Gen. Stat. § 4-85(b) in ordering the layoffs." *Id.* at *4 n.5. Accordingly, the Court was "unable to conclude that the actions complained of were legitimately legislative . . . [on the basis] of which the defendants are absolutely immune." *Id.* at *4.

Addressing Eleventh Amendment sovereign immunity, the District Court held that plaintiffs' claims were barred insofar as they sought to recover money damages. The District Court found that plaintiffs' claims were not barred, however, insofar as they sought injunctive relief. In explaining its conclusion with respect to money damages, the District Court relied on the Supreme Court's decision in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), in which the Supreme Court held that a lawsuit is "against the sovereign [and thus barred by the Eleventh Amendment] if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the government from acting, or to compel it to act." *Id.* at 102 n.11, *quoted by Dist. Ct. Op.*, 2006 WL 141645, at *5. The District Court concluded that, although the

claims for monetary relief in plaintiffs' amended complaint were nominally brought against defendants in their individual capacities, the relief sought "could hardly be accomplished in the absence of substantial interference with the public administration or the loss of substantial public resources." *Dist. Ct. Op.*, 2006 WL 141645, at *5. Accordingly, the District Court held that "[a]ny claim for money damages," including back-pay or retroactive benefits, was barred by the Eleventh Amendment.[5] *Id.* The District Court held that, on the other hand, the Eleventh Amendment presented no bar to the claims for prospective injunctive relief against defendants in their official capacities.[6] *Id.*

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[5] Plaintiffs argue that it is unclear whether the District Court intended to dismiss all of their claims for money damages. *See* Appellees' Br. at 51 n.15 (contending that "[t]he precise meaning of this aspect of the District Court's ruling is unclear" and that the District Court might have intended not to bar claims for "other aspects of compensatory damages" such as "emotional distress" and for "punitive damages"). We find no ambiguity in the District Court's statement that "[*a*]*ny* claim for money damages . . . is barred," *Dist. Ct. Op.*, 2006 WL 141645, at *5 (emphasis added), and we therefore reject plaintiffs' assertion that the District Court's ruling was unclear. We express no opinion on the merits of the District Court's ruling on the claims for money damages, which is not at issue in the instant appeal. *See* Appellees' Br. at 51 (acknowledging that the dismissal of plaintiffs' claims for money damages is not before the Court on this interlocutory appeal).

[6] The District Court also denied as "moot" defendants' claim that qualified immunity shielded them from liability. In particular, the District Court concluded that because qualified immunity is a defense against suits for money damages, and because

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On April 5, 2006, the District Court entered an order amending its earlier opinion (the "April 5 Order"). In particular, the District Court revised its earlier statement, in footnote 5 of the prior opinion, that "there is no evidence to support a finding that there existed a projected budget deficit of more than one percent, or . . . that [the governor filed a] report or plan, or even an affirmation that the governor had invoked his authority under § 4-85(b)." April 5 Order at 2, Joint Appendix ("J.A.") 90. The Court noted that, following its earlier ruling, "defendants filed for the first time a copy of an April 1, 2003 letter from the Office of the Comptroller to Governor Rowland stating that in September of 2002, there existed a deficit exceeding one percent and that on December 6, 2002, the governor furnished a deficit reduction plan." On the basis of that letter, the District Court concluded:

> Because the statute does not require the legislature to approve the governor's [budget] plan, or even for the governor to follow his own plan when making deficit reduction decisions, a court could reasonably conclude that the defendants complied with Gen. Stat. § 4-85(b)(2) when ordering the job terminations at issue, and hence, are entitled to legislative immunity. However, in this Court's view, before the defendants can cloak their

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plaintiffs' claims for money damages were precluded on Eleventh Amendment grounds, it was not necessary to address defendants' qualified immunity arguments. *Dist. Ct. Op.*, 2006 WL 141645, at *5.

> actions with immunity, they must make out a good faith claim to it, that is, they must show that they ordered the layoffs to achieve budgetary savings under Conn. Gen. Stat. § 4-85(b)(2), and not for other reasons.

Id. The Court then concluded that "because this remains a disputed issue of fact, . . . defendants are not entitled to legislative immunity at this juncture." *Id.* at 2-3, J.A. 90-91. The District Court therefore reiterated its earlier denial of defendants' motion to dismiss plaintiffs' claims for injunctive relief on the basis of legislative immunity.

This appeal followed.

II. DISCUSSION

A. Appellate Jurisdiction

Defendants seek to establish appellate jurisdiction over this interlocutory appeal under the collateral order doctrine, which permits interlocutory appellate review of certain non-final District Court decisions. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-47 (1993) (interlocutory review of an Eleventh Amendment claim); *Harhay v. Town of Ellington Bd. of Educ.*, 323 F.3d 206, 210 (2d Cir. 2003) (interlocutory review of a legislative immunity claim).

"Under the collateral order doctrine, . . . [a]n order denying a motion to dismiss a complaint against a[n] . . . official when the dismissal motion is

based on the official's assertion of absolute or qualified immunity is immediately reviewable, to the extent that the denial turns on issues of law." *Almonte*, 478 F.3d at 105 (internal quotation marks omitted). However, "if a factual determination is a necessary predicate to the resolution of whether . . . immunity is a bar, review is postponed" and we dismiss the appeal. *Id.* (quoting *Parkinson v. Cozzolino*, 238 F.3d 145, 149 (2d Cir. 2001)).

B. Legislative Immunity

We first address defendants' argument that legislative immunity bars plaintiffs' entire complaint and that the District Court therefore erred in concluding that discovery was necessary to determine whether legislative immunity applies to the instant claims.

1. Standard of Review and Governing Law

When a district court denies absolute or qualified immunity in response to a motion to dismiss, we review the district court's denial *de novo*. *See Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 250 (2d Cir. 2001) (reviewing claim of qualified immunity).

Under the Supreme Court's functional test for determining the applicability of absolute legislative immunity, "whether immunity attaches turns not on the official's identity, or even on the official's motive

or intent, but on the nature of the act in question." *Almonte*, 478 F.3d at 106; *see also Harhay*, 323 F.3d at 210 (citing *Bogan*, 523 U.S. at 54). In particular, "[a]bsolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Bogan*, 523 U.S. at 54 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). Legislative immunity shields from suit not only legislators, but also officials in the executive and judicial branches when they are acting "in a legislative capacity." *Bogan*, 523 U.S. at 55 (holding that a mayor was entitled to legislative immunity for acts taken that were "integral steps in the legislative process"); *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 734 (1980) (holding that Virginia Supreme Court justices were entitled to legislative immunity for acts taken in their legislative capacities).

2. Analysis

(a) Whether Legislative Immunity May Bar Claims for Injunctive Relief

It is uncontroversial that legislative immunity may bar claims for money damages brought against state and local officials in their personal capacities. *See*, *e.g.*, *Almonte*, 478 F.3d at 106. However, there is arguably conflicting case law on whether legislative immunity applies at all to claims for injunctive relief brought against state officials in their official capacities. Therefore, before addressing the legislative

nature *vel non* of defendants' allegedly unlawful actions, we must address, as a threshold matter, whether legislative immunity is even available as a potential defense to plaintiffs' claims for injunctive relief.

Generally speaking, "state legislators enjoy common-law immunity from liability for their legislative acts." *Consumers Union*, 446 U.S. at 732. The immunity "is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause."[7] *Id.* Tracing its roots to the "[p]arliamentary struggles of the Sixteenth and Seventeenth Centuries," *Tenney*, 341 U.S. at 372, the doctrine of legislative immunity found early expression in state constitutional provisions antedating the Federal Constitution, *see id.* at 373-75 (discussing early state constitutional provisions in Maryland, Massachusetts, and New Hampshire), and was "carefully preserved" at the time of the Founding, *id.* at 376. Legislative immunity has been deemed necessary, in part, because of the recognition by courts that civil litigation, "whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Consumers Union*, 446

[7] The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1.

U.S. at 733 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975)).

We first addressed whether legislative immunity may shield state officials from claims for injunctive relief (as opposed to claims for damages) in *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (2d Cir. 1980). In that case, we considered whether legislative immunity applied to bar claims seeking to enjoin members of the New York State Legislature from enforcing subpoenas that required the plaintiffs to appear before a select committee of the legislature. We noted that the Supreme Court had concluded, on the basis of the Speech and Debate Clause, that federal legislators "acting within the scope of their legislative function are immune from both damage and injunction suits," *Star Distributors*, 613 F.2d at 6 (citing *Eastland*, 421 U.S. at 503), and that state legislators were entitled to legislative immunity from suits for damages, *see id.* (citing *Tenney*, 341 U.S. at 367). We determined that, due to the "shared origins and justifications of [the Speech or Debate Clause and the doctrine of legislative immunity]," it was "inappropriate for us to differentiate the scope of the two without good reason." *Id.* We relied for support on the Supreme Court's decision in *United States v. Johnson*, 383 U.S. 169 (1966), in which the Court had stated that "the state legislative privilege [in suits brought under 42 U.S.C. § 1983 is] on a parity with the similar federal privilege" under the Speech or Debate Clause. *See Star Distributors*, 613 F.2d at 8 (quoting *Johnson*, 383 U.S. at 180). Accordingly, we held that

"state legislators, to the same extent as their federal counterparts, are immune from suit under § 1983 for injunctive relief as well as damages based on their activities within the traditional sphere of legislative activity." *Id.* at 9.

Shortly after we decided *Star Distributors*, the Supreme Court similarly held that the doctrine of legislative immunity barred claims against state officials for injunctive relief, as well as for damages. In *Consumers Union*, 446 U.S. at 719, the Court examined whether legislative immunity barred claims for declaratory and injunctive relief brought against members of the Virginia Supreme Court for their promulgation and enforcement of the Virginia Bar Code. After concluding that the *promulgation* of the Bar Code by a state court was a legislative act, the United States Supreme Court held that legislative immunity barred not only plaintiff's claims for damages, but also those claims for declaratory and injunctive relief that would have forced the Supreme Court to amend or repeal the code. *See id.* at 733-34 (reasoning that "there is little doubt that if the Virginia Legislature had enacted the State Bar Code and if suit had been brought against the legislature, its committees, or members for refusing to amend the Code," the suit would be barred "on the grounds of absolute legislative immunity"). The Court held, however, that defendants could be sued for injunctive relief with respect to their *enforcement* of the Bar Code because legislative immunity would not apply to their enforcement activities. *See id.* at 734-37. In

explaining why the doctrine of legislative immunity was not limited to claims for damages, the Court reasoned:

> We have . . . recognized that state legislatures enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause, *Tenney v. Brandhove*, 341 U.S. 367 (1951). In *Tenney*, we concluded that Congress did not intend § 1983 to abrogate the common-law immunity of state legislators. Although *Tenney* involved an action for damages under § 1983, its holding is equally applicable to § 1983 actions seeking declaratory or injunctive relief.

Id. at 732-33. The Court then cited approvingly our opinion in *Star Distributors*, and its holding that legislative immunity "bars an action for declaratory and injunctive relief just as it bars an action for damages." *Id.* at 732 n.10 (citing *Star Distributors*, 613 F.2d at 4); *see also Colon Berrios v. Hernandez Agosto*, 716 F.2d 85, 88 (1st Cir. 1983) ("[T]he Supreme Court has clearly held that state legislators acting in a legislative capacity are absolutely immune from the imposition of equitable remedies in a suit brought under 42 U.S.C. § 1983") (citing *Consumers Union*, 446 U.S. at 731-34).

Neither our Court nor the Supreme Court has expressly questioned, much less overruled, the holdings of *Star Distributors* and *Consumers Union.*

Nevertheless, the Supreme Court on two occasions has somewhat cryptically cast doubt on its holding in *Consumers Union* that legislative immunity may bar claims for injunctive relief as well as those for damages.

In *Kentucky v. Graham*, 473 U.S. 159 (1985), the Supreme Court considered whether plaintiffs who had obtained damages in an action against state employees in their personal capacities could maintain a claim for attorney's fees under 42 U.S.C. § 1988 against the State of Kentucky. The Court concluded that the claim for attorney's fees could not be maintained because the State of Kentucky was not a party to the suit and the remaining defendants were not, and could not be, sued for damages in their official capacities because Eleventh Amendment sovereign immunity barred those claims. *See id.* at 168-71. The Court, however, went on to explain in *dicta* the difference between a personal-capacity suit and an official-capacity suit, stating:

> When it comes to defenses to liability, an official in a personal capacity action may . . . be able to assert personal immunity defenses. . . . In an official-capacity action, these defenses are unavailable. The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment.

Id. at 166-67 (citations omitted).[8] Accordingly, under a potential reading of *Graham*, legislative immunity might not be available as a defense in a suit for injunctive relief against state agents in their official capacities.[9]

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[8] As the Court also explained,

> [p]ersonal capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. . . . Official capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

Graham, 473 U.S. at 165-66 (internal citations and quotation marks omitted). A plaintiff typically seeks injunctive relief against state agents only in their official capacities, because the remedy sought would be provided by the state itself.

[9] This possible reading of *Graham*, however, is called into question by another aspect of the decision. *Graham* also discussed with approval the Court's earlier holding in *Consumers Union* that plaintiffs could not claim attorney's fees premised on the legislative acts of the defendant Virginia Supreme Court justices, who were sued for injunctive relief in their official capacities. *See id.* at 164. The Court noted that in *Consumers Union* it had held that Congress did not intend "to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity." *Id.* (quoting *Consumers*

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More recently, the Supreme Court in *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), indicated in *dicta* that legislative immunity may not bar official-capacity claims altogether. The Court in *Umbehr* stated glancingly in a footnote that a local government board's asserted legislative immunity defense was "moot" because only official-capacity claims were before the Court and because "immunity from suit under § 1983 extends to public servants only in their *individual* capacities." 518 U.S. at 677 n.*. The Supreme Court in *Umbehr* did not cite, much less address or discuss, its earlier holding in *Consumers Union* that legislative immunity was available to *state* defendants who were sued in their official capacities. *See Consumers Union*, 446 U.S. at 731-34.

We too have arguably departed from the Supreme Court's holding in *Consumers Union* that legislative immunity applies to claims for injunctive relief, and from our own earlier holding to the same effect in *Star Distributors*. On three separate occasions, in cases involving suits against local government officials and entities, we have suggested that legislative immunity is a personal defense that government

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Union, 446 U.S. at 738). This supported the Court's more general conclusion in *Graham* that "where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant." *Id.* at 165. This discussion indicates that *Graham* did not intend to overrule the holding in *Consumers Union* that legislative immunity remains available as a defense to defendants who are sued for injunctive relief in their official capacities.

officials may not assert when they are sued in their official capacities. *See Almonte*, 478 F.3d at 106 (stating that "[i]mmunity, either absolute or qualified, is a *personal* defense that is available only when officials are sued in their individual capacities") (emphasis in original); *Morris v. Lindau*, 196 F.3d 102, 111 (2d Cir. 1999) (stating that "[t]he immunities Town Board members enjoy when sued personally do not extend to instances where they are sued in their official capacities"); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 73 (2d Cir. 1992) (stating that "[t]he fallacy in the town's argument on appeal lies in its assumption that the absolute legislative immunity of the town councilmen applies when the suit is brought against them in their *official* capacities") (emphasis in original). In *Morris*, we held explicitly that legislative immunity did not bar claims for injunctive relief in official-capacity suits against local government officials. *See Morris*, 196 F.3d at 111.

We do not think that *Almonte, Morris*, and *Goldberg* are applicable here. Each of those cases involved official-capacity claims against local-level officials, rather than state officials. While legislative immunity is available to local officials who are sued in their individual capacities, *see Bogan*, 523 U.S. at 54, the Supreme Court has made clear that, due to the historical unavailability of various immunity defenses to local governments, those governments (or "municipal corporations") are not entitled to the benefit of any immunities that might be available to local officials sued under § 1983. *See Owen v. City of Independence*,

445 U.S. 622, 638 (1980) ("[T]here is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded [defendant municipality]"); *see also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166 (1993) ("[U]nlike various government officials, municipalities do not enjoy immunity from suit – either absolute or qualified – under § 1983."); *Goldberg*, 973 F.2d at 73 (noting that "the immunities historically granted other government actors in § 1983 actions had not been available to municipal corporations").

The Supreme Court has never reached a similar conclusion with respect to suits against states, or against state agents in their official capacities. This may explain why we did not attempt to reconcile the holdings of *Almonte, Morris*, and *Goldberg* with our earlier holding in *Star Distributors*, or with the Supreme Court's similar holding in *Consumers Union.* Because the three cases addressing the availability of legislative immunity to municipalities did not cite or discuss, much less overrule, *Star Distributors*, and no decision of the Supreme Court has overruled the relevant holdings in *Consumers Union* or *Star Distributors*, we adhere to the law of the Circuit that legislative immunity may bar claims for injunctive relief against state officials. *See*, *e.g.*, *Nicholas v. Goord*, 430 F.3d 652, 659 (2d Cir. 2005) ("[W]e are bound by our own precedent unless and until its rationale is overruled, implicitly or expressly, by the

Supreme Court or this court *en banc.*") (internal quotation marks omitted).

We adhere to this conclusion, even in light of the recent Supreme Court decisions in *Graham* and *Umbehr*, for two reasons. First, the Speech or Debate Clause, which has been recognized as coterminous with the doctrine of absolute legislative immunity, *see Consumers Union*, 446 U.S. at 733, has long been applied to bar suits for both types of relief, and neither we nor the Supreme Court has had occasion to question that Clause's scope in this regard since our holding in *Star Distributors. Cf. Eastland*, 421 U.S at 503 ("[A] private civil action, *whether for an injunction or for damages*, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation.") (emphasis added). Second, and more importantly, we are unwilling to ignore the Supreme Court's squarely-applicable precedent in *Consumers Union* simply because of broadly-stated *dicta* in *Graham* not specifically referring to legislative immunity, *see Graham*, 473 U.S. at 166-67 – particularly in view of its approving discussion of *Consumers' Union* elsewhere in the opinion, *see id.* at 164 – or because of a footnote in *Umbehr* concerning the immunity of local, rather than state, officials, *see Umbehr*, 518 U.S. at 677 n.*.

Our conclusion is supported by recent decisions of the Third and Eleventh Circuits holding that legislative immunity may bar claims for injunctive relief against state officials, *see Scott v. Taylor*, 405 F.3d 1251 (11th Cir. 2005); *Larsen v. Senate of Pa.*, 152

F.3d 240 (3d Cir. 1998), as well as by earlier decisions of the Sixth and Seventh Circuits reaching similar conclusions, *see Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir. 1991) (injunctive relief against Governor of Wisconsin, acting in a legislative capacity, was barred because "[l]egislators' immunity is absolute and extends to injunctive as well as to damages suits"); *Alia v. Michigan Supreme Ct.*, 906 F.2d 1100, 1102 (6th Cir. 1990) (injunctive relief against Justices of Michigan Supreme Court for actions taken in their legislative capacity was barred by legislative immunity).

In *Scott*, the Eleventh Circuit held that the claims of a plaintiff who sought injunctive relief against state legislators were barred by legislative immunity. 405 F.3d at 1255-56. In reaching this conclusion, the Eleventh Circuit attempted to reconcile *Graham*'s *dicta* that an official-capacity defendant cannot invoke personal defenses but can only invoke official immunities applicable to the government as an entity, *see Graham*, 473 U.S. at 166-67, with the Supreme Court's decision in *Consumers Union*. The Eleventh Circuit began by explaining that the reason "personal" defenses such as legislative immunity "are generally unavailable in official capacity suits [is] because such suits are treated as suits against the underlying entity [*i.e.*, the state]," and not against the individual. *Scott*, 405 F.3d at 1255. The Eleventh Circuit then noted that under *Ex parte Young*, "official-capacity actions for prospective relief are *not* treated as actions against the state." *Id.* at

1255 (emphasis added). This led the Eleventh Circuit to conclude that the plaintiff's action seeking "prospective injunctive relief against [defendants] in their official capacities" was "not to be treated as a[n] action against the entity," but rather, as an action against the individual legislators. *Id.* The Eleventh Circuit therefore held that the individual defense of legislative immunity *was* available for the same reason that the official defense of Eleventh Amendment immunity *was not* available – namely, because the suit in question was not considered to be a suit against the state itself. *Id.*

In *Larsen*, 152 F.3d at 240, the Third Circuit held that legislative immunity barred claims for injunctive relief in a suit brought by a former Pennsylvania Supreme Court justice. The plaintiff sought reinstatement to judicial office following his impeachment and removal by the State Senate. The Third Circuit relied on the Supreme Court's opinion in *Consumers Union*, and on the principles embodied by the Speech or Debate Clause, to conclude that "*at least in appropriate cases*, legislators are entitled to immunity from claims for injunctive and/or declaratory relief." *Larsen*, 152 F.3d at 253 (emphasis added).

"Without attempting to draw a line for all cases," the Third Circuit determined that the relevant question in *Larsen* was "whether [plaintiff's] request for prospective relief from the Senators could be accorded consistent with the policies underlying legislative immunity." *Id.* The Third Circuit then concluded that legislative immunity applied because the plaintiff

"seeks reinstatement – nothing less than that the individual Senators rescind their guilty vote on his impeachment." *Id.* at 254. It noted that "[i]t is difficult to imagine a remedy that would more directly interfere with the role assigned exclusively to the Senators by the Pennsylvania Constitution." *Id.*[10]

Accordingly, we adhere to our holding in *Star Distributors*, 613 F.2d at 8-9, and reaffirm the vitality of its teaching that claims for injunctive relief against defendant state officials, sued in their official capacities, may be barred by the doctrine of legislative immunity, notwithstanding arguably contradictory *dicta* in *Graham* and *Umbehr*.

(b) Effect of Legislative Immunity on Plaintiffs' Claims

A defendant's entitlement to legislative immunity from claims for injunctive relief does not depend solely on whether the defendant's *acts* giving rise to the alleged violation were "taken in the sphere of legitimate legislative activity." *Bogan*, 523 U.S. at 54 (internal quotation marks omitted). We agree with the Third Circuit that, in considering whether the

[10] The Third Circuit recently reaffirmed its conclusion that legislative immunity may, in appropriate cases, bar claims for injunctive relief against state officials sued in their official capacity in *Baraka v. McGreevey*, 481 F.3d 187, 202-03 (3d Cir. 2007) (holding that claim for reinstatement by former poet laureate of New Jersey, whose position was eliminated by the state legislature, was barred by legislative immunity).

doctrine of legislative immunity is available to foreclose claims for injunctive relief in official-capacity suits, we must also look more specifically to whether granting the particular *relief sought* would enjoin defendants in their legislative capacities. *See Larsen*, 152 F.3d at 253 (requiring consideration of "the policies underlying legislative immunity" and of "the extent to which a court could order [the desired] relief"). This is so because, unlike a court's award of compensatory damages, which remedies discrete injuries caused by a defendant's prior acts, a court's grant of injunctive relief seeks to shape and direct future acts potentially different in nature and scope from those giving rise to the litigation. Therefore, even where a defendant's prior conduct giving rise to the cause of action consists of legislative acts for which the defendant is immune, the same may not be true of the future acts that would be compelled or prohibited by a grant of injunctive relief.

The case of *Consumers Union* is illustrative. In that case, the Supreme Court applied legislative immunity to bar plaintiff's claims for injunctive relief insofar as the relief sought would compel the defendants to perform a legislative act – the repeal or amendment of the state's bar code to conform with constitutional requirements. *See Consumers Union*, 446 U.S. at 733-34 (holding that court and its members were absolutely immune from suit for failure to amend bar code). The Court concluded, however, that legislative immunity did not bar claims for injunctive relief that would enjoin the defendant justices from

committing a distinctly non-legislative act – independent enforcement of the unconstitutional provisions of the bar code against particular individuals. *Id.* at 734-36.

Other cases have illustrated that even where a defendant commits allegedly unlawful acts in a legislative capacity, the desired injunctive order might act upon the defendant (or another defendant) in a purely non-legislative capacity. In such cases, we see no reason why a defendant should be entitled to legislative immunity simply because the harm alleged originated, in some sense, with a legislative act. *See*, *e.g.*, *Kilbourn v. Thompson*, 103 U.S. 168, 196-205 (1880) (in case involving Speech or Debate Clause, members of House of Representatives were immune for ordering an allegedly false arrest, but the sergeant-at-arms was not immune for carrying out the arrest).

Accordingly, before defendants in the instant case can invoke legislative immunity to defeat a claim for injunctive relief, they must show both (1) that the acts giving rise to the harm alleged in the complaint (*i.e.*, termination of plaintiffs from their positions in retaliation for political affiliations and union activities) were undertaken when defendants were acting in their legislative capacities under the functional test set forth in *Bogan*, 523 U.S. at 54-56; and (2) that the particular relief sought (*e.g.*, reinstatement of plaintiffs to their previous positions or to other positions) would enjoin defendants in their legislative capacities, and not in some other capacity in which they would not be entitled to legislative immunity.

(1) Whether Defendants' Alleged Acts Were "Legislative" Under *Bogan*

Defendants argue that, in firing plaintiffs and (allegedly) eliminating their positions, they were engaging in acts that were legislative in nature and thus, entitled to immunity for those acts. We first address the District Court's application of the functional test set forth by the Supreme Court in *Bogan* for deciding whether a defendant's acts are "legislative" and therefore protected by the doctrine of absolute legislative immunity.

According to that test, two factors are relevant in determining whether a defendant's acts are within the "sphere of legitimate legislative activity." *Id.* at 54 (internal quotation marks). First, it is relevant whether the defendants' actions were legislative "in form," *i.e.*, whether they were "integral steps in the legislative process." *Id.* at 55. Second, it may also be relevant whether defendants' actions were legislative "in *substance*," *i.e.*, whether the actions "bore all the hallmarks of traditional legislation," including whether they "reflected . . . discretionary, policymaking decision[s] implicating the budgetary priorities of the [government] and the services the [government] provides to its constituents." *Id.* at 55-56.

Although the Court in *Bogan* did not state explicitly whether establishing both the procedural and substantive elements of this inquiry was required for legislative immunity to apply, we agree with the

District Court that establishing both elements is required in these circumstances. In particular, we think that before high-level *executive* branch officials in the State of Connecticut can claim the protections of an immunity traditionally accorded to members of the *legislative* branch, it is important that they show that their activities were "legislative" both in form and in substance. *See Baraka v. McGreevey*, 481 F.3d 187, 199 (3d Cir. 2007) ("Regardless of the level of government, we believe the two-part substance/procedure inquiry is helpful in analyzing whether a non-legislator performing allegedly administrative tasks is entitled to immunity."). Accordingly, we conclude that the District Court properly framed its broad inquiry as whether defendants' alleged acts were "both: (1) substantively legislative, *i.e.*, acts that involve policy making; and (2) procedurally legislative, *i.e.*, passed by means of established legislative procedures." *Dist. Ct. Op.*, 2006 WL 141645, at *3 (citing *Ryan v. Burlington County*, 889 F.2d 1286, 1290-91 (3d Cir. 1989)). We turn now to evaluate the District Court's application of this inquiry to facts of the instant case.

Defendants argue that the District Court erred in concluding that further factual discovery is necessary to determine whether their alleged acts were procedurally legislative under the first prong of the *Bogan* test. In particular, defendants contend that the District Court impermissibly focused on defendants' motives, rather than on the nature of their acts, when conducting its analysis. Defendants point specifically

to the District Court's conclusion in the April 5 Order that further discovery is necessary so that the Court can determine whether defendants are able to make "a good faith [showing] . . . that they ordered the layoffs to achieve budgetary savings under Conn. Gen. Stat. § 4-85(b)(2), and not for other reasons." April 5 Order at 2, J.A. 90.

We agree with defendants that the District Court impermissibly focused on defendants' motives when concluding that discovery was warranted. 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. *See Bogan*, 523 U.S. at 54-55. Recognizing that "the privilege of absolute immunity 'would be of little value if [legislators] could be subjected to . . . the hazard of a judgment against them based upon a jury's speculation as to motives,'" *id.* at 54 (quoting *Tenney*, 341 U.S. at 377), and that "it is not consonant with our scheme of government for a court to inquire into the motives of legislators," *id.* at 55 (quoting *Tenney*, 341 U.S. at 377), the 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).

The District Court thus erred when it determined that before defendants' activities could be cloaked

with legislative immunity, defendants would have to make a "good faith showing" as to their "reasons" for ordering the alleged terminations. 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.

Nevertheless, we agree with the District Court's ultimate conclusion that further discovery is necessary to determine whether defendants' acts were indeed procedurally legislative under *Bogan*. We are unable to determine on the current record whether defendants' alleged acts were "integral steps in the legislative process." *Id.* at 55. Although the District Court concluded that "the governor had the legislative authority under Conn. Gen. Stat. § 4-85(b)(2) to make deficit reduction decisions," April 5 Order at 2, J.A. 90, it is unclear whether the alleged terminations were integral steps in the statutory budget process. More specifically, the record does not show whether defendants acted pursuant to their statutory budget authority when they ordered the terminations, or whether the terminations occurred independent of (or in violation of) that authority.[11] Thus, whether

[11] The District Court did not make any conclusive determinations in this regard. *See* April 5 Order at 2, J.A. 90 (stating that "a court *could* reasonably conclude that the defendants complied with Conn. Gen. Stat. § 4-85(b)(2) when ordering the job terminations at issue here") (emphasis added). Moreover, the amended complaint does not directly address the issue of which, if any, legislative powers were invoked, but simply alleges in a

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defendants' alleged acts were procedurally legislative under the functional test of *Bogan* remains a disputed question of fact that must be resolved after discovery. *Compare* Appellants' Br. at 41-42 (contending that "when the Governor acted to remedy the State's fiscal condition by revising its budget and reducing its workforce, he . . . was fully authorized to make legislative decisions"), *with* Appellees' Br. at 57 ("Plaintiffs are prepared to prove that Governor Rowland never invoked his rescission authority . . . and did not follow the mandatory statutory procedures"), *and id.* at 58 (asserting that the Governor "did not act within 30 days of being notified of the deficit," "did not submit a report explaining the reasons for the deficit [as] required by § 4-85(b)(2)," and "did not submit a plan for spending reductions that he could implement to eliminate the budget deficit").

We turn next to the District Court's application of the second prong of the *Bogan* test, inquiring whether the acts undertaken by defendants were substantively legislative. Defendants argue that because the District Court concluded that defendants' actions were "substantively legislative," and because the Supreme Court in *Bogan* did not address whether legislative immunity attaches *only* to actions that are *both*

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conclusory fashion that "[d]efendants were not acting in a legislative capacity when they made their demands for union contract concessions, when they made their threats of retaliatory union member terminations . . . , and when they implemented the terminations at issue in this lawsuit." Am. Compl. ¶ 50.

substantively and procedurally legislative, we should conclude that legislative immunity bars the instant action. Appellants' Br. at 37.

We reject this argument for two reasons. First, as explained above, to establish a legislative immunity defense in the instant case, defendants must show that their acts are procedurally, as well as substantively, legislative. Second, the current record does not reveal whether the District Court properly concluded that defendants' actions were substantively legislative. The District Court based its conclusion on its observation that "in this case the governor faced a budget crisis in the fall of 2002, and, as the state's chief executive officer, exercised his discretion to reduce expenditures by demanding collective bargaining agreement concessions and *by eliminating some 3,000 union jobs* through executive order." *Dist. Ct. Op.*, 2006 WL 141645, at *3 (emphasis added).

The elimination of a position, unlike "the hiring or firing of a particular employee," is a substantively legislative act for legislative immunity purposes. *Bogan*, 523 U.S. at 56 (noting that termination of an employee's position "may have prospective implications that reach well beyond the particular occupant of the office"). By contrast, "[a] personnel decision is administrative in nature if it is directed at a particular employee or employees, and is not part of a broader legislative policy." *Almonte*, 478 F.3d at 108; *see also Harhay*, 323 F.3d at 210 ("Discretionary personnel decisions, even if undertaken by public officials who otherwise are entitled to immunity, do not give rise to

[legislative] immunity. . . ."). However, we do not think it was proper for the District Court to conclude at the pleading stage, and without explanation, that defendants "eliminated" plaintiffs' positions, rather than terminated the employment of particular employees administratively. Plaintiffs do not allege in their amended complaint that defendants "terminat[ed] the budget lines" that would have funded their positions, *Almonte*, 478 F.3d at 108, or that defendants eliminated the positions through other means. Rather, plaintiffs allege only that state union employees were "terminat[ed]" for illegal reasons. *See*, *e.g.*, Am. Compl. ¶ 42. Moreover, no undisputed record evidence contradicts plaintiffs' allegations. Accepting plaintiffs' allegations as true, as we must in reviewing defendants' motion to dismiss, *see Almonte*, 478 F.3d at 104 & n.2, we conclude that the District Court should not have found that the positions were eliminated.

Even assuming *arguendo* that the current record established that *some* positions were eliminated from the state workforce during the relevant time period, defendants cannot demonstrate at this stage of the litigation that their acts were substantively legislative. The District Court did not consider whether *plaintiffs'* positions were eliminated, or whether plaintiffs' loss of their state employment was directly attributable to any budget modifications proposed or implemented administratively by defendants.[12]

[12] We note that defendants need not prove they acted unilaterally in order for their acts to be legislative. *Cf. Bogan*,

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Accordingly, discovery is necessary before the District Court can determine conclusively whether defendants' actions were substantively legislative. After discovery, the dispositive question to be answered by the District Court regarding this aspect of its *Bogan* inquiry should be whether plaintiffs' positions were eliminated (a substantively legislative act), *see Almonte*, 478 F.3d at 108, or whether plaintiffs were administratively fired (a substantively non-legislative act), *see id.* The District Court should include within the realm of substantively legislative activity not only any elimination of positions that occurred, but also "any discussions [defendants] may have held, and any agreements they may have made . . . regarding the new budget in the months preceding" any decision to eliminate the positions. *Id.*

Although we do not set forth the precise contours of the distinction between legislative position eliminations and administrative firings, we briefly note, for the benefit of the District Court, the possibility that discovery will reveal facts suggesting defendants initially administratively fired plaintiffs and only subsequently eliminated their positions. In *Jessen v. Town of Eastchester*, 114 F.3d 7 (2d Cir. 1997), we held that a plaintiff could sue municipal board members for

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523 U.S. at 55 (concluding, in the context of the procedural component of the two-part inquiry, that a defendant's "introduction of a budget that proposed the elimination of city jobs and his signing the ordinance into law [after passage by a legislative body] were formally legislative").

firing him administratively before they eliminated his position. We rested our conclusion in *Jessen* on the fact that the "earlier termination from a position which then, at least briefly, remained open was an administrative act that legislative immunity does not protect." *Id.* at 8. But insofar as plaintiffs are seeking reinstatement to positions that have been legislatively eliminated, it would make no difference whether plaintiffs had been administratively fired prior to the legislative position elimination. This is so because, for reasons of legislative immunity, the District Court would lack the power to direct state officials to perform the legislative act of recreating the positions in order to reinstate the plaintiffs to them.

(2) Whether the Relief Sought Would Enjoin Defendants in Their Legislative Capacities

Assuming *arguendo* that defendants' alleged actions are substantively and procedurally legislative under *Bogan*, defendants must still show, before they are afforded the protections of legislative immunity as to claims for injunctive relief, that the requested relief would enjoin them in their legislative capacities. Defendants do not address this issue, other than to assert broadly that the reasoning of the Eleventh Circuit's decision in *Scott* is persuasive and should be adopted by our Court. Plaintiffs address the issue more directly when urging us to find as a matter of law that legislative immunity is inapplicable to the instant claims for injunctive relief. In particular,

plaintiffs claim that they "do not seek to enjoin defendants from performing any legislative functions," but seek instead merely to prevent defendants "from enforcing unconstitutional legislation . . . that they participated in enacting." Appellees' Br. at 66. Consequently, plaintiffs argue that defendants may not invoke legislative immunity against the instant claims for injunctive relief at this stage, or at any future stage, in the litigation.

Addressing the merits of this argument, we look first to the nature of the relief sought. Plaintiffs' amended complaint seeks relief in the form of an order that would, *inter alia*, "compel[ ] defendants . . . in their official capacities, to reinstate [plaintiffs] to their former positions with the State of Connecticut or such other position as the Court deems appropriate, with full and appropriate restoration of seniority and benefits." Am. Compl. at 32 ¶ 9. We agree with plaintiffs that legislative immunity does not bar the requested relief insofar as it involves reinstatement to existing positions *other than* the positions that plaintiffs previously held – *i.e.*, reinstatement to "other position[s] as the Court deems appropriate." *Id.*; *see also* Appellees' Br. at 42 ("[E]ven if positions occupied by the unreinstated employees do not currently exist, these employees can be reinstated to equivalent positions . . . in any number of other State agencies"); *id.* at 43 ("[E]ven if no such vacancies in the full-time workforce exist, the District Court can order unreinstated workers to be hired as durational employees until openings arise"). Because ordering

defendants to hire plaintiffs into existing positions in the state workforce would not require either a new allocation of funds or the passage of new legislation, but would instead compel defendants to act only in their administrative capacities as executive branch officials with authority over the state workforce, we conclude that legislative immunity presents no obstacle to the District Court's ordering of any such relief.[13]

Nevertheless, we cannot assess, at the pleading stage, the merits of plaintiffs' argument that legislative immunity also presents no obstacle to their claims seeking reinstatement to their *previous positions*. Whether restoring plaintiffs to those positions would compel defendants to act in their legislative capacities will necessarily hinge on the findings made by the District Court regarding the issues to be resolved under *Bogan*. If defendants successfully demonstrate that their actions in terminating plaintiffs' positions were legislative in nature under *Bogan*, plaintiffs' claims for reinstatement to their previous positions would be barred by legislative immunity. This is so because ordering such relief would require no less than a judicial order compelling defendants, in their official capacities, to re-create positions that

[13] Of course, defendants could still object to the practical availability of the "administrative" relief sought by plaintiffs. But such objections would speak not to the legislative nature *vel non* of the relief that would be granted, but instead to the doctrines governing judicial exercise of discretion when determining the extent and nature of injunctive relief that may be granted.

would have been eliminated through prior legislative action. As the Third Circuit has recognized in similar circumstances, granting such relief contravenes "the general policies underlying legislative immunity." *See Baraka*, 481 F.3d at 203 (claims against the New Jersey Governor and State Assembly seeking reinstatement to position of Poet Laureate were barred because seeking reinstatement would "require . . . legislators to rescind their votes repealing the statute and to enact legislation recreating the position").

Moreover, unlike the injunction in *Consumers Union*, which prevented "enforcement" of unconstitutional provisions of the Virginia Bar Code, plaintiffs' projected relief would not merely enjoin defendants from performing discretionary functions or from exercising their "independent enforcement authority." *Consumers Union*, 446 U.S. at 734. Rather, it would compel the rescission of an existing budget agreement and the enactment of new budget legislation – precisely the activity which the legislative immunity privilege seeks to protect. *See Baraka*, 481 F.3d at 203 (concluding that because "[d]ebating, voting on, and passing statutes are role[s] assigned exclusively to the Legislature . . . [defendant's] request for reinstatement was barred by legislative immunity" (internal quotation marks omitted)). Because it is unclear whether and how defendants eliminated plaintiffs' positions, their entitlement to immunity from claims seeking reinstatement to their previous positions will depend on facts revealed during discovery.

In sum, we dismiss defendants' appeal for lack of jurisdiction insofar as it challenges the District Court's conclusion that defendants' entitlement to legislative immunity from plaintiffs' claims seeking reinstatement to their *previously-held positions* hinges on findings that can be made only following discovery. *See Almonte*, 478 F.3d at 105 (appellate jurisdiction does not exist where immunity determination depends on unresolved factual issues). However, because we conclude as a matter of law that legislative immunity presents no bar to plaintiffs' claims insofar as plaintiffs seek placement into *other, existing positions* in the State workforce, we affirm the District Court's denial of defendants' motion to dismiss this claim for relief and direct the Court, on remand, to consider this claim without regard to defendants' asserted legislative immunity defense.[14]

C. Eleventh Amendment Sovereign Immunity

We turn now to defendants' argument that Eleventh Amendment sovereign immunity bars the instant action in its entirety, and that the District Court

[14] Because defendants do not assert that the other forms of injunctive relief sought by plaintiffs, including plaintiffs' request for an injunction prohibiting retaliation against them, would enjoin defendants in their legislative capacities, we do not consider whether legislative immunity might also bar these forms of relief. The parties are directed to address arguments concerning these other forms of relief to the District Court in the first instance.

therefore erred by not dismissing plaintiffs' claims seeking injunctive relief.

1. Standard of Review and Governing Law

We review *de novo* the District Court's denial of defendants' motion to dismiss the amended complaint on Eleventh Amendment sovereign immunity grounds. *See Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18, 20 (2d Cir. 2004).

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "The reach of the Eleventh Amendment has . . . been interpreted to extend beyond the terms of its text to bar suits in federal courts against states, by their own citizens or by foreign sovereigns. . . ." *Western Mohegan*, 395 F.3d at 20. Under the well-known exception to this rule first set forth in *Ex parte Young*, 209 U.S. 123 (1908), however, "a plaintiff may sue a state official acting in his official capacity – notwithstanding the Eleventh Amendment – for prospective, injunctive relief from violations of federal law." *In re Deposit Ins. Agency*, 482 F.3d 612, 617 (2d Cir. 2007) (internal quotation marks omitted).

2. Analysis

Defendants assert that plaintiffs have failed to meet the requirement of *Ex parte Young* that they allege an "*ongoing* violation of federal law." *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2004) (emphasis added). Defendants maintain that the violations alleged here are not ongoing because (1) "since the adoption of a modified FY 2003 budget [several weeks after commencement of the instant litigation], [p]laintiffs' positions have not been available because they have not been funded," Appellants' Br. at 19; and (2) defendants do not have the power to recreate plaintiffs' previous positions without the authorization of the state legislature.

Plaintiffs claim that this Court lacks interlocutory appellate jurisdiction to consider defendants' sovereign immunity argument. They contend that defendants' argument is merely a claim of mootness disguised as a claim of entitlement to sovereign immunity and assert that a defendant should be deemed to have asserted a claim of mootness, rather than one of sovereign immunity, when, as here, the defendant has claimed that requested relief became unavailable *after* commencement of the litigation. Plaintiffs rely for support on two cases denying interlocutory review to government officials who were subjected to civil litigation – *Will v. Hallock*, 546 U.S. 345 (2006), which denied interlocutory review of a district court's order rejecting defendants' assertion of a statutory judgment bar, and *Bastien v. Office of Senator Ben Nighthorse Campbell*, 454 F.3d 1072 (10th Cir. 2006), which denied interlocutory review of a district court's

order denying the motion of the defendant Senator's office to dismiss on sovereign immunity and other grounds.

Neither *Will* nor *Bastien* works in plaintiffs' favor. *Will* did not involve a claim of entitlement to sovereign immunity. Indeed, the Court in *Will* expressly distinguished that case from cases emerging in the sovereign immunity context where, as the Court recognized, interlocutory appeal is generally permissible. *See Will*, 546 U.S. at 350 (stating that orders denying Eleventh Amendment sovereign immunity were "among the small class of orders" appealable on a collateral basis).

Although *Bastien* involved a claim of entitlement to sovereign immunity, it did not require application of the *Ex parte Young* exception that is relevant to the instant appeal. We are specifically required by *Ex parte Young* to examine whether there exists an *ongoing* violation of federal law. *See Verizon*, 535 U.S. at 645. Thus, it is relevant – in considering the existence *vel non* of an ongoing violation – to ask whether the claimed remedy is still available. Because defendants present a colorable argument that the purported elimination of plaintiffs' positions extinguished any ongoing violation of their right to state employment, we conclude that we retain jurisdiction over defendants' interlocutory appeal.[15] *Cf. Toussie v. Powell*,

[15] Because we also conclude below that defendants are not entitled to sovereign immunity from claims for injunctive relief as a matter of law, *see post*, we reject plaintiffs' additional argument

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323 F.3d 178, 182 (2d Cir. 2003) ("Because [the defendant] has, under our prior cases, a colorable claim to qualified immunity, we have jurisdiction to consider his claim, since otherwise that claim would be effectively lost") (internal quotation marks omitted).

Addressing the merits of defendants' sovereign immunity arguments, we find them to be unpersuasive. Every Circuit to have considered the issue, including our own, has held that claims for reinstatement to previous employment satisfy the *Ex parte Young* exception to the Eleventh Amendment's sovereign immunity bar. *See Dotson v. Griesa*, 398 F.3d 156, 178 (2d Cir. 2005); *Dwyer v. Regan*, 777 F.2d 825, 836 (2d Cir. 1985), *modified, reh'g denied*, 793 F.2d 457 (2d Cir. 1986); *see also Whalen v. Mass. Trial Ct.*, 397 F.3d 19, 30 (1st Cir. 2005); *Koslow v. Commonwealth of Pa.*, 302 F.3d 161, 179 (3d Cir. 2002); *Coakley v. Welch*, 877 F.2d 304, 307 n.2 (4th Cir. 1989); *Warnock v. Pecos County*, 88 F.3d 341, 343 (5th Cir. 1996); *Carten v. Kent State Univ.*, 282 F.3d 391, 396 (6th Cir. 2002); *Elliott v. Hinds*, 786 F.2d 298, 302 (7th Cir. 1986); *Murphy v. State of Ark.*, 127 F.3d 750, 754 (8th Cir. 1997); *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 840-42 (9th Cir. 1997); *Meiners v. Univ. of Kan.*, 359 F.3d 1222, 1232-33 (10th Cir. 2004); *Lassiter v. Ala. A&M Univ.*, 3 F.3d 1482, 1485 (11th Cir. 1993); *Dronenburg v. Zech*, 741 F.2d 1388, 1390 (D.C.

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against our exercise of interlocutory jurisdiction – namely, that resolution of the sovereign immunity issue hinges on unresolved factual determinations. *See* Appellees' Br. at 34-35.

Cir. 1984) (noting that claim by military officer against federal government seeking reinstatement was not barred by federal sovereign immunity).

Of these cases, only the First Circuit's decision in *Whalen* involved a claim seeking reinstatement to a position that no longer existed. *See Whalen*, 397 F.3d at 21. However, the court in *Whalen* had no occasion to address whether the elimination of the plaintiff's position was relevant to its holding because the position had been restored, and plaintiff had been reinstated to the position, while the suit was pending. *See id.* at 23. We therefore lack the benefit of any controlling or persuasive precedent that directly addresses whether the legislative elimination of a job position precludes a plaintiff's claim of an ongoing violation of federal law under *Ex parte Young*.

Assuming *arguendo* that plaintiffs' positions no longer exist, we conclude, as a matter of first impression, that the alleged violation of plaintiffs' rights is nevertheless "ongoing" for the purposes of the *Ex parte Young* exception. We reach this conclusion because, to the extent plaintiffs assert violations of their right to state employment, the elimination of their positions would do nothing to extinguish that right, much less the underlying violation. Rather, the elimination would merely extinguish the specific *positions* to which plaintiffs claim they are still entitled. Nothing prevents plaintiffs – either as a conceptual matter or under the doctrine of *Ex parte Young* – from claiming an "ongoing" harm based on the State's present, ongoing failure to re-create those positions in

the State workforce, or to restore plaintiffs to other existing positions. Indeed, the state's alleged failure to act in that regard is, by its nature, both (1) ongoing and (2) potentially curable by prospective relief compelling the State to re-create positions or rehire plaintiffs into existing positions.[16] *Cf. Elliott*, 786 F.2d at 302 (holding that "wrongful discharge is a continuing violation" because "as long as the state official keeps [the plaintiff] out of his allegedly tenured position the official acts in what is claimed to be derogation of [the plaintiff's] constitutional rights").

Green v. Mansour, 474 U.S. 64 (1985), and *Papasan v. Allain*, 478 U.S. 265 (1986), relied on by defendants, are not to the contrary. In *Green*, the plaintiffs conceded that the only "continuing" violations that were alleged at trial – the state's failure to credit childcare costs and its inclusion of step-parents' income under a federal benefits program – had since been rendered moot both by Congressional legislation and by the state's subsequent conformity with federal law. 474 U.S. at 65-67. The only forms of relief considered by the Supreme Court in *Green* were "notice relief" (*i.e.*, the sending of notice to individuals who were potentially entitled to state benefits) and a declaratory judgment. *See id.* Such relief is not what plaintiffs seek here, or analogous to the relief sought here, because these plaintiffs *do* allege that there is an ongoing violation that could be immediately cured

[16] Of course, we need not address here whether *legislative* immunity might bar the awarding of such relief.

by granting their claims for reinstatement. *See Elliott*, 786 F.2d at 302 ("The goal of reinstatement . . . is to compel the state official to cease her actions in violation of federal law. . . .").

Nor is the relief sought here analogous to that which the Supreme Court, in *Papasan*, held was barred under the Eleventh Amendment. In that case, the Court held that a request to enjoin the state from withholding "accrued benefits" of a land trust sought retroactive, rather than prospective, relief and was therefore barred by the Eleventh Amendment. 478 U.S. at 280-81. The Court noted that although the relief sought would be paid in "continuing income," the relief amounted to "an accrued monetary liability" that would require the state "to use its own resources" in what the Court deemed a "one-time restoration of the lost [trust money] itself." *Id.* at 281.

Here, plaintiffs' requested relief of reinstatement to positions that might no longer exist can hardly be characterized as "retroactive" or as seeking "accrued benefits." To the contrary, the relief would be entirely forward-looking inasmuch as it would require the state prospectively to rehire plaintiffs into existing positions or create *new* positions in the State workforce, and to compensate plaintiffs for work performed in the course of their *future* employment. *See Doe*, 131 F.3d at 841 (relying on fact that plaintiff "would be entitled to [a] salary solely for his work after reinstatement" to conclude that relief of reinstatement was prospective in nature). Moreover, plaintiffs' injunctive claims do not seek compensation

for past wrongs, and they would not appear to require the state to pay lost wages, backpay, or retroactive benefits to plaintiffs. *See id.* (observing that "while reinstatement would relate to the past violation, it would not amount to relief *solely for the past violation*"). Rather, reinstatement, if granted, would serve directly to "end[ ] the [alleged] violation of federal law." *Papasan*, 478 U.S. at 278.[17]

Defendants also argue that plaintiffs' other claims for injunctive relief, including its claims for an injunction prohibiting retaliation against plaintiffs, are barred by Eleventh Amendment sovereign immunity as a matter of law. Defendants contend that the additional forms of injunctive relief requested by plaintiffs also do not respond to any ongoing violation of federal law. We disagree. Plaintiffs seek other forms of injunctive relief as a remedy for defendants' alleged ongoing retaliation against the individual and union plaintiffs, as demonstrated by defendants' alleged failure to rehire the individual plaintiffs (or restore their positions). The prohibition against retaliation sought by plaintiffs, for example, would prevent this alleged ongoing injury from occurring again in the future. Thus, sovereign immunity does

[17] Defendants' argument that plaintiffs' eighth claim for relief is barred under the Eleventh Amendment because it is based on an alleged violation of state law, in violation of *Pennhurst*, 465 U.S. at 89, is also without merit at this stage in the litigation. Assuming *arguendo* that we have jurisdiction to review this argument, we conclude that the eighth claim adequately alleges a violation of federally-protected rights.

not bar the other forms of injunctive relief sought by plaintiffs.

In sum, we conclude that the District Court properly denied defendants' motion to dismiss plaintiffs' claims for injunctive relief on sovereign immunity grounds.

III. CONCLUSION

To summarize, we hold that:

(1) Legislative immunity does not apply exclusively to bar claims for damages, but may also apply to bar claims for injunctive relief brought against state officials in their official capacities.

(2) In determining whether the instant claims for injunctive relief are barred by legislative immunity, it is necessary to determine (a) whether defendants' actions were "substantively" and "procedurally" legislative; and (b) whether the specific relief sought would enjoin defendants in their performance of legislative functions.

(3) In the circumstances presented, discovery is necessary to assess whether defendants are entitled to legislative immunity with respect to plaintiffs' claims for reinstatement to their previous positions.

(4) As a matter of law, defendants are not entitled to legislative immunity with respect to plaintiffs' claims to placement into other, existing positions, because granting this relief would not

enjoin defendants in their performance of legislative functions.

(5) Eleventh Amendment sovereign immunity does not bar plaintiffs' claims for injunctive relief.

Accordingly, we hereby **DISMISS** the appeal for lack of jurisdiction insofar as it challenges the District Court's denial of legislative immunity with respect to plaintiffs' claims seeking reinstatement to their previous positions. We **AFFIRM** the order of the District Court insofar as it denied legislative immunity with respect to plaintiffs' claims seeking placement into *other*, existing positions. We also **AFFIRM** the order of the District Court insofar as it held that plaintiffs' claims for injunctive relief were not barred by the Eleventh Amendment.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE EMPLOYEES BARGAINING AGENT COALITION, ET AL., Plaintiffs,	:	Civil No. 3:03CV221 (AVC)
VS.	:	
JOHN G. ROWLAND, ET AL., Defendants.	:	

ORDER AMENDING THE COURT'S RULING DENYING THE DEFENDANTS' MOTION TO DISMISS

On January 31, 2006, the court denied the defendants' motion to dismiss the amended complaint for want of subject matter jurisdiction, concluding that the doctrine of absolute legislative immunity did not bar the action because issues of fact precluded the court from determining whether the executive actions condemned here were legislatively authorized. In particular, the court concluded that the record was "devoid of any evidence that [in the fall of 2002] the governor invoked his authority [under Conn. Gen. Stat. § 4-85(b)(2)] when ordering the job terminations here."

For the governor to attain budget modification authority under Conn. Gen. Stat. § 4-85(b)(2), the comptroller must notify the governor that there exists a projected deficit in the general fund of greater than one percent. The governor, in turn, must file a report

with the joint standing committee that includes a plan to modify the budget to prevent a deficit. There are no other requirements. In footnote 5 to the court's January 31, 2006 ruling, the court observed that "there is no evidence to support a finding that there existed a projected budget deficit of more than one percent, or . . . [that the governor filed a] report or plan, or even an affirmation that the governor had invoked his authority under § 4-85(b)."

On March 9, 2006, however, the defendants filed for the first time a copy of an April 1, 2003 letter from the Office of the Comptroller to Governor Rowland stating that in September of 2002, there existed a deficit exceeding one percent and that on December 6, 2002, the governor furnished a deficit reduction plan. Because these are the only requirements for invoking budget modification authority under § 4-85(b)(2), the court concludes that the governor had the legislative authority under Conn. Gen. Stat. § 4-85(b)(2) to make deficit reduction decisions.

Because the statute does not require the legislature to approve the governor's plan, or even for the governor to follow his own plan when making deficit reduction decisions, a court could reasonably conclude that the defendants complied with Conn. Gen. Stat. § 4-85(b)(2) when ordering the job terminations at issue here, and hence, are entitled to absolute legislative immunity. However, in this court's view, before the defendants can cloak their actions with immunity, they must make out a good faith claim to it, that is, they must show that they ordered the layoffs to

achieve budgetary savings under Conn. Gen. Stat. § 4-85(b)(2) and not for other reasons. Because this remains a disputed issue of fact, the court concludes that the defendants are not entitled to absolute legislative immunity at this juncture. The defendants' motion to dismiss on grounds of absolute legislative immunity therefore remains DENIED.

It is so ordered this 5th day of April, 2006 at Hartford, Connecticut.

Alfred V. Covello
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE EMPLOYEES BARGAINING AGENT COALITION, ET AL., Plaintiffs,	:	Civil No. 3:03CV221 (AVC)
VS.	:	
JOHN G. ROWLAND, ET AL., Defendants.	:	

RULING ON THE DEFENDANTS' MOTION TO DISMISS

This is an action for money damages and injunctive relief brought pursuant to 42 U.S.C. § 1983 and alleging violations of the United States Constitution. The plaintiffs, State Employees Bargaining Agent Coalition ("SEBAC"), and twelve of thirteen unions that comprise the SEBAC along with five individually named union members, allege that the defendants, Connecticut Governor John Rowland and the Connecticut Secretary of the Office of Policy and Management, Marc Ryan ("the defendants" or "Rowland" and "Ryan") violated their constitutional rights when in the fall of 2002, they ordered the lay-offs of approximately 3,000 state union employees.

The defendants now move for dismissal pursuant to Fed. R. Civ. P. 12(b)(1) on grounds that: (1) the amended complaint is barred by the doctrine of absolute legislative immunity; (2) the amended complaint is barred by the Eleventh Amendment to the

United States Constitution; and (3) the defendants are entitled to qualified immunity with respect to any award of money damages. The defendants have also moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) on grounds that various counts of the amended complaint fail to state a claim for which relief may be granted. For the reasons hereinafter set forth, the motion is DENIED to the extent it seeks dismissal for want of federal subject matter jurisdiction. Further, the motion is DENIED WITHOUT PREJUDICE to the extent it seeks dismissal on various counts for failure to state a claim.

FACTS

Examination of the amended complaint, the motion to dismiss, the accompanying memorandum of law and the responses thereto, reveal the following factual background.

A. Background

This lawsuit arises out of a decision of the Governor of Connecticut in December of 2002 to terminate the employment of some 3,000 unionized state employees all in the name of required budgetary savings. As the rules governing formation and modification of the state budget are relevant background, they are recited as follows.

The constitutional[1] and statutory scheme for budget administration in Connecticut is a mix of legislative and executive responsibilities.[2] The Governor is charged by law with presenting a budget plan to the general assembly every two years. Conn. Gen. Stat. § 4-72 and § 4-73. On a quarterly basis, each budgeted state agency must submit to the Governor, through the Secretary of OPM, a requisition for a quarterly allotment. Conn. Gen. Stat. § 4-85(a). The Governor may disapprove of the request if he/she determines that a change in circumstances since the adoption of budget requires a modification. Conn. Gen. Stat. 4-85(b)(1). Before any modification is effected, the Governor must file a report with the joint standing committee of the general assembly charged with responsibility for budget appropriations

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[1] Conn. Const. Art. III § 18(a), as adopted in Article XXVIII of the amendments (constitutional balanced budget requirement: "The amount of general budget expenditures authorized for any fiscal year shall not exceed the estimated amount of revenue for such fiscal year."); *see also* Conn. Const. Art. III § 18(b) as adopted in Article XXVIII of the amendments (constitutional spending cap: "The general assembly shall not authorize an increase in general budget expenditures for any fiscal year above the amount of general budget expenditures authorized for the previous fiscal year by a percentage which exceeds the greater of the percentage increase in personal income or the percentage increase in inflation, unless the governor declares an emergency or the existence of extraordinary circumstances and at least three-fifths of the members of each house of the general assembly vote to exceed such limit for the purposes of such emergency or extraordinary circumstances . . . ").

[2] See Conn. Gen. Stat. § 4-69 through § 4-107a.

describing the change in circumstances requiring budget reductions. *Id.* The Governor is also mandated, by law, to devise and implement a plan to prevent a budget deficit if a deficit of more than one percent of the state's general fund of appropriations is projected. Conn. Gen. Stat. § 4-85(b)(2).

B. The Amended Complaint

In June of 2001, the general assembly approved a budget for the state of Connecticut to control through 2003. In the fall of 2002, however, the state faced a budget crisis.[3] Thereafter, Governor John Rowland and the Connecticut Secretary of the Office of Policy and Management ("OPM"), Marc Ryan ("the defendants") demanded more than 450 million dollars annually in concessions from state employee unions ("the plaintiffs") under various collective bargaining agreements.

The amended complaint alleges that, to coerce the plaintiffs into making concessions, the defendants threatened to terminate state union workers. When all contract concessions were not forthcoming, the

[3] Although the amended complaint does not allege that during the fall of 2002, a budget crisis existed in the State of Connecticut, the court is authorized to take judicial notice of this fact based on evidence in the record. The court is further authorized to consider this fact in conjunction with the defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). *See Antares Aircraft, L.P. v. Federal Republic of Nigeria,* 948 F.2d 90, 96 (2d Cir. 1991).

defendants, through executive orders, began implementing lay-offs of over 3,000 union employees. The amended complaint alleges that the defendants wrongfully singled out union employees for lay off, motivated by the desire to retaliate against political opponents, as evidenced by Rowland's statement that his "natural enemies have been the unions." As further evidence of Rowland's anti-union animus, the amended complaint alleges that during Rowland's 2002 re-election campaign, all but one of the unions endorsed his opponent. The union supporting Rowland was the Connecticut State Police Union ("CSPU"). In the course of soliciting this endorsement, Rowland allegedly told CSPU union leadership that he would not lay off any state troopers. No CSPU members were selected for the lay-offs at issue here, even though state employees performing police functions in other unions have been selected for lay off. The union employees selected for lay-off were all members of unions that did not support Rowland.

STANDARD

A court must grant a motion to dismiss brought pursuant to Fed. R. Civ. P. Rule 12(b)(1) where a plaintiff has failed to establish subject matter jurisdiction. *Golden Hill Paugussett Tribe of Indians v. Weicker,* 839 F.Supp. 130, 136 (D.Conn.1993). In analyzing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), the court must accept as true and must draw inferences in favor of the plaintiff. *Capitol Leasing Co. v. F.D.I.C.,* 999 F.2d 188, 191 (7th Cir.1993).

Where a defendant challenges the district court's subject matter jurisdiction, the court may resolve disputed factual issues by reference to evidence outside the pleadings, such as affidavits. *Antares Aircraft, L.P. v. Federal Republic of Nigeria,* 948 F.2d 90, 96 (2d Cir.1991).

DISCUSSION

1. Absolute Legislative Immunity

The defendants first move to dismiss the amended complaint pursuant to Fed. R. Civ. P. Rule 12(b)(1) on grounds that it is barred by the doctrine of absolute legislative immunity. Specifically, they argue that they are entitled to absolute legislative immunity because their "actions in laying off state employees to achieve budgetary savings were an exercise of [their lawful authority] and, [as broad based policy actions] were legislative in nature" and authorized by Conn. Gen. Stat. § 4-85(b). In response, the plaintiffs maintain that the defense is unavailable because the actions condemned here, i.e., demanding collective bargaining agreement concessions, threatening job terminations of union members, and eliminating some 3,000 union jobs, were effectuated by executive actions and not by established legislative procedures.

At this juncture, discovery is required before the court can determine whether the defendants are entitled to the defense. "The principle that legislators are absolutely immune from liability for their activities has long been recognized in Anglo-American law."

Bogan v. Scott-Harris, 523 U.S. 44, 49, 118 S. Ct. 966, 970 (1998). "Recognizing this venerable tradition, [the United States Supreme Court has] held that state and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities." *Id.* The rationale for the defense is that "the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability." *Id.* (*citing Spallone v. United States,* 493 U.S. 265, 279, 110 S.Ct. 625, 634 (1990)).

"Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Bogan,* 523 U.S. at 54 (*quoting Tenney v. Brandhove,* 341 U.S. 367, 376, 71 S.Ct. 788 (1951)). Acts within the sphere are those that are both: (1) substantively legislative, i.e., acts that involve policy making; and (2) procedurally legislative, i.e., passed by means of established legislative procedures. *Ryan v. Burlington County,* 889 F.2d 1286, 1290-91 (3d Cir. 1989). "The test for determining whether an act is legislative 'turns on the nature of the act, rather than on the motive or intent of the official performing it.'" *Harhay v. Town of Ellington Bd of Edu.,* 323 F.3d 206, 210 (2d Cir. 2003). "This approach to immunity law is a 'functional' one." *Harlow v. Fitzgerald,* 457 U.S. 800, 810, 102 S.Ct. 2727, 2734 (1982). Hence, "officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions . . . " *Bogan,* 523 U.S. at 55.

In *Bogan v. Scott-Harris,* 523 U.S. 44 (1998), the United States Supreme Court considered the reach of absolute legislative immunity in a lawsuit brought against a local, executive branch official. *Id.* In that case, an aggrieved city administrator sued the mayor[4] for introducing a budget that, after being approved by the city council, eliminated her job through a city ordinance. *Id.* The city administrator claimed that the ordinance was actually motivated by racial animus and by a desire to retaliate against her for the exercise of First Amendment rights. *Id.* at 44. Although the city administrator prevailed at trial on the First Amendment claim, the United States Supreme Court reversed, concluding that the mayor was entitled to absolute legislative immunity because the ordinance "reflected a discretionary, policymaking decision implicating the city's budgetary priorities and its services to constituents" *id.* at 45, – actions that, in the Court's view, "were integral steps in the legislative process." *Id.* at 55.

This court cannot say that the actions condemned here were integral steps in the legislative process. In this case the Governor faced a budget crises [sic] in the fall of 2002 and, as the state's chief executive officer, exercised his discretion to reduce expenditures by demanding collective bargaining agreement concessions and by eliminating some 3,000 union jobs through executive order. This action was substantively legislative

[4] The city administrator also sued the vice president of the city council and other officials.

because it reflected a discretionary, policymaking decision implicating the state's budgetary priorities and its services to constituents. However, the loss of jobs came about through executive order – a quintessentially executive function. For that executive function to be entitled to legislative immunity, it must have been authorized by some legislative scheme. *See e.g., Dwonzyok v. Balt. County,* 328 F. Supp. 2d 572, 579-80 (D. Md. 2004) (discussing *Bogan* and holding that city was entitled to absolute legislative immunity because the elimination of the plaintiff's job resulted from a reorganization plan *enacted by the local legislature* as part of a budgetary process).

The defendants point to a state statute, Conn. Gen. Stat. § 4-85(b), as authorizing the executive action here. While that statute gives the Governor the discretion in a budget crisis to modify a previously adopted budget, the record is devoid of any evidence that the governor invoked that authority when ordering the job terminations here.[5] For these reasons, the

[5] In *Abbey v. Rowland,* 359 F. Supp.2d 94 (D. Conn. 2005), the court took judicial notice of Connecticut's budget crisis during the fall of 2002 and specifically found that "the State of Connecticut in the autumn of 2002 was facing a projected budget deficit of more than one percent and that, as a result, Governor Rowland was acting pursuant to the mandate of [Conn. Gen. Stat. § 4-85(b)[(2)] [in ordering the layoffs]." *Id.* at. 98. Although the record in this case supports a finding that the state faced a budget crisis in the fall of 2002, there is no evidence to support a finding that there existed a projected budget deficit of more than one percent, or that Governor Rowland was acting pursuant to Conn. Gen. Stat. § 4-85(b) in ordering the layoffs here. In this

(Continued on following page)

court is unable to conclude that the actions complained of were legitimately legislative, constituting integral steps in the legislative process of which the defendants are absolutely immune.

2. Eleventh Amendment Immunity

The defendants next move to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(1) on grounds that it is barred by the Eleventh Amendment to the United States Constitution. Specifically, they argue that although the lawsuit names two public officials, it is in essence a suit against the state and therefore subject to the Eleventh Amendment bar. In addition, the defendants argue that "special sovereignty interests" as articulated by the Supreme Court in *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 269 (1997), militate in favor of declining jurisdiction to the extent the amended complaint seeks prospective injunctive relief under *Ex parte Young,* 209 U.S. 123 (1908).

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regard, before invoking the authority to modify a budget under § 4-85(b)(1), the Governor was required to furnish a report describing the circumstances of the projected budget deficit to the joint standing committee having cognizance of matters relating to state finance, revenue and bonding. Before invoking the authority to modify a budget under § 4-85(b)(2), the Governor was required to furnish not only a report, but also his plan to prevent the deficit. The record contains no such report or plan, or even an affirmation that the Governor had invoked his authority under § 4-85(b).

In response, the plaintiffs maintain that the Eleventh Amendment does not bar claims for money damages against the defendants in their individual capacities, and that, in accordance with *Ex parte Young,* 209 U.S. 123 (1908) and the Supreme Court's recent decision in *Verizon Maryland v. Public Service Commission of Maryland,* 535 U.S. 635 (2004), the court has jurisdiction to adjudicate claims for prospective injunctive relief without regard to so called special sovereignty interests.

The Eleventh Amendment bars "citizens from bringing actions against states for money damages, absent consent." *Atasadero* [sic] *State hospital v. Scanlon,* 473 U.S. 234, 105 S.Ct. 3142 (1985). It is well established, however, that the Eleventh Amendment does not bar an action seeking prospective injunctive relief with respect to ongoing violations of federal law. *Ex parte Young,* 209 U.S. 123 (1908). Courts have recognized that where a public employee seeks reinstatement to employment terminated in alleged violation of his constitutional rights, the constitutional wrong is ongoing for purposes of jurisdiction. *Elliott v. Hinds,* 786 F.2d 298, 302 (7th Cir. 1986); *see also Shane v. State of Connecticut,* 821 F. Supp. 829, 832 (D. Conn. 1993) ("the Eleventh Amendment does not bar an action seeking prospective injunctive relief, such as reinstatement or restoration of employment benefits").

In *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261 (1997), the Supreme Court considered whether the Eleventh Amendment barred an Indian tribe from

seeking declaratory relief against the state of Idaho and its officials, establishing the tribe's rights to certain lands held by the state and shifting substantially all benefits of ownership and control to the tribe. *Id.* The Court found that the claim was a functional equivalent of a quiet title action with respect to historically sovereign lands that implicated Idaho's special sovereignty interests and was therefore barred by the Eleventh Amendment. *Id.* at 281-82. Justice Kennedy, joined by Chief Justice Rehnquist, agreed that special or core sovereignty interest can limit lawsuits that seek declaratory or injunctive relief against states where the relief requested would be so much of a divestiture of the state's sovereignty as to render the suit as one against the state itself. *Id.* at 283-87. A majority of the Court, however, have agreed that this standard is vague and, accordingly, in determining whether the Eleventh Amendment presents a bar to suit, lower courts need only "conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland v. Public Service Commission of Maryland,* 535 U.S. 635, 645 (2004) (*quoting Coeur d'Alene,* 521 U.S. at 296)).

With respect to money damages, the Eleventh Amendment presents no obstacle so long as the suit is against a state official in his individual capacity. *Shane,* 821 F. Supp. at 832. "But even when a suit is against a public officer in his or her individual capacity, the court is obliged to consider whether it may

really and substantially be against the state." *Luder v. Endicott,* 253 F.3d 1020, 1023 (7th Cir. 2001). Hence, "a suit nominally against state employees in their individual capacities that demonstrably has the identical effect as a suit against the state is [] barred." *Id.* "[A] suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be to restrain the government from acting, or to compel it to act.'" *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 102 n.11 (1984).

The present action seeks an order reversing thousands of state employment decisions and to compel the state to make the plaintiffs whole for all financial losses arising from the defendants' actions. Such relief, if granted, could hardly be accomplished in the absence of substantial interference with public administration or the loss of substantial public resources. Consequently, this action, though nominally against the Governor and the Secretary of OPM, is a suit against the state. Any claim for money damages, to include back-pay or retroactive benefits, is barred by the Eleventh Amendment. Because the amended complaint alleges unconstitutional job terminations, that is, an ongoing violation of federal law and seeks relief properly characterized as prospective, the Eleventh Amendment presents no bar to the extent

the action seeks prospective injunctive relief against the defendants in their official capacities.[6]

3. Qualified Immunity

The defendants next argue that they are entitled to qualified immunity because, in their view, it was objectively reasonable for them to believe that their actions, in laying off unionized state employees, were in furtherance of their constitutional and statutory duties and did not violate the First Amendment. In response, the plaintiffs maintain that qualified immunity is unavailable to the defendants because, when viewing the amended complaint in the light most favorable to the plaintiffs, it was not objectively reasonable for the defendants to have believed that selecting the plaintiffs for layoff on account of their union membership would be constitutionally permissible.

Government officials performing discretionary functions are entitled to qualified immunity from money damages if "(1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe that their

[6] Even if the court were required to consider whether, under *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261 (1997), there exist a special sovereignty interest foreclosing relief available under *Ex parte Young,* the court would be hesitant to conclude – in the absence of more extensive briefing – that granting the relief requested here would impermissibly divest the state of its control over a core sovereign interest.

acts did not violate those rights." *Oliveira v. Mayer,* 23 F.3d 642, 648 (2d Cir. 1994).

Although the defendants maintain that, in their view, it was objectively reasonable for them to believe that their actions did not violate the constitution, their view does not control on a motion to dismiss. Rather, examining the amended complaint in the view most favorable to the plaintiffs, the court concludes that an issue of fact exists as to whether the defendants belief was objectively reasonable. *See DeLoreto v. Ment,* 944 F. Supp. 1023, 1034 (D. Conn. 1996) ("a state employer may not retaliate against an individual, such as by terminating his or her employment, because of his or her union activities"). Accordingly, the defendants are not entitled to qualified immunity at this juncture. However, because qualified immunity does nothing more than immunize a defendant from an award of money damages, and the court has already concluded that the plaintiffs may not recover money damages under principles of Eleventh Amendment immunity, the defense is moot.

4. Other Arguments

The defendants also move to dismiss varying counts of the amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) on grounds that the claims fail to state a claim for which relief may be granted. At first glance, the court is of the opinion that the arguments presented are without merit and, accordingly, the

court declines to invest any further time in addressing these claims at this juncture. To the extent a bona fide basis for dismissal of these claims exist [sic], that basis may be brought to the court's attention at summary judgment.

CONCLUSION AND ORDER

For the forgoing reasons, the motion to dismiss the amended complaint (document no. 85) is DENIED to the extent it seeks dismissal for want of subject matter jurisdiction. The motion is DENIED WITHOUT PREJUDICE to the extent it seeks dismissal for failure to state a claim for which relief may be granted. The defendants earlier filed motion to dismiss (document no. 35) is DENIED AS MOOT.

Further, the court's previous orders staying discovery in this matter (document nos. 59 and 83) are hereby VACATED. In light of the substantial time that has lapsed since the filing of the complaint, discovery will commence without delay, notwithstanding the rule that immunity determinations are entitled to interlocutory appeal. *See e.g., Poe v. Leonard,* 282 F.3d 123 (2d Cir. 2002). However, because absolute legislative immunity may bar this action *in toto* – to include claims for injunctive relief – and the issue of whether the defendants are entitled to the defense remains undecided, the court will authorize a limited first phase of discovery concerning the application of absolute legislative immunity, and re-argument on that issue before merits discovery, if desired. The

parties are to report their respective positions to the court in a joint submission to be filed on or before January 27, 2006.

It is so ordered this 18th day of January, 2006 at Hartford, Connecticut.

Alfred V. Covello
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

STATE EMPLOYEES BARGAINING AGENT COALITION, individually and on behalf of all of its members, AMERICAN FEDERATION OF SCHOOL ADMINISTRATORS, Local 61, AFL-CIO, CONNECTICUT ASSOCIATION OF PROSECUTORS, PROTECTIVE SERVICES COALITION, IAFF, AFL-CIO, JUDICIAL MARSHALS, INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, AFL-CIO, CONNECTICUT STATE POLICE UNION, CONGRESS OF CONNECTICUT COMMUNITY COLLEGES, SEIU, AFL-CIO, CONNECTICUT STATE UNIVERSITY, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, CONNECTICUT STATE EMPLOYEES ASSOCIATION, SEIU, AFL-CIO, CONNECTICUT EMPLOYEES UNION INDEPENDENT, SEIU, AFL-CIO, CONNECTICUT FEDERATION OF EDUCATIONAL AND PROFESSIONAL	CIV. NO. 3:03CV221 (AWT) MAY 27, 2003

EMPLOYEES, AFT, AFL-CIO, DISTRICT 1199, NEW ENGLAND HEALTH CARE EMPLOYEES UNION, SEIU, AFL-CIO, COUNCIL 4, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL-CIO, DENISE A. BOUFFARD, GENEVA M. HEDGECOCK, DENNIS P. HEFFERNAN, WILLIAM D. HILL and MARCELLE Y. PICHANICK, individually and on behalf of all others similarly-situated,	:
PLAINTIFFS,	:
V.	:
JOHN G. ROWLAND, individually and in his official capacity as Governor of the State of Connecticut, and MARC S. RYAN, individually and in his official capacity as Secretary of the Office of Policy and Management of the State of Connecticut,	:
DEFENDANTS.	:

AMENDED COMPLAINT

INTRODUCTION

In November 2002, defendants John G. Rowland and Marc S. Ryan, the Governor and the Secretary of

the Office of Policy and Management of the State of Connecticut, ordered the termination of employment of over 3,000 unionized state employees. The terminations – deliberately singling out union members – violated the unions' and their members' exercise of protected First Amendment rights of free speech and free association, and were ordered with anti-union animus, and in retaliation for the unions' refusal to yield union members' statutorily-protected contracts [sic] rights.

This action is brought for monetary damages and injunctive relief pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983. Plaintiff State Employees Bargaining Agent Coalition ["SEBAC"] and twelve of its constituent unions bring this action on their own behalf and on behalf of their 45,000 members. The individual plaintiffs – union members whose employment was terminated or otherwise adversely affected by defendants' illegal conduct – bring this action on behalf of themselves and all others similarly-situated. Plaintiffs seek to redress defendants' intentional violation of their constitutional rights to freedom of speech, freedom of association, due process and equal protection of the law under the First, Fifth and Fourteenth Amendments to the United States Constitution.

I. JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1343(a) & 1331.

2. Venue is appropriate in this District pursuant to 28 U.S.C. §1391(b)(1) & (2) in that all defendants reside in Connecticut and a substantial part of the events or omissions giving rise to plaintiffs' claims occurred in Connecticut.

II. PARTIES

A. THE UNION PLAINTIFFS

3. Plaintiff State Employees Bargaining Agent Coalition ["SEBAC"] is a coalition of 13 state employee unions, representing 45,000 Connecticut state employees. SEBAC brings this action on its behalf and on behalf of the 12 constituent unions listed below and their individual union members to vindicate its own rights and the associational rights of its constituent unions and their members.

4. Plaintiff American Federation of School Administrators, Local 61, AFL-CIO ["AFSA"] represents approximately 50 administrators employed by the Connecticut State Board of Education in vocational and technical high schools throughout the State of Connecticut. Plaintiff AFSA brings this action on its own behalf and on behalf of its members to vindicate its own rights and the associational rights of its members.

5. Plaintiff Connecticut Association of Prosecutors ["CAP"] represents approximately 200 line and supervisory prosecutors employed by the State of Connecticut Judicial Branch. Plaintiff CAP brings

this action on its own behalf and on behalf of its members to vindicate its own rights and the associational rights of its members.

6. Plaintiff Protective Services Coalition, IAFF, AFL-CIO ["Protective Services"] represents approximately 900 firefighters, university police and other protective service workers employed by the State of Connecticut. Plaintiff Protective Services brings this action on its own behalf and on behalf of its members to vindicate its own rights and the associational rights of its members.

7. Plaintiff Judicial Marshals, International Brotherhood of Police Officers, National Association of Government Employees, AFL-CIO ["IBPO-Marshals"] represents approximately 900 judicial marshals employed by the State of Connecticut Judicial Branch. Plaintiff IBPO-Marshals brings this action on its own behalf and on behalf of its members to vindicate its own rights and the associational rights of its members.

8. Plaintiff Connecticut State Police Union ["CSPU"] represents approximately 950 state police officers employed by the State of Connecticut. Plaintiff CSPU brings this action on its own behalf and on behalf of its members to vindicate its own rights and the associational rights of its members.

9. Plaintiff Congress of Connecticut Community Colleges, SEIU, AFL-CIO ["CCCC"] represents approximately 1,000 full-time faculty members, counselors, librarians and administrators at Connecticut's

community colleges. Plaintiff CCCC brings this action on its own behalf and on behalf of its members to vindicate its own rights and the associational rights of its members.

10. Plaintiff Connecticut State University, American Association of University Professors ["CSU-AAUP"] represents approximately 1,150 faculty members and additional numbers of part-time employees in the Connecticut State University System. Plaintiff CSU-AAUP brings this action on its own behalf and on behalf of its members to vindicate its own rights and the associational rights of its members.

11. Plaintiff Connecticut State Employees Association, SEIU, AFL-CIO ["CSEA"] represents approximately 4,000 state employees in five different bargaining units, including teachers, engineers, data processing professionals, police inspectors and related employees, as well as lieutenants employed by the Department of Corrections. Plaintiff CSEA brings this action on its own behalf and on behalf of its members to vindicate its own rights and the associational rights of its members.

12. Plaintiff Connecticut Employees Union Independent, SEIU, AFL-CIO ["CEUI"] represents approximately 5,000 employees in two bargaining units, including maintainers, telephone operators, cooks, truck and snow plow drivers and related employees, as well as production workers, mechanics and related workers at the State Board of Education

and Services for the Blind. Plaintiff CEUI brings this action on its own behalf and on behalf of its members to vindicate its own rights and the associational rights of its members.

13. Plaintiff Connecticut Federation of Educational and Professional Employees, AFT, AFL-CIO ["CFEPE"] represents approximately 6,500 workers through 6 AFT locals, each of which bargains on behalf of state employees. These locals are: (a) the Administrative & Residual Employees Union, which represents numerous classifications of professional employees throughout the State; (b) the University of Connecticut Professional Employees Association, which represents professional employees at the University of Connecticut; (c) the University Health Professionals, which represents professsional [sic] employees at the University of Connecticut Health Center; (d) the State Vocational Federation of Teachers, which represents teachers at the state vocational and technical high schools, (e) the Federation of Technical College Teachers, which represents faculty, counselors and librarians at five of the State's community colleges; and (f) the Judicial Professionals, which represents professional employees in the State of Connecticut Judicial Department. Plaintiff CFEPE brings this action on its own behalf and on behalf of its members to vindicate its own rights and the associational rights of its members.

14. Plaintiff District 1199, New England Health Care Employees Union, SEIU, AFL-CIO ["District 1199"] represents approximately 8,000 professional

and non-professional health care employees in the Department of Mental Health and Addiction Services, the Department of Mental Retardation and various other departments and divisions throughout the State of Connecticut. Plaintiff District 1199 brings this action on its own behalf and on behalf of its members to vindicate its own rights and the associational rights of its members.

15. Plaintiff Council 4, American Federation of State, County, and Municipal Employees, AFL-CIO ["AFSCME Council 4"] represents approximately 14,000 professional and non-professional state employees through 21 different locals throughout the State. Plaintiff AFSCME Council 4 brings this action on its own behalf and on behalf of its members to vindicate its own rights and the associational rights of its members.

16. Plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CSPU, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199, and AFSCME Council 4 [collectively, "the plaintiff Unions"] each brings this action individually and on behalf of all of its respective union members.

B. THE INDIVIDUAL PLAINTIFFS

17. Plaintiff Denise A. Bouffard is a resident of Ellington, Connecticut and was an employee of the State of Connecticut Judicial Branch for six years. Plaintiff Bouffard was terminated from her position as a Support Enforcement Officer with the State of

Connecticut Judicial Branch effective January 16, 2003. At the time of her termination, plaintiff Bouffard was, and is to date, a member of plaintiff CFEPE.

18. Plaintiff Geneva M. Hedgecock is a resident of Bristol, Connecticut and was an employee of the State of Connecticut for nine years. Plaintiff Hedgecock was terminated from her position as a Secretary with the Department of Social Services of the State of Connecticut effective January 7, 2003. At the time of her termination, plaintiff Hedgecock was, and is to date, a member of plaintiff AFSCME Council 4.

19. Plaintiff Dennis P. Heffernan is a resident of Portland, Connecticut and was an employee of the State of Connecticut for 28 years. Plaintiff Heffernan was terminated from his position as a Storekeeper for the Department of Administrative Services of the State of Connecticut effective January 17, 2003. At the time of his termination, plaintiff Heffernan was, and is to date, a member of plaintiff CEUI.

20. Plaintiff William D. Hill is a resident of Suffield, Connecticut and has been an employee of the State of Connecticut for 16 years. On December 6, 2002, plaintiff Hill was notified that he is to be terminated from his position as a Drug and Alcohol Rehabilitation Counselor for the Department of Mental Health and Addiction Services of the State of Connecticut. At the time he received such notice,

plaintiff Hill was, and is to date, a member of plaintiff District 1199.

21. Plaintiff Marcelle Y. Pichanick is a resident of Marlborough, Connecticut and was an employee of the State of Connecticut for 14 years. Plaintiff Pichanick was terminated from her position as a Management Analyst for the State of Connecticut Department of Environmental Protection effective January 17, 2003. At the time of her termination, plaintiff Pichanick was, and is to date, a member of plaintiff CFEPE.

C. THE DEFENDANTS

22. Defendant John G. Rowland is and, at all times relevant herein, was the Governor of the State of Connecticut. Defendant Rowland is sued in his official and individual capacities.

23. Defendant Marc S. Ryan is and, at all times relevant herein, was the Secretary of the Office of Policy and Management of the State of Connecticut. Defendant Ryan is sued in his official and individual capacities.

III. CLASS ACTION ALLEGATIONS

A. THE AFFECTED EMPLOYEES CLASS

24. Plaintiffs Bouffard, Hedgecock, Heffernan, Hill and Pichanick ["the Named Plaintiffs"] bring this action individually and on behalf of all other similarly-situated union member employees of the State of

Connecticut subjected to termination or other adverse employment action as a result of defendants' conduct. The class consists of all individuals

> a) who were employees of the State of Connecticut as of November 17, 2002;
>
> b) who were in a bargaining unit represented by one of the plaintiff unions;
>
> c) whose employment has been terminated or who have been notified that he/she will be terminated by defendants as part of the course of illegal conduct at issue herein or who have been bumped or demoted to new positions or otherwise adversely affected by the terminations implemented by defendants as alleged herein.

25. The class that the Named Plaintiffs seek to represent ["the Affected Employees Class"] is so numerous that the joinder of all members is impracticable. Defendants have already announced that the terminations at issue will affect over 3,000 union employees who meet the criteria for class participation and have publicly threatened to terminate additional union employees. In addition, numerous other union employees have been or will be bumped, demoted or otherwise adversely affected by the terminations.

26. There are questions of law or fact common to the class. Class members are all union employees of the State of Connecticut who have been or will be subject to termination or other adverse action as a

result of defendants' conduct herein. Defendants have acted on grounds generally applicable to the class.

27. The Named Plaintiffs' claims are typical of the claims of the class members and the named plaintiffs will fairly and adequately protect the interests of the class.

28. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members and a class action is superior to other methods of adjudicating the controversy. The prosecution of separate actions by the individual class members would create a risk of adjudications with respect to the individual members which would be dispositive of the interests of the other members.

B. THE SEBAC CLASS

29. Plaintiff SEBAC brings this action individually and on behalf of a class ["the SEBAC Class" consisting of all of the members of the plaintiff Unions (including the Named Plaintiffs and the members of the Affected Employees Class), who have suffered an impairment of their constitutional rights as a result of defendants' conduct in ways other than through termination or other adverse employment action.

30. The class that SEBAC seeks to represent is so numerous – consisting of over 45,000 members of

SEBAC's constituent unions – that the joinder of all members is impracticable.

31. There are questions of law or fact common to the class. Class members are all union employees of the State of Connecticut whose rights under the First, Fifth and Fourteenth Amendments to the United States Constitution and the Contract Clause have been violated and whose future exercise of their rights under the First, Fifth and Fourteenth Amendments to the United States Constitution and the Contract Clause has been chilled by defendants' conduct as alleged herein. By their conduct alleged herein, defendants have acted on grounds generally applicable to the class.

32. SEBAC's claims are typical of the claims of the class members and SEBAC will fairly and adequately protect the interests of the class.

33. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members and a class action is superior to other methods of adjudicating the controversy. The prosecution of separate actions by the individual class members would create a risk of adjudications with respect to the individual members which would be dispositive of the interests of the other members.

IV. CLAIMS FOR RELIEF

A. FIRST CLAIM FOR RELIEF

1.-33. Paragraphs 1 through 33 of this Complaint are hereby incorporated as paragraphs 1 through 33 of this First Claim for Relief.

34. At all times mentioned herein, plaintiff SEBAC has been designated by the State of Connecticut Board of Labor Relations as the representative and exclusive bargaining agent of the plaintiff Unions for the purpose of negotiating and entering into collective bargaining agreements covering health care, pension and other terms of employment of the state employee members of SEBAC's constituent unions.

35. At all times mentioned herein, the plaintiff Unions have been designated by the State of Connecticut Board of Labor Relations as the representative and exclusive bargaining agent of their respective members for the purpose, *inter alia,* of negotiating and entering into collective bargaining agreements covering terms of employment on behalf of their respective members.

36. At all times mentioned herein, plaintiff SEBAC and the plaintiff Unions have been parties to collective bargaining agreements negotiated and entered into with the State of Connecticut and approved by the Connecticut General Assembly pursuant to Conn. Gen. Stat. § 5-278(b).

37. At all times mentioned herein, defendants were, and are to the present time, members of the Executive Branch of Connecticut's state government, and have been acting in furtherance of their functions as high-ranking Executive Branch officers. As Governor and Secretary of the Office of Policy and Management ("OPM"), defendants had, at all times mentioned herein and to the present time, responsibility for the management of the state's work force and the negotiation of the terms of collective bargaining agreements with state employees in furtherance of their Executive Branch functions.

38. At all times mentioned herein and to the present time, defendant Ryan, as Secretary of OPM, has been designated, pursuant to Conn. Gen. Stat. § 4-65a(1) & (2), as the employer representative "in collective bargaining negotiations concerning changes to the employees retirement system and health and welfare benefits," and in other matters involving collective bargaining, including the negotiation, administration and changes to ("supplemental understandings") collective bargaining agreements. Defendant Ryan was appointed Secretary of OPM by defendant Rowland pursuant to Conn. Gen. Stat. §§ 4-6, 4-65a, and "acts as the executive officer of the Governor for accomplishing the purposes of his department." Conn. Gen. Stat. § 4-8.

39. In November, 2002, shortly after defendant Rowland was re-elected as Governor, defendants Rowland and Ryan sought changes to plaintiff SEBAC's and the plaintiff Unions' collective bargaining

agreements, demanding that plaintiff SEBAC and the plaintiff Unions grant concessions in their members' rights under their collective bargaining agreements totaling over $450 million annually.

40. Pursuant to Conn. Gen. Stat. § 5-272(c), plaintiff SEBAC and the plaintiff Unions were not required to grant any concessions of their members' rights under their collective bargaining agreements.

41. In an impermissible effort to coerce plaintiff SEBAC and the plaintiff Unions into giving up their members' contract rights, defendants threatened that if the unions did not agree to the concessions demanded, defendants would terminate the employment of state union workers.

42. When plaintiff SEBAC and the plaintiff Unions declined to grant all of the contract concessions demanded by defendants, defendants carried out their prior threats and announced and have begun implementing the termination of over 3,000 state union employees. Those terminations started to take effect on November 18, 2002 and have continued to be implemented to date and are scheduled to continue in the future. Defendants have, further, threatened to terminate additional state union employees in the future if the demanded concessions are not granted.

43. Although the state work force has both union and non-union members, and although all state employees receive health care and pension benefits, defendants intentionally directed their demands for

health care and pension concessions (and their corresponding threats of termination if their concessions were not granted) solely to state union employees.

44. Although the state work force has both union and non-union members, defendants intentionally singled out only union members for termination.

45. The terminations ordered by defendants have been intentionally directed solely against state union members because of their state union membership.

46. Defendants' order to terminate union-member state employees was motivated by impermissible anti-union animus.

47. At all times mentioned herein and to the present time, the defendant Governor and the defendant Secretary of OPM have been the decision-makers for the State of Connecticut with respect to the collective bargaining agreement demands and employee terminations at issue in this lawsuit.

48. Defendants' demands for union contract concessions, their threats of retaliatory union member terminations if their demands were not granted, and their implementation of such terminations were undertaken by defendants solely in their capacity as members of the Connecticut Executive Branch, acting solely in furtherance of their Executive Branch functions.

49. The Connecticut General Assembly did not participate in demanding that plaintiff SEBAC and

the plaintiff Unions agree to $450 million in contract concessions, did not participate in threatening terminations of union members if the demands were not granted, and was not involved in determining whether any (and, if so, which) state union employees would be terminated when the demands were not granted.

50. Defendants were not acting in a legislative capacity when they made their demands for union contract concessions, when they made their threats of retaliatory union member terminations if their demands were not granted, and when they implemented the terminations at issue in this lawsuit.

51. Defendants' conduct as aforesaid was intended to interfere with the Named Plaintiffs' and the Plaintiff Affected Employees Class' exercise of their rights of freedom of association and freedom of speech, as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

52. Defendants' conduct as aforesaid has violated the rights of the Named Plaintiffs and the Plaintiff Affected Employees Class to seek union representation, to join their respective unions, and to participate in union activities, without reprisal, as guaranteed by the First and Fourteenth Amendment rights to freedom of speech and freedom of association.

53. 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 seek union representation, and to join, support and participate in a union.

54. Defendants' conduct as aforesaid was taken under color of state law and deprived the Named Plaintiffs and the plaintiff Affected Employees Class of their constitutional rights to freedom of speech and freedom of association, as guaranteed by the First and Fourteenth Amendments to the United States Constitution, in violation of 42 U.S.C. § 1983.

55. The Named Plaintiffs and the plaintiff Affected Employees Class have suffered and will in the future suffer economic loss as a result of defendants' impermissible conduct.

56. The Named Plaintiffs and the plaintiff Affected Employees Class have suffered and will in the future suffer emotional distress as a result of defendants' impermissible conduct.

57. At all times mentioned herein, defendants were aware that their conduct as aforesaid violated the First and Fourteenth Amendment rights of the Named Plaintiffs and the plaintiff Affected Employees Class.

58. At all times mentioned herein, defendants deliberately intended to interfere with the constitutional rights of the Named Plaintiffs and the plaintiff Affected Employees Class, in intentional and reckless disregard of the constitutional rights of the Named Plaintiffs and the plaintiff Affected Employees Class.

59. Defendants Rowland and Ryan, in their individual capacities, are liable to the Named Plaintiffs and the plaintiff Affected Employees Class for monetary damages.

60. Defendants Rowland and Ryan, in their individual capacities, are liable to the Named Plaintiffs and the plaintiff Affected Employees Class for an award of punitive damages.

B. SECOND CLAIM FOR RELIEF

1.-50. Paragraphs 1 through 50 of the First Claim for Relief are hereby incorporated as paragraphs 1 through 50 of this Second Claim for Relief.

51. In deciding which state union employees to terminate, defendant Rowland was motivated by the desire to retaliate against his political opponents.

52. Throughout his tenure as Governor, defendant Rowland has had a hostile attitude toward state employee unions and has publicly stated that his "natural enemies have been the unions."[1]

53. In the fall of 2002, defendant Rowland was running for reelection as Governor of the State of Connecticut.

54. In the fall of 2002, plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CCCC, CSU-AAUP,

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[1] *See*, *e.g.,* John J. Zakarian, *Rowland Speaks: Q & A,* The Hartford Courant, Feb. 16, 1997, at B1.

CSEA, CEUI, CFEPE, District 1199, and AFSCME Council 4 ["the endorsing unions"] endorsed and supported defendant Rowland's opponent in the race for Governor.

55. In the fall of 2002, defendant Rowland sought the endorsement of plaintiff CSPU, the only state employee union that was not supporting his opponent.

56. On October 15, 2002, the Board of Directors of plaintiff CSPU voted to endorse defendant Rowland for reelection as Governor.

57. On October 21, 2002, at plaintiff CSPU's public endorsement of defendant Rowland, defendant Rowland stated to CSPU leadership that no state police officers would be laid off.

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 been selected for termination, no members of CSPU have been terminated or selected for termination by defendants.

59. The Named Plaintiff 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.

61. Defendants' conduct as aforesaid was. taken under color of state law and deprived the Named Plaintiffs and the plaintiff Affected Employees Class of their right to support, individually and through their unions, political candidates of their choice, without reprisal, as guaranteed by the First and Fourteenth Amendment rights to freedom of political speech and freedom of political association, in violation of 42 U.S.C. § 1983.

62. The Named Plaintiffs and the plaintiff Affected Employees Class have suffered and will in the future suffer economic loss as a result of defendants' impermissible conduct.

63. The Named Plaintiffs and the plaintiff Affected Employees Class have suffered and will in the future suffer emotional distress as a result of defendants' impermissible conduct.

64. At all times mentioned herein, defendants were aware that their conduct as aforesaid violated

the First and Fourteenth Amendment rights of the Named Plaintiffs and the plaintiff Affected Employees Class.

65. At all times mentioned herein, defendants deliberately intended to interfere with the constitutional rights of the Named Plaintiffs and the plaintiff Affected Employees Class, in intentional and reckless disregard of the constitutional rights of the Named Plaintiffs and the plaintiff Affected Employees Class.

66. Defendants Rowland and Ryan, in their individual capacities, are liable to the Named Plaintiffs and the plaintiff Affected Employees Class for monetary damages.

67. Defendants Rowland and Ryan, in their individual capacities, are liable to the Named Plaintiffs and the plaintiff Affected Employees Class for an award of punitive damages.

C. THIRD CLAIM FOR RELIEF

1.-50. Paragraphs 1 through 50 of the First Claim for Relief are hereby incorporated as paragraphs 1 through 50 of this Third Claim for Relief.

51. Defendants' conduct as aforesaid was intended to undermine plaintiff SEBAC's and the plaintiff Unions' ability to organize, function and represent their members.

52. In a further effort to undermine plaintiff SEBAC, the plaintiff Unions and the unions' leadership, defendants publicly derided the union leadership and made direct appeals to union members to urge their leadership to agree to the rejected concessions. Defendants have caused email messages to be sent directly to union members describing negotiating proposals not previously presented to the unions' leadership, thereby attempting to by-pass the union leadership.

53. Defendants Rowland and Ryan have, at all times, been aware that they are not permitted to by-pass the union leadership on issues subject to the existing collective bargaining agreements, and that their conduct was prohibited by state statutes, Conn. Gen. Stat. §§ 5-271 and 5-272, which require the State to recognize plaintiff SEBAC and the plaintiff Unions as the exclusive bargaining agent for their members, to bargain collectively with plaintiff SEBAC and the plaintiff Unions as the exclusive bargaining agents for their members, and to refrain from conduct interfering with the existence or administration of employee unions or otherwise discouraging union membership.

54. As a result of the conduct of defendants as aforesaid, plaintiff SEBAC, the plaintiff Unions and their members ("the SEBAC Class") have been impermissibly penalized for exercising their First and Fourteenth Amendment rights to organize as unions, to seek union representation, to join and participate in a union, and to represent their members.

55. Defendants' conduct as aforesaid was taken under color of state law and deprived plaintiff SEBAC, the plaintiff Unions and their members of their rights to organize as unions, to seek union representation, and to represent their members, as guaranteed by the First and Fourteenth Amendment rights to freedom of speech and freedom of association, in violation of 42 U.S.C. § 1983.

56. As a result of the conduct of defendants as aforesaid, plaintiff SEBAC, the plaintiff Unions and their members have sustained financial loss.

57. At all times mentioned herein, defendants were aware that their conduct as aforesaid violated the First and Fourteenth Amendment rights of plaintiff SEBAC, the plaintiff Unions and their members.

58. At all times mentioned herein, defendants deliberately intended to interfere with the constitutional rights of plaintiff SEBAC, the plaintiff Unions and their members, in intentional and reckless disregard of the constitutional rights of plaintiff SEBAC, the SEBAC Class, the plaintiff Unions and their members.

59. Defendants Rowland and Ryan, in their individual capacities, are liable to plaintiff SEBAC, the plaintiff Unions and their members for monetary damages.

60. Defendants Rowland and Ryan, in their individual capacities, are liable to plaintiff SEBAC,

the plaintiff Unions and their members for an award of punitive damages.

D. FOURTH CLAIM FOR RELIEF

1.-59. Paragraphs 1 through 59 of the Second Claim for Relief are hereby incorporated as paragraphs 1 through 59 of this Fourth Claim for Relief.

60. As a result of the conduct of defendants as aforesaid, plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199, and AFSCME Council 4 and their members (the SEBAC Class) have been impermissibly penalized for exercising their First and Fourteenth Amendment rights to support, as unions and individually, political candidates of their choice.

61. Defendants' conduct as aforesaid was taken under color of state law and violated the rights of plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199, and AFSCME Council 4 and their members to support, as a union and individually, political candidates of their choice, without reprisal, as guaranteed by the First and Fourteenth Amendment rights to freedom of political speech and freedom of political association, in violation of 42 U.S.C. § 1983.

62. Plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199, and AFSCME Council 4 and

their members have suffered financial loss as a result of the conduct of defendants as aforesaid.

63. At all times mentioned herein, defendants were aware that their conduct as aforesaid violated the First and Fourteenth Amendment rights of plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199, and AFSCME Council 4 and their members.

64. At all times mentioned herein, defendants deliberately intended to interfere with the constitutional rights of plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199, and AFSCME Council 4 and their members, in intentional and reckless disregard of the constitutional rights of plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199, and AFSCME Council 4 and their members.

65. Defendants Rowland and Ryan, in their individual capacities, are liable to plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199, and AFSCME Council 4 and their members for monetary damages.

66. Defendants Rowland and Ryan, in their individual capacities, are liable to plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199, and AFSCME Council 4 and their members for an award of punitive damages.

E. FIFTH CLAIM FOR RELIEF

1.-52. Paragraphs 1 through 52 of the First Claim for Relief are hereby incorporated as paragraphs 1 through 52 of this Fifth Claim for Relief.

53. As a result of the conduct of defendants as aforesaid, the Named Plaintiffs and the plaintiff Affected Employees Class have been impermissibly penalized and will in the future be penalized for exercising their First and Fourteenth Amendment rights to seek union representation, and to join, support and participate in a union.

54. The actions of defendants Rowland and Ryan, in their official capacities, have been taken under color of state law and have violated and will in the future violate the rights of the Named Plaintiffs and the members of the plaintiff Affected Employees Class to seek union representation, and to join and participate in union activities, without reprisal, as guaranteed by the First and Fourteenth Amendment rights to freedom of speech and freedom of association, in violation of 42 U.S.C. § 1983.

55. The Named Plaintiffs and the plaintiff Affected Employees Class have suffered and will in the future suffer irreparable harm as a result of defendants' conduct as aforesaid.

56. The Named Plaintiffs and the Plaintiff Affected Employees Class are entitled to injunctive relief in the form of an order (a) directing defendants Rowland and Ryan, in their official capacities, to

restore them to their prior employment with full and uninterrupted seniority and benefits; and (b) enjoining defendants Rowland and Ryan, in their official capacities, from taking adverse action against them on account of their participation in a union or union activities.

F. SIXTH CLAIM FOR RELIEF

1.-59. Paragraphs 1 through 59 of the Second Claim for Relief are hereby incorporated as paragraphs 1 through 59 of this Sixth Claim for Relief.

60. As a result of the conduct of defendants as aforesaid, the Named Plaintiffs and the plaintiff Affected Employees Class have been and will in the future be impermissibly penalized for exercising their First and Fourteenth Amendment rights to support, individually and through their union, political candidates of their choice.

61. The actions of defendants Rowland and Ryan, in their official capacities, have been taken under color of state law and have violated and will in the future violate the rights of the Named Plaintiffs and the plaintiff Affected Employees Class to support, individually and through their union, political candidates of their choice, without reprisal, as guaranteed by the First and Fourteenth Amendment rights to freedom of political speech and freedom of political association, in violation of 42 U.S.C. § 1983.

62. The Named Plaintiffs and the plaintiff Affected Employees Class have suffered and will in the future suffer irreparable harm as a result of defendants' conduct as aforesaid.

63. The Named Plaintiffs and the plaintiff Affected Employees Class are entitled to injunctive relief in the form of an order (a) directing defendants Rowland and Ryan, in their official capacities, to restore them to their prior employment with full and uninterrupted seniority and benefits; and (b) enjoining defendants Rowland and Ryan, in their official capacities, from retaliating against them for refusing to support defendant Rowland in his re-election bid and for supporting his opponent.

G. SEVENTH CLAIM FOR RELIEF

1.-53. Paragraphs 1 through 53 of the Third Claim for Relief are hereby incorporated as paragraphs 1 through 53 of this Seventh Claim for Relief.

54. As a result of defendants' conduct as aforesaid, plaintiff SEBAC, the plaintiff Unions and their members (the SEBAC Class) have been and will in the future be impermissibly penalized for exercising their First and Fourteenth Amendment rights to organize as unions, to seek union representation, to join and participate in a union, and to represent their members.

55. The actions of defendants Rowland and Ryan, in their official capacities, have been taken

under color of state law and deprived plaintiff SEBAC, the plaintiff Unions and their members of their rights to organize as unions, to seek union representation, and to represent their members, without reprisal, as guaranteed by the First and Fourteenth Amendment rights to freedom of speech and freedom of association, in violation of 42 U.S.C. § 1983.

56. Plaintiff SEBAC, the plaintiff Unions and their members have suffered and will in the future suffer irreparable harm as a result of defendants' conduct as aforesaid.

57. Plaintiff SEBAC, the plaintiff Unions and their members are entitled to injunctive relief in the form of an order enjoining defendants from pursuing any conduct (a) penalizing plaintiff SEBAC, the plaintiff Unions and their members for participating in union activities; or (b) undermining plaintiff SEBAC or the plaintiff Unions and their leadership with their rank and file members or otherwise interfering with their effective representation of their members, refusing to bargain collectively with the unions as the exclusive bargaining agents for their members, or discouraging union membership.

H. EIGHTH CLAIM FOR RELIEF

1.-59. Paragraphs 1 through 59 of the Fourth Claim for Relief are hereby incorporated as paragraphs I through 59 of this Eighth Claim for Relief.

60. As a result of the conduct of defendants as aforesaid, plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199, and AFSCME Council 4 and their members (the SEBAC Class) have been impermissibly penalized for exercising their First and Fourteenth Amendment rights to support, through their union and individually, political candidates of their choice.

61. The actions of defendants Rowland and Ryan, in their official capacities, have been taken under color of state law and deprived plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199, and AFSCME Council 4 and their members of their rights to support, as a union and individually, political candidates of their choice, without reprisal, as guaranteed by the First and Fourteenth Amendment rights to freedom of political speech and freedom of political association, in violation of 42 U.S.C. § 1983.

62. Plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199, and AFSCME Council 4 and their members have suffered and will in the future suffer irreparable harm as a result of defendants' conduct as aforesaid.

63. Plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199, and AFSCME Council 4 and their members are entitled to injunctive relief in the

form of an order enjoining defendants Rowland and Ryan, in their official capacities, from retaliating against them for refusing to support defendant Rowland in his reelection bid and for supporting his opponent.

I. NINTH CLAIM FOR RELIEF

1.-50. Paragraphs 1 through 50 of the Fifth Claim for Relief are hereby incorporated as paragraphs 1 through 50 of this Ninth Claim for Relief.

51. In 1997, plaintiff SEBAC, acting on behalf of the plaintiff Unions and their members, entered into a collective bargaining agreement ["the SEBAC Agreement"] with the State of Connecticut covering health care, pension and other terms of employment.

52. The SEBAC Agreement was approved by the Connecticut legislature pursuant to Conn. Gen. Stat. § 5-278(b).

53. Pursuant to Conn. Gen. Stat. § 5-278(c), the Connecticut legislature has been required to appropriate whatever funds are required to comply with the SEBAC Agreement.

54. The members of plaintiff SEBAC's constituent unions have statutorily-protected rights to receive the benefits conferred pursuant to the SEBAC Agreement.

55. At all times mentioned herein, defendants Rowland and Ryan have been aware that the SEBAC

Agreement is a binding, legislatively-approved contractual obligation of the State of Connecticut and that the State is statutorily required to fund the SEBAC Agreement.

56. At all times mentioned herein, defendants Rowland and Ryan have been aware that the members of plaintiff SEBAC's constituent unions have statutorily-protected rights pursuant to the SEBAC Agreement.

57. Beginning in November 2002 and continuing to the present time, defendants Rowland and Ryan have demanded that plaintiff SEBAC agree to give up its members' statutorily-protected rights under the SEBAC Agreement and threatened to terminate the employment of members of plaintiff SEBAC's constituent unions if plaintiff SEBAC and its members did not agree to give up such rights.

58. Because plaintiff SEBAC refused to give up its members' statutorily-protected rights under the SEBAC Agreement, defendants Rowland and Ryan have directed the terminations of state union employees described above, and the Named Plaintiffs and the plaintiff Affected Employees have been terminated, and/or face termination, and/or have been bumped, demoted or suffered other adverse employment consequences.

59. Because plaintiffs have asserted their rights under the SEBAC Agreement, as protected by the Fifth Amendment to the United States Constitution and by the Contract Clause of the United States

Constitution, defendants have penalized and/or sought to penalize the Named Plaintiffs and the plaintiff Affected Employees Class by depriving them, or threatening to deprive them, of their right to continued public employment and/or to benefits arising out of their public employment.

60. The actions of defendants Rowland and Ryan, in their official capacities, in intentionally penalizing and intentionally seeking to penalize the Named Plaintiffs and the plaintiff Affected Employees Class for asserting their rights under the SEBAC Agreement, as guaranteed by the Contract Clause and by the Fifth Amendment to the United States Constitution, have been taken under color of state law, and infringe the rights of plaintiff SEBAC, the plaintiff Unions, and their members, including in particular the rights of the Named Plaintiffs and the plaintiff Affected Employees Class, under the Contract Clause and to substantive due process and equal protection of the law guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution, in violation of 42 U.S.C. § 1983.

61. Plaintiffs have suffered and will in the future suffer irreparable harm as a result of defendants' conduct as aforesaid.

62. Plaintiffs are entitled to injunctive relief in the form of an order (a) directing defendants Rowland and Ryan, in their official capacities, to restore the Named Plaintiffs and the plaintiff Affected Employees Class to their prior employment with full and

uninterrupted seniority and benefits; and (b) enjoining defendants, in their official capacities, from (i) taking any action to force, coerce or pressure plaintiff SEBAC, the plaintiff Unions, or their members (including the Named Plaintiffs and the plaintiff Affected Employee Class) to grant concessions on their legislatively-approved contracts; (ii) penalizing or retaliating against plaintiff SEBAC, the plaintiff Unions, or their members (including the Named Plaintiffs and the plaintiff Affected Employees Class) for refusing to grant concessions on their legislatively-approved contract rights; or (iii) depriving or threatening to deprive the members of the plaintiff Unions (including the Named Plaintiffs and the plaintiff Affected Employees Class) of their right to continued public employment and/or to benefits arising out of their public employment.

J. TENTH CLAIM FOR RELIEF

1.-53. Paragraphs 1 through 53 of the Fifth Claim for Relief are hereby incorporated as paragraphs 1 through 53 of this Tenth Claim for Relief.

54. By virtue of their state employment and their respective union's statutorily-approved collective bargaining agreement(s), the Named Plaintiffs and the plaintiff Affected Employees Class had a statutorily-protected right to continued state employment and could not be terminated from their state employment or subjected to adverse employment

action for arbitrary, irrational or constitutionally impermissible reasons.

55. Defendants' decision to order the terminations of the Named Plaintiffs and the plaintiff Affected Employees Class and their selection of members of the endorsing unions as the targets of the terminations and other adverse employment action were motivated by impermissible anti-union and political animus.

56. Defendants' decision to terminate only state employees who are members of state unions was arbitrary, irrational and/or undertaken for constitutionally impermissible reasons.

57. Defendants have ordered terminations of the Named Plaintiffs and the plaintiff Affected Employees Class and have subjected the Named Plaintiffs and the plaintiff Affected Employees Class to adverse employment action for arbitrary, irrational and constitutionally-impermissible reasons.

58. The actions of defendants Rowland and Ryan, in their official capacities, in ordering the terminations of the Named Plaintiffs and the plaintiff Affected Employees Class for arbitrary, irrational and/or constitutionally-impermissible reasons were taken under color of state law and deprived the Named Plaintiffs and the plaintiff Affected Employees Class of their rights to substantive due process and equal protection under the First, Fifth and Fourteenth Amendments to the United States Constitution, in violation of 42 U.S.C. § 1983.

59. The Named Plaintiffs and the plaintiff Affected Employees Class have suffered and will in the future suffer irreparable harm as a result of defendants' conduct as aforesaid.

60. The Named Plaintiffs and plaintiff Affected Employees Class are entitled to injunctive relief in the form of an order (a) directing defendants Rowland and Ryan, in their official capacities, to restore the Named Plaintiffs and the members of the plaintiff Affected Employees Class to their prior employment with full and uninterrupted seniority and benefits; and (b) enjoining defendants, in their official capacities, from (i) depriving or threatening to deprive the Named Plaintiffs and the members of the plaintiff Affected Employees Class of their right to continued public employment and/or to benefits arising out of their public employment by arbitrary, irrational or constitutionally-impermissible terminations; or (ii) adversely affecting or threatening to adversely affect the right of the Named Plaintiffs and the plaintiff Affected Employees Class in continued public employment and/or to benefits arising out of their public employment by arbitrary, irrational or constitutionally-impermissible terminations.

V. PRAYER FOR RELIEF.

WHEREFORE, plaintiffs pray the following relief:

1. That the Court certify plaintiff SEBAC's claims in this action as a class action on behalf of

plaintiff SEBAC and the members of its 12 constituent unions participating in this action;

2. That the Court certify the Named Plaintiff's claims in this action as a class action on behalf of the Named Plaintiffs and all individuals similarly-situated;

3. As to the First and Second Claims for Relief only: compensatory damages, as against defendants Rowland and Ryan, in their individual capacities, on behalf of the Named Plaintiffs and the members of the plaintiff Affected Employees Class;

4. As to the First and Second Claims for Relief only: punitive damages, as against defendants Rowland and Ryan, in their individual capacities, on behalf of the Named Plaintiffs and the members of the plaintiff Affected Employees Class;

5. As to the Third Claim for Relief only: compensatory damages, as against defendants Rowland and Ryan, in their individual capacities, on behalf of plaintiff SEBAC, the plaintiff Unions and their members (the SEBAC Class);

6. As to the Third Claim for Relief only: punitive damages, as against defendants Rowland and Ryan, in their individual capacities, on behalf of plaintiff SEBAC, the plaintiff Unions and their members (the SEBAC Class);

7. As to the Fourth Claim for Relief only: compensatory damages, as against defendants Rowland and Ryan, in their individual capacities, on behalf of

plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199 and AFSCME Council 4 and their members;

8. As to the Fourth Claim for Relief only: punitive damages, as against defendants Rowland and Ryan, in their individual capacities, on behalf of plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199 and AFSCME Council 4 and their members;

9. As to the Fifth, Sixth, Ninth and Tenth Claims for Relief only: entry of an order (a) compelling defendants Rowland and Ryan, in their official capacities, to reinstate the Named Plaintiffs and the members of the plaintiff Affected Employees Class to their former positions with the State of Connecticut or such other position as the Court deems appropriate, with full and appropriate restoration of seniority and benefits; and (b) enjoining defendants, in their official capacities, from ordering further terminations of members of the plaintiff Unions on account of their participation in or support of constitutionally-protected union activities;

10. As to the Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Claims for Relief only: entry of an order enjoining defendants Rowland and Ryan, in their official capacities, from (a) penalizing plaintiff SEBAC, the plaintiff Unions or their members on account of their participation in or support of union

activities; (b) retaliating against the endorsing unions and/or their members for refusing to support defendant Rowland in his re-election bid and for supporting his opponent; (c) undermining plaintiff SEBAC, the plaintiff Unions, and the unions' leadership with their rank and file members or otherwise interfering with their effective representation of their members, refusing to bargain collectively with plaintiff SEBAC or the plaintiff Unions as the exclusive bargaining agents for their members, or discouraging union membership; or (d) penalizing plaintiffs for refusing to grant concessions on their legislatively-approved and statutorily-protected contract rights;

11. Attorneys' fees and costs of this action, pursuant to 42 U.S.C. § 1988;

12. Such other relief as the Court deems appropriate.

PLAINTIFFS STATE EMPLOYEES BARGAINING AGENT COALITION, individually and on behalf of all of its members, AMERICAN FEDERATION OF SCHOOL ADMINISTRATORS, Local 61, AFL-CIO, CONNECTICUT ASSOCIATION OF PROSECUTORS, PROTECTIVE SERVICES COALITION, IAFF, AFL-CIO, JUDICIAL MARSHALS, INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, AFL-CIO, CONNECTICUT STATE POLICE UNION,

CONGRESS OF CONNECTICUT COMMUNITY COLLEGES, SEIU, AFL-CIO, CONNECTICUT STATE UNIVERSITY, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, CONNECTICUT STATE EMPLOYEES ASSOCIATION, SEIU, AFL-CIO, CONNECTICUT EMPLOYEES UNION INDEPENDENT, SEIU, AFL-CIO, CONNECTICUT FEDERATION OF EDUCATIONAL AND PROFESSIONAL EMPLOYEES, AFT, AFL-CIO, DISTRICT 1199, NEW ENGLAND HEALTH CARE EMPLOYEES UNION, SEIU, AFL-CIO, COUNCIL 4, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL-CIO, DENISE A. BOUFFARD, GENEVA M. HEDGECOCK, DENNIS P. HEFFERNAN, WILLIAM D HILL and MARCELLE Y. PICHANICK, individually and on behalf of all others similarly-situated,

BY /s/ David S. Golub

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CERTIFICATION

This is to certify that a copy of the foregoing has been served by UPS overnight delivery, this 27th day of May, 2003, to:

Albert Zakarian, Esq.
Allan B. Taylor, Esq.
Victoria Woodin Chavey, Esq.
Daniel A. Schwartz, Esq.
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/s/ David S. Golub
DAVID S. GOLUB

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE EMPLOYEES BARGAINING AGENT COALITION, ET AL	:	CIVIL ACTION NO. 3:03-CV-221 (AVC)
Plaintiffs	:	
v.	:	
JOHN G. ROWLAND, ET AL	:	
Defendants	:	JULY 31, 2009

FIRST AMENDED ANSWER
TO AMENDED COMPLAINT

The Defendants, M. Jodi Rell and Robert Genuario, in their respective official capacities as Governor of the State of Connecticut and Secretary of the Office of Policy and Management of the State of Connecticut, answer the allegations of the Plaintiffs' Amended Complaint dated May 27, 2003 as follows:

I. JURISDICTION

1. Admitted.

2. Admitted.

II. PARTIES

A. THE UNION PLAINTIFFS

3. Admit that SEBAC is a coalition of 13 state employee unions, which represents approximately

45,000 state employees. Lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 3 and, therefore, leave the Plaintiff to its proof.

4. Admit the allegation in the first sentence of paragraph 4. Lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 4 and, therefore, leave the Plaintiff to its proof.

5. Admit the allegation in the first sentence of paragraph 5. Lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 5 and, therefore, leave the Plaintiff to its proof.

6. Admit the allegation in the first sentence of paragraph 6. Lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 6 and, therefore, leave the Plaintiff to its proof.

7. Admit the allegation in the first sentence of paragraph 7. Lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 7 and, therefore, leave the Plaintiff to its proof.

8. Admit the allegation in the first sentence of paragraph 8. Lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 8 and, therefore, leave the Plaintiff to its proof.

9. Admit the allegation in the first sentence of paragraph 9. Lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 9 and, therefore, leave the Plaintiff to its proof.

10. Admit the allegation in the first sentence of paragraph 10. Lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 10 and, therefore, leave the Plaintiff to its proof.

11. Admit the allegation in the first sentence of paragraph 11. Lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 11 and, therefore, leave the Plaintiff to its proof.

12. Admit the allegation in the first sentence of paragraph 12. Lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 12 and, therefore, leave the Plaintiff to its proof.

13. Admit the allegations in the first and second sentence of paragraph 13. Lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 13 and, therefore, leave the Plaintiff to its proof.

14. Admit the allegation in the first sentence of paragraph 14. Lack information or knowledge sufficient to form a belief as to the truth of the remaining

allegations in paragraph 14 and, therefore, leave the Plaintiff to its proof.

15. Admit the allegation in the first sentence of paragraph 15. Lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 15 and, therefore, leave the Plaintiff to its proof.

16. The allegation in paragraph 16 states a legal conclusion as to which no response is required.

B. THE INDIVIDUAL PLAINTIFFS

17. Admit the allegations in the first sentence of paragraph 17. Admit the allegation in the second sentence of paragraph 17, but state that Bouffard was laid off for economic reasons and was rehired on June 27, 2003 as a Support Enforcement Officer at her same rate of pay. Admit the allegations in the third sentence of paragraph 17.

18. Admit the allegation in the first sentence of paragraph 18. Admit the allegation in the second sentence of paragraph 18, but state that Hedgecock was laid off for economic reasons and was rehired to the same position and salary on May 23, 2003.

19. Admit the allegation in the first sentence of paragraph 19. Admit the allegation in the second sentence of paragraph 19, but state that Heffernan subsequently exercised his statutory option to retire. Admit that Heffernan was a member of plaintiff CEUI at the time of his termination, but lack

knowledge or information sufficient to form a belief as to his current membership status.

20. Admit the allegation in the first sentence of paragraph 20. Deny that the state ever actually terminated Hill's employment, but admit that he received a notice of termination from his position. Admit the remaining allegations of paragraph 20.

21. Admit the allegation in the first sentence of paragraph 21. Admit the allegation in the second sentence of paragraph 21, but state that Pichanick was laid off for economic reasons and was rehired on November 5, 2003 as a Fiscal Administrative Officer and is a currently a Financial Examiner at the Department of Banking.

C. THE DEFENDANTS

22. Deny that John G. Rowland is currently the Governor of the State of Connecticut, but admit that he was governor at all times relevant herein. Admit the allegation in the second sentence of paragraph 22.

23. Deny that Marc S. Ryan is currently the Secretary of the Office of Policy and Management of the State of Connecticut, but admit that he was secretary at all times relevant herein. Admit the allegation in the second sentence of paragraph 23.

III. CLASS ACTION ALLEGATIONS

A. THE AFFECTED EMPLOYEES CLASS

24-28. The allegations of paragraphs 24 through 28 state legal conclusions as to which no response is required. To the extent a response is required, the allegations are denied.

B. THE SEBAC CLASS

29-33. The allegations of paragraphs 29 through 33 state legal conclusions as to which no response is required. To the extent a response is required, the allegations are denied.

IV. CLAIMS FOR RELIEF

A. FIRST THROUGH FOURTH CLAIMS FOR RELIEF

The District Court dismissed the first, second, third and fourth claims for relief against defendants Rowland and Ryan in their individual capacities. Accordingly, the defendants do not respond to the allegations of said claims.

B. FIFTH CLAIM FOR RELIEF

1-33. The responses to paragraph 1 through 33 of the Amended Complaint are incorporated as the responses to paragraphs 1 through 33 of the Fifth Claim for Relief.

34. Admitted.

35. Admitted.

36. Admitted.

37. Admitted.

38. Admitted.

39. Admitted.

40. The allegation in paragraph 40 states a legal conclusion as to which no response is required.

41. Denied.

42. Denied.

43. Admit.

44. Denied.

45. Denied.

46. Denied.

47. Deny the allegation insofar as it relates to the Secretary of OPM, but admit the allegation insofar as it relates to the Governor of the State of Connecticut.

48. Admit that the defendants acted solely in their capacity as members of the Connecticut Executive Branch and solely in furtherance of their Executive Branch functions, but otherwise deny the allegations of paragraph 48.

49. Denied.

50. Denied.

51. Denied.

52. The allegations of paragraph 52 assert a legal conclusion as to which no response is required. To the extent a response is required, the allegations are denied.

53. Denied.

54. Denied.

55. Denied.

56. Denied.

C. SIXTH CLAIM FOR RELIEF

By stipulation of dismissal filed on April 23, 2009, the plaintiffs have withdrawn the sixth claim for relief with prejudice.

D. SEVENTH CLAIM FOR RELIEF

1-50. The responses to paragraph 1 through 50 of the First Claim for Relief of the Amended Complaint are incorporated as the responses to paragraphs 1 through 50 of the Seventh Claim for Relief.

51. Denied.

52. Denied.

53. Denied.

54. Denied.

55. Denied.

56. Denied.

57. Denied.

E. EIGHTH CLAIM FOR RELIEF

By stipulation of dismissal filed on April 23, 2009, the plaintiffs have withdrawn the eighth claim for relief with prejudice.

F. NINTH CLAIM FOR RELIEF

1-50. The responses to paragraph 1 through 50 of the Fifth Claim for Relief of the Amended Complaint are incorporated as the responses to paragraphs 1 through 50 of the Ninth Claim for Relief.

51. Admitted

52. Admitted.

53. The allegation in paragraph 53 asserts a legal conclusion as to which no response is required.

54. The allegation in paragraph 54 asserts a legal conclusion as to which no response is required.

55. The defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations asserted in paragraph 55 regarding Rowland's and Ryan's "awareness" and therefore leave the plaintiffs to their proof.

56. The defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations asserted in paragraph 57 regarding Rowland's and Ryan's "awareness" and therefore leave the plaintiffs to their proof.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

61. Denied.

62. Denied.

G. TENTH CLAIM FOR RELIEF

1-53. The responses to paragraph 1 through 53 of the Fifth Claim for Relief of the Amended Complaint are incorporated as the responses to paragraphs 1 through 53 of the Tenth Claim for Relief.

54. The allegation in paragraph 54 asserts a legal conclusion as to which no response is required.

55. The defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 55 regarding the motivations of Rowland or Ryan and therefore leave the plaintiffs to their proof.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The plaintiffs' claims fail to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The plaintiffs' claims and/or the relief sought are barred, in whole or in part, by absolute legislative immunity.

THIRD AFFIRMATIVE DEFENSE

The plaintiffs' claims are barred, in whole or in part, by the Eleventh Amendment.

FOURTH AFFIRMATIVE DEFENSE

The plaintiffs' claims present nonjusticiable political questions that this Court has no power to adjudicate.

FIFTH AFFIRMATIVE DEFENSE

The plaintiffs' claims are barred, in whole or in part, on the ground that they are moot.

DEFENDANTS

By /s/ (Daniel J. Klau

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CERTIFICATION

I hereby certify that on July 31, 2009, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by e-mail to all counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/
Daniel Klau

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

STATE EMPLOYEES BARGAINING AGENT COALITION, ET AL,	:	
Plaintiffs,	:	
V.	:	CIV. NO. 3:03CV221 (AVC)
M. JODI RELL, in her official capacity as Governor of the State of Connecticut, and BRENDA L. SISCO, in her official capacity as Acting Secretary of the Office of Policy and Management of the State of Connecticut,	:	
Defendants.	:	JUNE 30, 2010

JOINT LOCAL RULE 56(a)1 & (2) STATEMENT

Plaintiffs State Employees Bargaining Agent Coalition, *et al*, through counsel, and defendants M. Jodi Rell and Brenda L. Sisco, in their official capacities as Governor and Acting Secretary of the Office of Policy and Management of the State of Connecticut, through counsel, submit the following Joint Local Rule 56(a)1 & (2) Statement setting forth the *agreed* material undisputed facts that the parties rely upon for the cross-motions for summary judgment as to liability in this action.

The parties expressly reserve all objections to the legal relevance and admissibility of the undisputed facts set forth herein. The defendants further reserve the right to ask the Court to take judicial notice of the fact that the State of Connecticut faced a budget crisis in fiscal year 2003. The defendants' acknowledgment in their official capacities of the following undisputed facts does not constitute the admission by John G. Rowland or Marc S. Ryan individually of any fact herein.

UNDISPUTED FACTS

I. The Parties

A. The Plaintiff Unions

1. Plaintiff State Employees Bargaining Agent Coalition ["SEBAC"] is, and at all times mentioned herein has been, a coalition of 13 state employee unions, representing approximately 40,000 Connecticut state employees. Plaintiff SEBAC brings this action on its own behalf and on behalf of its constituent unions and their individual union members.

2. At all times mentioned herein, plaintiff SEBAC has been designated by the State of Connecticut Board of Labor Relations as the representative and exclusive bargaining agent of its constituent unions for the purpose of negotiating and entering into collective bargaining agreements covering health care, pension and other terms of employment of the state employee members of SEBAC's constituent unions.

3. Plaintiff American Federation of School Administrators, Local 61, AFL-CIO ["AFSA"] is a union that represents administrators employed by the Connecticut State Board of Education in vocational and technical high schools throughout the State of Connecticut. In November-December 2002, plaintiff AFSA represented approximately 50 administrators employed by the State of Connecticut. Plaintiff AFSA brings this action on its own behalf and on behalf of its members.

4. Plaintiff Connecticut Association of Prosecutors ["CAP"] is a union that represents line and supervisory prosecutors employed by the State of Connecticut Judicial Branch. In November-December 2002, plaintiff CAP represented approximately 200 line and supervisory prosecutors employed by the State of Connecticut. Plaintiff CAP brings this action on its own behalf and on behalf of its members.

5. Plaintiff Protective Services Coalition, IAFF, AFL-CIO ["Protective Services"] is a union that represents firefighters, university police and other protective service workers employed by the State of Connecticut. In November-December 2002, plaintiff Protective Services represented approximately 900 firefighters, university police and other protective service workers employed by the State of Connecticut. Plaintiff Protective Services brings this action on its own behalf and on behalf of its members.

6. Plaintiff Judicial Marshals, International Brotherhood of Police Officers, National Association

of Government Employees, AFL-CIO ["IBPO-Marshals"] is a union that represents judicial marshals employed by the State of Connecticut Judicial Branch. In November-December 2002, plaintiff IBPO-Marshals represented approximately 900 judicial marshals employed by the State of Connecticut. Plaintiff IBPO-Marshals brings this action on its own behalf and on behalf of its members.

7. Plaintiff Connecticut State Police Union ["CSPU"] is a union that represents state police officers employed by the State of Connecticut. In November-December 2002, plaintiff CSPU represented approximately 950 state police officers employed by the State of Connecticut. Plaintiff CSPU brings this action on its own behalf and on behalf of its members.

8. Plaintiff Congress of Connecticut Community Colleges, SEIU, AFL-CIO ["CCCC"] is a union that represents full-time faculty members, counselors, librarians and administrators employed by the State of Connecticut at Connecticut's community colleges. In November-December 2002, plaintiff CCCC represented approximately 1,000 full-time faculty members, counselors, librarians and administrators employed by the State of Connecticut at Connecticut's community colleges. Plaintiff CCCC brings this action on its own behalf and on behalf of its members.

9. Plaintiff Connecticut State University, American Association of University Professors ["CSU-AAUP"] is a union that represents faculty members and additional numbers of part-time employees

employed by the State of Connecticut in the Connecticut State University System. In November-December 2002, plaintiff CSU-AAUP represented approximately 1,150 faculty members and additional numbers of part-time employees employed by the State of Connecticut in the Connecticut State University System. Plaintiff CSU-AAUP brings this action on its own behalf and on behalf of its members.

10. Plaintiff Connecticut State Employees Association, SEIU, AFL-CIO ["CSEA"] is a union that represents state employees in five different bargaining units, including teachers, engineers, data processing professionals, police inspectors and related employees, as well as lieutenants employed by the Connecticut Department of Corrections. In November-December 2002, plaintiff CSEA represented approximately 4,000 state employees in five different bargaining units, including teachers, engineers, data processing professionals, police inspectors and related employees, as well as lieutenants employed by the Department of Corrections. Plaintiff CSEA brings this action on its own behalf and on behalf of its members.

11. Plaintiff Connecticut Employees Union Independent, SEIU, AFL-CIO ["CEUI] is a union that represents state employees in two bargaining units, including maintainers, telephone operators, cooks, truck and snow plow drivers and related employees, as well as production workers, mechanics and related workers at the State Board of Education and Services for the Blind. In November-December 2002, plaintiff CEUI represented approximately 5,000 employees of

the State of Connecticut in two bargaining units, including maintainers, telephone operators, cooks, truck and snow plow drivers and related employees, as well as production workers, mechanics and related workers at the State Board of Education and Services for the Blind. Plaintiff CEUI brings this action on its own behalf and on behalf of its members.

12. Plaintiff Connecticut Federation of Educational and Professional Employees, AFT, AFL-CIO ["CFEPE"] is a union that represents state employees through six AFT locals, each of which bargains on behalf of state employees, including (a) the Administrative & Residual Employees Union, which represents numerous classifications of professional employees throughout the State; (b) the University of Connecticut Professional-Employees Association, which represents professional employees at the University of Connecticut; (c) the University Health Professionals, which represents professsional [sic] employees at the University of Connecticut Health Center; (d) the State Vocational Federation of Teachers, which represents teachers at the state vocational and technical high schools, (e) the Federation of Technical College Teachers, which represents faculty, counselors and librarians at five of the State's community colleges; and (f) the Judicial Professionals, which represents professional employees in the State of Connecticut Judicial Department. In November-December 2002, plaintiff CFEPE represented approximately 6,500 workers employed by the State of Connecticut through

the six AFT locals. Plaintiff CFEPE brings this action on its own behalf and on behalf of its members.

13. Plaintiff District 1199, New England Health Care Employees Union, SEIU, AFL-CIO ["District 1199"] is a union that represents professional and non-professional health care state employees in the Department of Mental Health and Addiction Services, the Department of Mental Retardation and various other departments and divisions throughout the State of Connecticut. In November-December 2002, plaintiff District 1199 represented approximately 8,000 professional and non-professional health care employees of the State of Connecticut. Plaintiff District 1199 brings this action on its own behalf and on behalf of its members.

14. Plaintiff Council 4, American Federation of State, County, and Municipal Employees, AFL-CIO ["AFSCME Council 4"] is a union that represents professional and non-professional state employees through 21 different locals throughout the State. In November-December 2002, plaintiff AFSCME Council 4 represented 14,000 professional and non-professional state employees through 21 different locals. Plaintiff AFSCME Council 4 brings this action on its own behalf and on behalf of its members.

15. Plaintiffs AFSA, CAP, Protective Services, IBPO-Marshals, CSPU, CCCC, CSU-AAUP, CSEA, CEUI, CFEPE, District 1199, and AFSCME Council 4 are collectively referred to herein as the "plaintiff Unions."

16. At all times mentioned herein, each of the plaintiff Unions was designated by the State of Connecticut Board of Labor Relations as the representative and exclusive bargaining agent of its members for the purpose, inter alia, of negotiating and entering into collective bargaining agreements covering terms of employment on behalf of its members.

B. The Individual Plaintiff Union Members

17. Plaintiff Denise A. Bouffard is a resident of Ellington, Connecticut and was, as of January 2003, an employee of the State of Connecticut, with approximately six years of service as a state employee. Plaintiff Bouffard was terminated from her position as a Support Enforcement Officer with the State of Connecticut Judicial Branch effective January 16, 2003. At the time of her termination in January 2003, plaintiff Bouffard was, and is to date, a member of plaintiff CFEPE.

18. Plaintiff Marcelle Pichanick Groves is a resident of Marlborough, Connecticut and was, as of January 2003, an employee of the State of Connecticut, with approximately fourteen years of service as a state employee. Plaintiff Groves was terminated from her position as a Management Analyst for the State of Connecticut Department of Environmental Protection effective January 17, 2003. At the time of her termination in January 2003, plaintiff Groves was, and is to date, a member of plaintiff CFEPE.

19. Plaintiff Geneva M. Hedgecock is a resident of Bristol, Connecticut and was, as of January 2003, an employee of the State of Connecticut, with approximately nine years of service as a state employee. Plaintiff Hedgecock was terminated from her position as a Secretary with the Department of Social Services of the State of Connecticut effective January 7, 2003. At the time of her termination in January 2003, plaintiff Hedgecock was, and is to date, a member of plaintiff AFSCME Council 4.

20. Plaintiff Dennis P. Heffernan is a resident of Portland, Connecticut and was, as of January 2003, an employee of the State of Connecticut, with approximately twenty-eight years of service as a state employee. Plaintiff Heffernan was terminated from his position as a Storekeeper for the Department of Administrative Services of the State of Connecticut effective January 17, 2003. At the time of his termination, plaintiff Heffernan was, and is to date, a member of plaintiff CEUL [sic].

21. Plaintiff William D. Hill is a resident of Suffield, Connecticut and had been an employee of the State of Connecticut, as of December 2002, with approximately sixteen years of service as a state employee. On December 6, 2002, plaintiff Hill was notified that he was to be terminated from his position as a Drug and Alcohol Rehabilitation Counselor for the Department of Mental Health and Addiction Services of the State of Connecticut subsequent to June 30, 2003. At the time he received such notice,

plaintiff Hill was, and is to date, a member of plaintiff District 1199.

22. Plaintiffs Bouffard, Groves, Heffernan, Hedgecock and Hill are collectively referred to herein as the Individual Plaintiffs.

C. The Class of Affected State Employee Union Members

23. Plaintiffs further bring this action on behalf of the Class established by this Court's March 9, 2010 Ruling certifying this action as a class action, The Class of similarly-situated state employee union members is comprised of all persons:

(1) who were employees of the State of Connecticut as of November 17, 2002;

(2) who were members of a bargaining unit represented by one of the plaintiff unions; and

(3) whose employment was terminated or who were bumped or demoted to new positions or otherwise adversely affected by the terminations implemented by defendants as alleged in [plaintiffs'] Amended Complaint.

D. The Defendants (Official Capacity Only)

24. Defendant M. Jodi Rell is Governor of the State of Connecticut. Defendant Rell is sued in her official capacity only.

25. Defendant Brenda L. Sisco is Acting Secretary of the Office of Policy and Management ["OPM"] of the State of Connecticut. Defendant Sisco is sued in her official capacity only.

II. The Plaintiff Unions' Collective Bargaining Agreements

26. In 1997, plaintiff SEBAC, acting on behalf of its constituent unions and their members, entered into a long-term collective bargaining agreement [the "SEBAC Agreement"] with the State of Connecticut covering health care, pension benefits and other terms of employment. (A copy of the SEBAC Agreement is attached as Exhibit A.)

27. The SEBAC Agreement was approved by the Connecticut legislature pursuant to Conn. Gen. Stats. § 5-278(b).

28. The SEBAC Agreement was in effect in November-December 2002 and was, by its terms, to remain in effect through 2017.

29. Prior to November 2002, each of the plaintiff Unions, acting on behalf of its members, entered into a multi-year collective bargaining agreement with the State of Connecticut covering the terms and conditions of its members' employment.

30. Each of the plaintiff Unions' collective bargaining agreements was approved by the Connecticut legislature pursuant to Conn. Gen. Stats. § 5-278(b).

31. Each of the plaintiff Unions' collective bargaining agreements was in effect in November-December 2002 and was, by its terms, to remain in effect for a period of years thereafter.

32. Copies of the plaintiff Unions' collective bargaining agreements in effect in November-December 2002 are attached as Exhibits B-M.

III. The Conduct at Issue

33. In November 2002 and at all times thereafter until July 1, 2004, John G. Rowland was Governor of the State of Connecticut.

34. In November 2002 and through the end of December 2004, Marc S. Ryan was Secretary of the OPM of the State of Connecticut.

35. The Connecticut Governor and Secretary of OPM [the "Secretary"] are (and were, at all times relevant to this action) members of the Executive Branch of Connecticut's state government who were acting in furtherance of their functions as high-ranking Executive Branch officials. The Governor and Secretary had, at all times mentioned herein and to the present time, responsibility for the management of the state's work force and the negotiation of the terms of collective bargaining agreements with state employees in furtherance of their Executive Branch functions.

36. The Secretary is (and, at all times relevant to this action, was) designated, pursuant to Conn.

Gen. Stat. § 4-65a(1) & (2), as the employer representative "in collective bargaining negotiations concerning changes to the employees retirement system and health and welfare benefits," and in other matters involving collective bargaining, including the negotiation, administration and changes to ("supplemental understandings") collective bargaining agreements. The Secretary is (and, at all times relevant to this action, was) an appointee of the Governor pursuant to Conn. Gen. Stats. §§ 4-6, 4-65a, and "acts as the executive officer of the Governor for accomplishing the purposes of his department." Conn. Gen. Stats. § 4-8.

37. In November 2002, shortly after Rowland was re-elected as Governor, he determined to seek long-term changes to the plaintiff Unions' collective bargaining agreements.

38. Pursuant to such determination, Rowland (and at Rowland's direction, Ryan) demanded that plaintiff SEBAC and the other plaintiff Unions grant long-term concessions in their members' rights under their collective bargaining agreements totaling over $450 million annually.

39. Rowland (and, at Rowland's direction, Ryan) sought hundreds of millions of dollars (initially, approximately $450 million) in long-term (i.e., extending for the life of the agreements) concessions to the vested contract benefits conferred by the unions' legislatively-approved collective bargaining agreements with the State, including changes applicable

in years subsequent to Fiscal Year ["FY"] 2003 to the health care and pension benefits provided for and vested by the SEBAC Agreement.

40. At all times relevant to this lawsuit, the State of Connecticut's work force has consisted of unionized and non-unionized employees. State employees are not required to belong to a union. Non-unionized employees occupy non-management and management, as well as temporary positions, and hold the same non-management positions as unionized employees. In November 2002, there were approximately 50,000 employees in the State's work force. Approximately 37,500 (75%) of these employees were members of state unions, and approximately 12,500 (25%) were non-unionized.

41. In November 2002, Rowland and Ryan met with leaders of SEBAC and the other plaintiff Unions and advised the union leaders that unless the unions agreed to modify their collective bargaining agreements to grant the State hundreds of millions of dollars in future annual concessions, they would terminate, through purported layoffs, the employment of approximately 3,000 unionized state employees.

42. The collecting [sic] bargaining agreements as to which Rowland (and, at Rowland's direction, Ryan) sought concessions from SEBAC and the other plaintiff Unions in November 2002 had been approved by the Connecticut General Assembly pursuant to Conn. Gen. Stats. § 5-278(b).

43. The plaintiffs Unions had a statutory right, pursuant to Conn. Gen. Stats. § 5-272(c), to decline to agree to the collective bargaining agreement concessions sought by Rowland and Ryan.

44. Although the state work force has both union and non-union members, and although all state employees receive the same health care and pension benefits, Rowland (and, at Rowland's direction, Ryan) intentionally directed their demands for health care and pension concessions (and their corresponding threats of termination if the concessions were not granted) solely to state union employees.

45. In response to Rowland's and Ryan's demands, SEBAC and the other plaintiff Unions offered financial concessions that would have provided tens of millions of dollars of savings to the State of Connecticut in FY 2003.

46. When SEBAC and the plaintiff Unions declined to agree to all of the concessions demanded by Rowland, Rowland ordered Ryan to cause the employment of approximately 2,800 unionized state employees to be terminated, and Ryan caused OPM to implement Rowland's instructions as directed.

47. In December 2002, Rowland instructed Ryan to order the elimination of union positions and the terminations of union employees because the unions did not agree to the collective bargaining agreement concessions demanded by Rowland.

48. Rowland ordered the elimination of union positions and the terminations of union employees to try to compel the plaintiffs to agree to the demanded concessions.

49. The decision to order reductions in each bargaining unit was based on Rowland's determination of what it would take to compel the plaintiff Unions to agree to the demanded concessions.

50. Rowland advised the plaintiff Unions and their members in December 2002 that the terminations of union employees would be rescinded if the plaintiff Unions agreed to the long-term collective bargaining agreement concessions he sought.

51. Rowland directed Ryan to target union workers (i.e., to order the elimination of union positions and termination of union employees) because the plaintiff Unions did not agree to the long-term concessions in their vested collective bargaining agreements that Rowland had demanded. Ryan complied with Rowland's instructions.

52. On August 7, 2003, Secretary Ryan publicly stated, truthfully, that defendants "did target union workers, because we got no concessions."

53. The terminations ordered by Rowland and effectuated by Ryan (and OPM) in December 2002 were limited to unionized state employees.

54. In December 2002, Rowland instructed Ryan to cause OPM to instruct the State's agency heads to reduce agency staffing based upon specified

reductions of the numbers of employees in each bargaining unit of unions that refused to grant concessions.

55. In December 2002, Ryan, acting pursuant to Rowland's directions, caused OPM to instruct the State of Connecticut's agency heads to reduce agency staffing based upon specified reductions of the numbers of employees in each collective bargaining unit in each agency.

56. The written instructions to State of Connecticut agency heads to reduce agency staffing in December 2002 issued by OPM at Ryan's direction as aforesaid were limited to reductions of employees in collective bargaining units – i.e., to members of state employee unions.

57. The instructions provided by OPM to State of Connecticut agency heads were not based on any evaluations by OPM of the staffing needs of each agency with respect to whether union or non-union employees in the agency were needed for the performance of the agency's functions or the savings that could be realized by reducing non-union employee staffing.

58. Rowland and Ryan did not determine which and how many job reductions to order in December 2002 based on any calculation of which and how many job reductions were necessary to achieve the savings in FY 2003 sought by Rowland and Ryan in their demand to the plaintiff Unions for collective bargaining agreement concessions.

59. The savings realized in FY 2003 from the unionized work force reductions Governor Rowland ordered in early December 2002 did not correlate to the amount of the concessions he demanded for FY 2003, and Governor Rowland understood that no such correlation existed when he caused the reductions to be ordered.

60. OPM instructed the agency heads that with respect to employees in their worker test period or working in training classes, all of those working test period employees and trainees with a bargaining unit title as their target class were to be separated from state service, but no such instructions were given with respect to such employees who did not have a bargaining unit title as their target class.

61. The employment of the Individual Plaintiffs (other than plaintiff Hill) was terminated in January 2003 pursuant to OPM's implementation of Ryan's instructions as ordered by Rowland.

62. Many of the terminations ordered by Governor Rowland had no effect on the State's FY 03 budget deficit.

63. Included in the terminations ordered by defendants in December 2002 were employees who, by contract, could not be laid off before June 30, 2003.

64. Although plaintiff Hill was given notice of termination in December 2002, his termination, by contract, was not scheduled to take effect until after June 30, 2003.

65. Included in the terminations ordered by defendants in December 2002 were employees whose positions were funded by private industry.

66. Included in the terminations ordered by defendants in December 2002 were employees who were entitled to receive payment for accrued unused sick days and vacation pay that required the State of Connecticut to continue paying the employees their salary beyond June 30, 2003.

67. The reductions ordered by Governor Rowland had minimal effect on the State's FY 03 expenses and were ordered as a means of trying to compel the plaintiff unions to agree to the concessions demanded by Governor Rowland.

68. The financial concessions offered by SEBAC and the plaintiff Unions for FY 2003 exceeded by millions of dollars any FY 2003 budget savings realized by the State from the job terminations at issue in this lawsuit.

69. The permanent state employees whose job terminations are at issue in this lawsuit received written notices from the State notifying them that they were being laid off due to economic necessity caused by the State of Connecticut's FY 2003 budget deficit.

70. On at least three occasions, at arbitration hearings to consider grievances by employees who contended that there was no economic necessity to warrant their layoffs, it was determined by the

arbitrators, after hearing, that the layoffs were improper in that the State of Connecticut had failed to establish any economic necessity for the layoffs.

71. On December 6, 2002, Governor Rowland announced a "Balanced Budget Plan," a proposal setting forth actions to eliminate Connecticut's FY 2003 budget deficit.

72. The job terminations at issue in this lawsuit were not included in Governor Rowland's Balanced Budget Plan as one of the actions to eliminate Connecticut's FY 2003 budget deficit.

73. Rowland and Ryan were acting under color of state law when they engaged in the conduct described above.

IV. Defendants' Contentions

74. It is defendants' position that where they wish to modify the terms of legislatively-approved collective bargaining agreements and where the state employee unions do not agree to collective bargaining agreement concessions sought, defendants may, consistent with the First, Fifth and Fourteenth Amendments and Contract Clause of the United States Constitution, terminate or lay off members of state employee unions as a way to compel the unions to grant the demanded concessions.

75. It is defendants' position that where state employee unions have refused to agree to concessions to their legislatively-approved collective bargaining

agreements, it is constitutionally permissible for defendants to terminate or lay off employees in such unions as a way of compelling the unions to grant concessions to their collective bargaining agreements.

76. Defendants further contend 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.

PLAINTIFFS STATE
EMPLOYEES BARGAINING
AGENT COALITION, ET AL,

By /s/

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CERTIFICATION

I hereby certify that on June 30, 2010, a copy of the foregoing Joint Local Rule 56(a)1 & (2) Statement was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties

may access this filing through the Court's CM/ECF System.

/s/

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CORRECTIONS
[NP-4] BARGAINING UNIT

CONTRACT

Between

STATE OF CONNECTICUT

[SEAL]

And

COUNCIL 4 of the
AMERICAN FEDERATION of STATE,
COUNTY AND MUNICIPAL EMPLOYEES

[SEAL]

EFFECTIVE: JULY 1, 2001 EXPIRING: JUNE 30, 2004

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PREAMBLE

STATE OF CONNECTICUT, acting by and through the Commissioner of Administrative Services, hereinafter called "the State" or "the Employer," and Council 4, American Federation of State, County and Municipal Employees, (Local Nos. 387, 391 and 1565), AFL-CIO, hereinafter called "AFSCME" or "the Union," hereby agrees as follows (the inclusions of Locals herein does not alter the Recognition or any other Article of this Agreement):

WITNESSETH:

ARTICLE 1
RECOGNITION

Section 1. **Covered Employees.** The State recognizes the Union for the purposes of collective bargaining as the exclusive representative of all employees in the unit certified by the Connecticut State Board of Labor Relations, in Case No. SE-4728, Decision No.

1703, issued January 5, 1979, including, temporary and durational employees, excluding all others, provided that this Agreement shall not apply to non-permanent employees who are appointed on a emergency, provisional, summer or intermittent basis. Employees hired as Federal Grant Participants, or serving a working test period shall be considered as covered employees.

Section 2. **New Job Specifications.** The Union shall be notified in writing of any proposed change or new job specification for bargaining unit classifications prior to implementation. Upon written request of the Union, the State agrees to negotiate over the impact of the effect of any change to the extent required by law, however, such negotiations shall not prevent the State from implementation.

ARTICLE 2
ENTIRE AGREEMENT

Section 1. **Entire Agreement.** This Agreement, upon ratification, (when applicable), and upon legislative approval, supersedes and cancels all prior practices and agreements, whether written or oral, unless expressly stated to the contrary herein, and constitutes the complete and entire agreement between the parties and concludes collective bargaining for its term.

Section 2. **Opportunity to Present Demands.** The parties acknowledge that during the negotiations which resulted in this Agreement, each had the

unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the State and the Union, for the duration of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargaining collectively with respect to any subject or matter referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

ARTICLE 3
NON-DISCRIMINATION AND AFFIRMATIVE ACTION

Section 1. **Non-discrimination.** The parties herein agree that neither shall discriminate against any employee on the basis of race, color, creed, sex, age, national origin, marital status or lawful political activity.

Section 2. **Union Participation.** Neither party shall discriminate against an employee on the basis of membership or non-membership or lawful activity in behalf of the exclusive bargaining agent. The Employer agrees not to interfere with the rights of

employees to become members of the Union, and there shall be no discrimination, interference, restraint, or coercion by the Employer or any Employer representative against any employee because of any employee activity in an official capacity on behalf of the Union.

Section 3. **Affirmative Action.** The parties acknowledge the need for positive and aggressive affirmative action to redress the effects of past discrimination, if any, whether intentional or unintentional, to eliminate present discrimination, if any, to prevent further discrimination, and to ensure equal opportunity in the application of this Agreement. The Labor Management Committee (but not the grievance procedure) shall be the proper forum for problems, ripe or anticipated, which impact upon philosophy and/or directives of this Section.

Section 4. **Americans with Disabilities Act.** Notwithstanding any provision of this agreement to the contrary, the Employer will have the right and duty to take all actions necessary to comply with the provisions of the Americans with Disabilities Act, 42 U.S.C. 2101, et seq. (ADA). Upon request the Employer will meet and discuss specific concerns identified by the Union; however, this shall not delay any actions taken to comply with the ADA.

Section 5. **Harassment or Disparate Treatment.** The Employer shall take reasonable measures to prevent harassment or disparate treatment at the work place.

* * *

ARTICLE 5
MANAGEMENT RIGHTS

Section 1. **Management Rights.** Except as otherwise limited by an express provision of this Agreement, the State reserves and retains, whether exercised or not, all the lawful and customary rights, powers and prerogatives of public management. Such rights include but are not limited to establishing standards of productivity and performance of its employees; determining the mission of an agency and the methods and means necessary to fulfill that mission, including the contracting out of or the discontinuation of services, positions, or programs in whole or in part; the determination of the content of job classification; the appointment, promotion, assignment, direction and transfer of personnel; the suspension, demotion, discharge or any other appropriate action against its employees; the relief from duty of its employees because of lack of work or other legitimate reasons; the establishment of reasonable work rules; and the taking of all necessary actions to carry out its mission in emergencies. Except as otherwise limited by a specific provision of this Agreement, inherent management rights are not subject to the grievance procedure.

ARTICLE 6
UNION SECURITY AND PAYROLL DEDUCTIONS

Section 1. **Dues Election.** Union dues and initiation fees, if any, shall be deducted by the State Employer biweekly from the paycheck of each employee who signs and remits to the State Employer an authorization form. Such deduction shall be discontinued upon written request of an employee thirty (30) days in advance.

Section 2. **Agency Service Fee.** An employee covered by this Agreement who is not a member of the Union is required, as a condition of employment, to pay to the Union an amount equal to the regular dues, fees and assessments that a member is charged.

A. Service Fee Election. The State shall deduct the agency service fee biweekly from the paycheck of each employee who is required under Section 5-280 of the Connecticut General Statutes to pay such a fee as a condition of employment, provided, however, no such payment shall be required of an employee whose membership is terminated for reasons other than non-payment of Union dues.

B. Service Fee; Effective Date. The deduction of the agency service fee shall be effective with the first payroll check received as an employee covered by this contract and the amount of agency service fee shall be determined by the Union and shall not exceed the amount of the Union dues. An employee who objects to payment of such fee based on the tenets of a bona-fide religious sect shall have his/her agency service fee forwarded

by the Union to a nationally recognized charity, designated by mutual agreement of the Union and State, provided that the employee submits such objection in writing to the Union.

C. Remittance. The amount of dues or agency service fees deducted under this Article shall be remitted to the appropriate Local Union Treasurer after the payroll period in which such dues and fees are deducted, together with a list of names of employees from whose salaries such deductions were made.

D. Correction of Errors. Should the Union believe that the Union dues/fees of an employee have not been deducted correctly the Union shall notify the employing agency with the specific nature of the problem. Upon agency verification of the problem the agency shall arrange for corrective action with the Union and the employee. (For example, an employee whose dues have been underdeducted by $1.00 for six (6) pay periods shall have $1.00 extra deducted, in addition to the correct dues deduction, for a period of six (6) pay periods).

E. Indemnification. The Union agrees to indemnify the State Employer for its damages or cost incurred in defense of actions taken under this Section by the State.

Section 3. **Political Action Fund.** In accordance with those procedures promulgated by the Office of the State Comptroller the State shall allow for the deduction of contributions for the Union's political action fund.

Section 4. **Quarterly Reports.** The State shall furnish AFSCME Council 4, on a quarterly basis reports containing the following information sorted by facility:

a) New hires into Bargaining Unit, their classification, Social Security number, and address.

b) Re-employed workers into the Bargaining Unit, their classification, social security number, address, and date of hire.

c) Employees separated from the Bargaining Unit and date of separation.

d) General changes for Bargaining Unit employees.

ARTICLE 7
UNION RIGHTS

Section 1. **Access to Information.** The Employer agrees to provide the Union, upon request and adequate notice, access to materials and information necessary for the Union to fulfill its statutory responsibility to administer this Agreement. The Union will not be charged for infrequent and/or reasonable copying expenses, however, the Union shall reimburse the State for the expense and time spent photocopying such information and otherwise as permitted under the State Freedom of Information Law. The Union shall not have access to privileged or confidential information.

Section 2. **Bulletin Board.** The State will furnish a minimum of one bulletin board at each institution

which the Union may utilize for their announcements and Union material. Two such boards will be provided in the larger facilities. The Union shall be provided a key for access to the bulletin board at institutions where such boards are presently locked. The State reserves the right to have the Union remove material that is of a partisan, political nature or is inflammatory, or derogatory to the State Employer or any of its officers or employees. After the material in question is removed, the Union shall have the right to grieve and to arbitrate.

Section 3. **Posting of Vacancies.** Agency bargaining unit vacancies, including promotions, shall be posted at least ten (10) calendar days prior to the closing date of the position.

Section 4. **Access to Premises.** AFSCME representatives (International or District Council staff or steward assigned) shall be permitted to enter the facilities of the Department of Corrections at any reasonable time for the purpose of discussing, processing or investigating grievances, or fulfilling its role as collective bargaining agent, provided that they give telephone notice of their intended visit and upon arrival they give notice of their presence immediately to the office.

Section 5. **Use of Employer Facilities.** The Department will continue to permit use of certain facilities for Union meetings, subject to the operating needs of the Department.

Section 6. **Mailings and Handouts.** The Employer will permit the Union to leave handouts in specified areas and to allow the Union to use mail boxes where available. Employees will be allowed to carry Union mail between institutions as long as this does not interfere with the performance of duties. Employees may receive Union business faxes, at designated locations from AFSCME and Locals.

Section 7. **Union Business Leave.** A maximum of five hundred (500) person-days per year shall be granted without loss or pay of benefits for the purpose of attending to union business related functions. In the year of the International AFL-CIO convention, an additional eighty (80) person-days shall be granted for attendance at that convention. Each contract year, delegates to the Connecticut State AFL-CIO Convention shall be granted leave without loss of pay or benefits for the days on which the Convention is scheduled. Seventy (70) person days shall be granted for this provision. It is understood, however, that in emergency situations such leave may be withheld or revoked. Employees may or may not change work schedules for weeks in which conventions occur. Requests for leave time shall be made in writing as soon as possible and no later than two (2) weeks in advance to the Office of Labor Relations except in cases where two (2) weeks is not possible.

Section 8. **Union Leave.** Not more than one (1) employee elected or appointed to a full-time office or position with the Union will be eligible for an unpaid leave of absence not to exceed one (1) year may be

granted subject to the approval of the Director of Personnel and Labor Relations. Upon return from such leave, the State Employer shall offer said employee a position relatively equal to the former position in pay, benefits, and duties at the rates in force at time of return from such leave.

Section 9. **Number of Stewards.** The Union shall furnish the Employer with a list of all employee representatives and Union staff members authorized to so represent the Union within sixty (60) calendar days from the date of execution of this Agreement. Such list shall be updated quarterly.

Section 10. **Role of Stewards, Executive Board Members in Processing Grievances.** The stewards or Union Executive Board members will obtain permission from their immediate supervisors when they desire to leave their work assignments to properly and expeditiously carry out their duties in connection with the employee/management agreement. When contacting an employee, the stewards or Union Executive board members will first report to and obtain permission to see the employee from his/her supervisor, and such permission will be granted unless the work situation or an emergency demands otherwise. If the immediate supervisor is unavailable, permission will be requested from the next level of supervision. Requests by stewards or Union Executive Board members to meet with employees and/or employees to meet with stewards or Union Executive Board members will state the name of the employee involved, his/her location, indicating briefly what

union business is to be discussed, and the approximate time that will be needed. Stewards or Union Executive Board members thus engaged will report back to their supervisors on completion of such duties and return to their job and will suffer no loss of pay or other benefits as a result thereof.

Section 11. **Limitation on Entry for Representation.** Permission to enter the premises or to conduct representational business during working hours may be denied or revoked in profound circumstances.

Section 12. **AFSCME Representatives.** International representatives and Union staff representatives may be present at Labor Management meetings and at grievance hearings at the level of Step II and above.

Section 13. **Recognition of Stewards.** Employer representatives shall deal exclusively with Union designated stewards or representatives in the processing of grievances or any other aspect of contract administration.

* * *

ARTICLE 10
SENIORITY

Section 1. **Seniority for Length of Vacation and Longevity.** For the purpose of computing longevity and length of vacation leave, seniority shall be defined as length of continuous state service, with the

inclusion of Section 5-255 and 256, including military service.

A. Total Service, Longevity. Effective July 1, 1997, the calculation of service for purposes of longevity benefits shall be based upon total State service, including paid leave and war service.

B. Continuous Service, Vacation Accrual. Effective July 1, 1997, the calculation of service for purposes of vacation accrual eligibility shall be based on length of continuous State service including paid leave, war service, up to six (6) months of unpaid leave and/or to one (1) year of any period of continuous layoff provided the employee is reemployed within three (3) years.

C. No Effect on Pension. The definition of seniority in this Article shall not affect pension rules.

Section 2. **Seniority for Vacation Scheduling and Transfer.** Seniority shall be defined as length of total service in each class from date of permanent appointment to such class, subject to the provisions of Section 3, "Seniority and Working Test Period," of this article, and shall apply as follows:

A. Vacation Scheduling. In the event of conflicting schedules of vacation leave as determined by the operating needs of the facility or institution, class seniority shall be the determining factor. Ties shall be broken utilizing the employee's employee number with the lowest number having preference.

B. Involuntary Transfer. Inverse class seniority shall be the basis for selecting employees for

non-disciplinary, involuntary transfer from one institution or facility to another.

C. **(1) Transfer List.** As the correctional institutions and centers develop vacancies, the senior institution or center employee in the same classification whose name appears on the transfer list for institutions or centers will be transferred. An employee on workers' compensation leave will be eligible to transfer under this provision. An employee requesting transfer under this Section must put his/her name on the departmental transfer list in accordance with the departmental procedures in order to be considered. Such list will be updated quarterly.

(2) Eligibility; Six Months as Permanent Status. An employee must have worked six (6) months as a permanent employee to be eligible to have his/her name placed on the transfer list.

(3) Eligibility; Rejection within Six Months. Employees are not eligible for transfer under this Article if they have been granted, rejected or constructively rejected a prior transfer request within the previous six (6) month period.

(4) Removal of Name. Employees may remove their names from the transfer list at any time prior to being notified of an opening at the facility of their choice. The employee must notify the employer within 24 hours upon receipt of an offer of transfer of his/her intention to accept or reject such offer.

Failure to comply with this provision shall be considered a constructive rejection of the offer of transfer.

(5) New Facilities. When new facilities are established and opened, up to fifty (50%) percent of all bargaining unit positions will be filled by seniority transfer when there are sufficient numbers of employees on the transfer list. No more than fifteen (15%) percent of the total positions in a single facility shall be transferred to a new facility upon opening. The opening of new facilities shall be announced within ninety (90) days of the projected opening in order that interested persons can place their names on the transfer list.

Section 3. **Seniority and Working Test Period.** Seniority shall not be computed until after completion of the working test period. Seniority shall be retroactive to the date of hire.

This Section shall be interpreted to include time spent in training as a Correction Officer Trainee (Cadet) as retroactive seniority applicable as a Correction Officer after completion of the working test period.

Section 4. **Seniority and Trainee Class.** State service while working in a trainee class shall not accrue until permanent appointment after successful completion of the training, whereupon it shall be retroactively applied to include such service.

Section 5. **Broken Seniority.** Seniority shall be deemed broken by:

a) termination of employment caused by resignation, dismissal for just cause, or retirement;

b) failure to report for five (5) working days without authorization.

Section 6. **Seniority Lists.** Seniority lists shall be maintained on a six (6) month basis with copies to local Union presidents.

Section 7. **Break in Service.** Employees who resign and are reinstated in the same classification within one (1) year from date of resignation shall have credit for seniority up to the break in service restored. At the appointing authority's discretion, credit for seniority up to the break in service may be restored to an employee who otherwise returns to service within three (3) years of a service break.

Section 8. **Superseniority.** Union stewards and Union Executive Board members, while serving in these capacities, shall have top class seniority for purposes of layoffs.

Section 9. **Shift Assignment for Continuous Operations.** Class seniority will be applied as the determining factor in shift assignment for continuous operations when all other factors are equal. Management retains the right to determine when all other factors are equal. The Union may grieve a pattern of denials of shift assignment by seniority.

Section 10. **Shift Transfer Lists.** Each facility shall maintain a shift transfer list which will be updated on a quarterly basis.

ARTICLE 11
ORDER OF LAYOFF AND REEMPLOYMENT

Section 1. **Layoff by Seniority.** In the event of a reduction of the work force, employees shall be laid off by seniority with the least senior employee being laid off first. Layoff shall be by class and sub-title. In any class affected by a layoff, non-permanent employees in the affected class who are excluded from the bargaining unit in Article 1, Recognition, shall be laid off prior to any bargaining unit employee. When the Employer decides to reduce the work force in a facility, Section 2, "Bumping," of this article shall be invoked. When a layoff becomes necessary, the agency will identify the specific position to be eliminated and notify the incumbent in writing with as much notice as possible, but not less than four (4) weeks. A copy of the written notice shall be sent concurrently to the Union.

Section 2. **Bumping.** An employee in a class affected by layoff may, at his/her option, bump the least senior employee in his/her facility in a job in which he/she formerly held permanent status or the least senior employee in the same classification in the employee's agency, provided he/she has more seniority than the least senior employee affected.

A. Option to Bump Throughout Agency. The least senior employee in the classification in the facility affected by the reduction in work force shall be laid off and given the option to replace the least senior employee in the same classification in the employee's agency.

B. Recall List. An employee, failing to exercise this option, shall be laid off and his/her name placed on the recall list for vacancies as they occur for a period of three (3) years.

C. Waiver of Bumping Rights. An employee affected by layoff shall fill an existing vacancy, if any. If an employee declines to fill a vacancy, he/she shall have waived any bumping rights. Should multiple vacancies exist, the employee shall have the option to select the facility in line with his/her seniority.

Section 3. **Pay Rate for Bumping Employee.** The bumping employee would be paid for services in the lower classification at the closest rate of pay in the lower salary range to the rate held by the employee at the time of reassignment, but not higher.

Section 4. **Reemployment.** Employees on layoff shall be recalled in the reverse order of the procedure as stated above for layoffs.

ARTICLE 12
GRIEVANCE PROCEDURE

Section 1. **Definition of Grievance.** A grievance is defined as, and limited to, a written complaint

involving an alleged violation or a dispute involving the application or interpretation of a specific provision of this Agreement.

A. Amendments. Any grievance may be amended up to and including Step III of the grievance procedure.

Section 2. **Grievance Form.** Grievances shall be filed on mutually agreed forms which specify:

a) the facts,
b) the issue,
c) the date of the violation alleged,
d) the specific controlling contract provision,
e) the remedy or relief sought.

Section 3. **Grievant.** A Union representative, with or without the aggrieved employee, may submit a grievance and the Union may, in appropriate cases, submit an "institutional" or "general" grievance in its own behalf. When individual employee(s) or, in case of a class grievance, a group of employees elect(s) to submit a grievance without Union representation, the Union's representative or steward shall be notified of the pending grievance and shall be provided a copy thereof and shall have the right to be present at any discussion of the grievance, except that if the employee does not wish to have the steward and/or Executive Board member present, the steward and/or Executive Board member shall not attend the meeting, but shall be provided with a copy of the written response to the grievance. The steward and/or Executive Board member shall be entitled to receive upon

request from the Employer all documents furnished to the grievant pertinent to the disposition of the grievance and to file statements of position. Any adjustment of a grievance filed by an employee(s) without representation shall not be inconsistent with the terms of this Agreement.

Section 4. **Informal Resolutions.** The grievance procedure outlined hereunder is designed to resolve grievances promptly at the lowest level. Informal discussions between the employee and the Union and agency managers are encouraged prior to using the grievance procedure detailed in Section 6 of this article.

Section 5. **Time Limits.** A grievance shall be deemed waived unless submitted at Step 1 (disciplinary grievance at Step 3) within fifteen (15) calendar days from the date of the cause of the grievance, or within fifteen (15) days from the date the grievant became aware of the cause of the grievance. As used in this Article "cause of a grievance" and "effect or impact of a grievance" are not similar. A grievance shall be deemed waived unless subsequently processed within the time limits provided in this Agreement.

Section 6. **Grievance Procedure: Steps**

> ***Step I.*** **First Supervisor.** A grievance may be submitted within the fifteen (15) day period specified in Section 5, "Time Limits," to the employee's first supervisor in the chain of command who is outside the bargaining unit. The institution

head, warden, or designee shall meet with the steward or Union Executive Board member and/or the grievant and issue a written response within seven (7) days after such meeting. The meeting shall take place and the written response issued not later than ten (10) days from the date of receipt.

Step II. **Commissioner or Designee.** When the answer at Step I does not resolve the grievance, it shall be submitted to the Commissioner of Corrections or his/her designee within five (5) days of the due date of the previous response. Within fourteen (14) days after receipt of the grievance, a meeting will be held with the employee and/or a union representative and a written response issued within five (5) days thereafter. The grievant may be represented by the persons already designated at Step I and the local union president or his/her designee, but in no event more than two (2) representatives.

Step III. **Director of Labor Relations or Designee.** An unresolved grievance may be appealed to the Director of Labor Relations within seven (7) days of the date that the Step II response is due. Said Director or his/her designated representative shall hold a conference within forty-five (45) days of receipt of the grievance and issue a response within ten (10) days of the conference. The local union president or his/her designee, staff representative and steward may be present at the Step III level.

Section 7. **"Day" Defined.** For the purpose of the time limits hereunder "days" shall mean calendar

days unless otherwise specified. The Union and the State, by mutual agreement, in any instance may extend time limits or waive any or all of the steps herein before cited.

Section 8. **Failure to Answer Grievance.** In the event that the State Employer fails to answer a grievance within the time specified, the grievance may be processed to the next higher level and the same time limits therefor shall apply as if the State Employer's answer had been timely filed on the last day.

Section 9. **Arbitration.** Within forty (40) days from receipt of a Step III response, or if no response, within forty (40) days of the due date, grievances, during the life of this Agreement, shall be submitted for arbitration as follows:

A. Dismissals.

(1) Submission. Submission shall be to the Connecticut Board of Mediation and Arbitration by letter, postage pre-paid, addressed to the Board; a copy of such letter will also be mailed concurrently to the Office of Labor Relations by certified mail;

(2) Cost Allocation. Effective July 1, 1994, and for each year of this Contract, the State shall allocate $5,000.00 to cover the cost of arbitration at a rate of $250.00 per case. Unexpended funds in any contract year shall carry over into the next contract year. Should the yearly allocation and the carry over funds

combined be insufficient to pay for cases in any contract year, the parties agree to share equally in the per case cost;

(3) Arbitrators. Arbitrators assigned to hear cases under this provision shall be mutually agreeable to the parties;

(4) Cases Submitted Under Previous Agreement. For cases already submitted to the Board under previous contract provisions, those involving suspensions of fifteen (15) days or more shall remain with the Board. All other cases shall be processed under B. below. In the assignment of cases, discharge cases will be assigned first, all other cases will be assigned in the order of the date of filing, first filed, first assigned. Cases shall be assigned on a rotating basis to the arbitrators. For Dismissal cases resulting from progressive discipline, the underlying lesser disciplines shall also be heard by the same arbitrator.

B. Other Discipline and Contract Interpretation

(1) Submission. Submission shall be by certified letter, postage prepaid to the Office of Labor Relations.

(2) Selection of Panel. The parties shall establish a panel of five (5) arbitrators selected by mutual agreement.

(3) Costs. The parties shall share equally in the expenses of the arbitrator.

(4) Assignment of Cases. Cases shall be assigned on a rotating basis (alphabetically) to the arbitrator panel based on the date of filing, first filed, first assigned.

(5) Removal of Arbitrator. Either party, upon written notice to the other, between March 1st and March 10th of each contract year may remove an arbitrator(s). By April 1st the parties will have a reconstituted mutually agreed upon panel of five (5) arbitrators for the succeeding contract year.

C. Arbitrability. A party raising an issue of arbitrability shall do so by notifying the other party at least seven (7) working days in advance of the scheduled hearing. Such notice requirement shall be waived in instances of new evidence discovered during the arbitration hearing.

D. Expedited Cases. Up to ten (10) cases per contract year by the Union and up to five (5) cases per year by the State may receive expedited arbitrator assignment as exclusions to the "first filed, first assigned" rule expressed herein.

E. Pending Cases. The parties agree, immediately upon legislative approval of this Agreement, if not beforehand, to meet and discuss the backlog of pending arbitration cases with the goal of resolving, thereby reducing, the numbers of same.

F. Multiple Case Assignments. The parties by mutual agreement may assign multiple cases to an individual arbitrator for expedited arbitration.

G. Postponements. In any individual arbitration case, each party will be allowed one postponement. Thereafter, postponements shall only be by mutual consent of the parties.

H. Arbitrator's Authority. The arbitrator shall have no power to add to, subtract from, alter, or modify this Agreement, nor to grant to either party matters which were not obtained in the bargaining process, nor to impose any remedy or right of relief for any period of time prior to the effective date of the Agreement, nor to grant pay retroactively for more than thirty (30) calendar days prior to the date a grievance was submitted at Step I.

I. Decision Final and Binding. The arbitrator's decision shall be final and binding on the parties in accordance with Connecticut General Statutes Section 52-418, provided, however, neither the submission of questions of arbitrability to any arbitrator in the first instance nor any voluntary submission shall be deemed to diminish the scope of judicial review over arbitral awards, including awards on arbitrability.

Section 10. **Grievance Subjects.** Notwithstanding any contrary provision of this Agreement, the following matters shall not be subject to the grievance or arbitration procedure:

a) dismissal of employees during the working test period;
b) reduction in force decision, except for order of layoff;

c) classification and pay grade for newly created jobs, provided, however, this clause shall neither enlarge nor diminish the Union's right to negotiate on pay grades;

d) compliance with health and safety standards and COSHA;

e) appeal of rejection from admission to an examination;

f) any grievance processed in accordance with the procedures in effect at the time the grievance arose;

g) disputes over claimed unlawful discrimination in violation of Article 3, Section 1, "Non-Discrimination and Affirmative Action," shall be subject to the grievance procedure but shall not be arbitrable in any case where the Human Rights Commission has asserted jurisdiction.

Section 11. **Job Classification Disputes.** Disputes over an employee's job classification (reclassification grievances) shall be subject to the grievance procedure but shall not be arbitrable. The final step shall be appeal to a three (3) person panel consisting of personnel officers from each of two (2) State agencies, each of which has more than one hundred (100) employees, and one (1) designee of the Union who is experienced in the area of job classification.

Section 12. **Witnesses.** The State will continue its practice of paid leave time for necessary witnesses of either party.

Section 13. **Hearings.** All Arbitrations and related conferences or meetings shall be closed to the public, unless the parties jointly agree to the contrary.

ARTICLE 13
DISMISSAL, SUSPENSION, DEMOTION OR OTHER DISCIPLINE

Section 1. **Disciplinary Actions.** Disciplinary action includes oral reprimand, written reprimand, suspension (with written notice except in emergency), demotion, discharge, transfer between facilities.

Section 2. **Oral and Written Reprimands.** An oral reprimand shall not be deemed to have been issued unless the employee reprimanded has been advised in writing that he/she has received an oral reprimand and a notation to that effect from the party administering the reprimand is made part of the employee's official personnel file. No written reprimand shall be deemed to have been issued unless the written communication is labeled a written reprimand and a copy of said reprimand is made part of the employee's official personnel file. Any action not complying with the above requirements shall not be deemed a reprimand and shall not be considered as disciplinary action. The record of an oral reprimand shall be removed from the employee's personnel file on the anniversary date of the issuance. The record of a written reprimand shall be removed from the employee's personnel file on the second anniversary date of the issuance. It is understood that the record of

reprimand shall not be removed within the above time period if the employee has received subsequent related discipline within the above specified time period.

Section 3. **Discipline.** No employee who has completed the working test period shall be disciplined or discharged except for just cause. In determining just cause, the regulations of the Blue Book governing disciplinary action as defined above are hereby incorporated by reference.

Section 4. **Expedited Procedure.** Any grievance under Section 1, "Disciplinary Action," of this article will be submitted at Step III. By mutual agreement, a grievance under Section 1 of this article may be expedited directly to arbitration.

Section 5. **Exclusive Forum.** The grievance procedure shall be the exclusive forum for resolving disputes over disciplinary action and shall supersede all pre-existing forums. It is understood that the arbitrator's remedial powers include reinstatement with full back pay and restoration of all other rights.

Section 6. **Privacy.** If an employer has reason to criticize an employee, it shall be done in a manner that will not embarrass the employee before others.

Section 7. **Leave for Investigations.** An appointing authority may, pending an investigation of alleged action that constitutes grounds for dismissal (including disposition of a criminal charge against the employee), place the employee on an administrative

leave of absence in accordance with Regulation 5-240-5a. The appointing authority may reassign the employee to an alternative assignment during the investigation, where practicable. The provisions of this Section shall not preclude an employee from electing to be placed on an unpaid leave of absence and drawing accrued time, except sick leave.

Section 8. **Union Representation.** An employee who is to be interrogated concerning an incident or action which may subject him/her to disciplinary action shall be allowed to have a Union steward or other representative at the interrogation. This provision shall be applicable to interrogation before, during, or after the filing of a charge against an employee or notification to the employee of disciplinary action. Should an employee waive his/her right to have a Union steward present during an interrogation the employee must make such waiver in writing.

Section 9. **Investigation and Interrogation.** Whenever practicable, the investigation, interrogation or discipline of employees shall be scheduled in a manner intended to conform with the employee's work schedule, with an intent to avoid overtime. When any employee is called to appear at any time beyond his/her normal work time, and actually testifies, he/she shall be deemed to be actually working. This provision shall not apply to Union stewards or Executive Board members.

Section 10. **Grounds for Dismissal, Demotion, Suspension, Reprimand.** The grounds presently

spelled out in Section 5-240 for dismissal, demotion, suspension and reprimand, including the consequences of unsatisfactory service rating(s), are hereby incorporated by reference. False claims of illness shall be grounds for serious discipline, which may include dismissal.

Section 11. **Unsatisfactory Service Ratings.** Unsatisfactory service rating(s), except during a working test period shall be grievable.

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