

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 Management of
the State of Connecticut, in their individual capacities,

Petitioners,

v.

STATE EMPLOYEES BARGAINING
AGENT COALITION, et al.,

Respondents.

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

**MOTION FOR LEAVE TO FILE *AMICUS*
CURIAE BRIEF AND BRIEF OF YANKEE
INSTITUTE FOR PUBLIC POLICY IN SUPPORT
OF THE PETITION FOR WRIT OF CERTIORARI**

JUSTIN R. CLARK
DAVIS & CLARK LLC
148 Eastern Blvd., Suite 100
Glastonbury, CT 06033
Tel.: (860) 430-9200
Fax: (860) 812-2039
jclark@davisclarklaw.com

*Counsel for Amicus Curiae,
Yankee Institute for Public Policy*

**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

Pursuant to Supreme Court Rule 37.2(b), the Yankee Institute for Public Policy (“Yankee Institute”), respectfully moves for leave to file the accompanying *amicus curiae* brief in support of Petitioners, John G. Rowland and Marc S. Ryan. Counsel for the petitioners in their individual capacities have consented to the filing of this *amicus* brief. All other parties take no position.

The Yankee Institute is one of America’s oldest state think tanks and is a nonpartisan educational and research group organized more than two decades ago under the laws of the State of Connecticut. The Yankee Institute’s mission is to “promote economic opportunity through lower taxes and new ideas for better government in Connecticut.” The Yankee Institute develops and advocates for free market, limited government public policy solutions in Connecticut and is dedicated to improving lives through freedom and opportunity. Central to these notions are maintaining a balance between public sector management and promoting participation in the political process. Here, the Yankee Institute seeks to highlight these fundamental principles. The Yankee Institute submits that in its decision the Second Circuit has fundamentally and negatively altered the balance of power between management and labor in the public sector by tying the hands of executives and legislatures in labor negotiations and management. Further, the Yankee Institute believes that the

Second Circuit's decision grants to the federal courts the power to make decisions that are reserved to the states and, in the case of Connecticut, the legislative and executive branches therein. Finally, the Yankee Institute believes that this decision has a chilling effect on participation in the political process by exposing elected officials to personal liability for objectively lawful decisions made while in office and thus discouraging people from seeking said office. Further, the implications of this decision go well beyond the governor's office in Connecticut. This decision will impact any executive in the public sector in the Second Circuit and has potentially disastrous implications nationwide.

Thus, the Yankee Institute urges that this Court grant the Petition for Certiorari to reestablish the proper balance between public sector management and labor, leave such decisions in the hands of those people best equipped and elected to make them and to remove a substantial barrier to participation in the political process. Though the Petition has touched on these issues, the Yankee Institute brings a sharper focus to those principles. The Yankee Institute believes that this focus will be useful to this Court in determining whether to grant the Petition for Certiorari.

WHEREFORE, the Yankee Institute for Public Policy respectfully requests that this Court grant its leave to participate as *amicus curiae* and to file the accompanying *amicus curiae* brief in support of Petitioners, John G. Rowland and Marc S. Ryan.

DATED this 18th day of November 2013.

Respectfully submitted,

JUSTIN R. CLARK
DAVIS & CLARK LLC
148 Eastern Blvd., Suite 100
Glastonbury, CT 06033
Tel.: (860) 430-9200
Fax: (860) 812-2039
jclark@davisclarklaw.com

Counsel for Amicus Curiae
Yankee Institute for Public Policy

QUESTIONS PRESENTED FOR REVIEW

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

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
<i>AMICUS CURIAE</i> BRIEF OF YANKEE INSTITUTE OF PUBLIC POLICY	1
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	1
ARGUMENT	3
I. THIS COURT SHOULD REVERSE THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BECAUSE THAT DECISION WILL HAVE BROAD AND NEGATIVE PUBLIC POLICY IMPACTS FOR CONNECTICUT AND THE NATION	3
A. The Case	3
B. Strong Legal and Policy Reasons Support Reviewing The Decision of the Second Circuit	6
1. The Second Circuit Fundamentally and Negatively Altered the Balance of Power in Public Sector Labor Law	6
2. The Second Circuit Improperly Granted the Federal Courts Political Powers That Are Best Left to the Political Branches	9
3. The Second Circuit Chilled Participation in the Political Process	11
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

<i>Crawford-El v. Britton</i> , 523 U.S. 574 (1998)	12
<i>Nixon v. United States</i> , 506 U.S. 224 (1993)	10
<i>State Empls. Bargaining Agent Coalition v. Rowland</i> , 494 F.3d 71 (2007)	3

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I	5
U.S. Const. amend. X	10
U.S. Const. amend. XI	5

**AMICUS CURIAE BRIEF OF
YANKEE INSTITUTE OF PUBLIC POLICY**

The Yankee Institute for Public Policy (“Yankee Institute”) submits this *amicus curiae* brief, on behalf of itself and its members, in support of the petition for a writ of certiorari filed by Petitioners, John G. Rowland and Marc S. Ryan to review the judgment of the United States Court of Appeals for the Second Circuit. Pursuant to Supreme Court Rule 37.2(a), this *amicus curiae* brief is filed with the consent of one of the parties, with the others taking no position.¹



**IDENTITY AND INTEREST
OF AMICUS CURIAE**

The Yankee Institute is one of America’s oldest state think tanks and is a nonpartisan educational and research group organized more than two decades ago under the laws of the State of Connecticut. The

¹ Pursuant to Supreme Court Rule 37.2, emails indicating the Yankee Institute’s intent to file this *amicus curiae* brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. Counsels for the petitioners in their individual capacities have consented to the filing of this *amicus* brief. All other parties take no position. Therefore, this brief is appended to the Yankee Institute’s Motion for Leave to File this brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the Yankee Institute, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Yankee Institute’s mission is to “promote economic opportunity through lower taxes and new ideas for better government in Connecticut.”

The Yankee Institute is a nonpartisan research and education organization founded in 1984, under section 501(c)(3) of the Internal Revenue Service code. The Yankee Institute develops and advocates for free market, limited government public policy solutions in Connecticut and is dedicated to improving lives through freedom and opportunity. The Yankee Institute has nearly 2,000 members, most of whom are individuals who reside in the state of Connecticut. The Yankee Institute maintains offices in East Hartford, Connecticut.

If the United States Court of Appeals for the Second Circuit’s decision is not overturned, any current or future governor’s hands will be tied with respect to alleviating budgetary issues, and negotiating with public employee unions, which affects the Yankee Institute’s members. The decision also creates a chilling effect on the political process as people will be discouraged from seeking public office because of the potential personal, legal exposure. The Yankee Institute and its members fundamentally oppose such an outcome. Therefore, the Yankee Institute respectfully submits this *amicus curiae* brief in support of the Petition for Writ of Certiorari.



ARGUMENT

I. THIS COURT SHOULD REVERSE THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BECAUSE THAT DECISION WILL HAVE BROAD AND NEGATIVE PUBLIC POLICY IMPACTS FOR CONNECTICUT AND THE NATION

The United States Court of Appeals for the Second Circuit created a public policy nightmare for public sector executives seeking to deal with budget crises and discourages individuals from seeking office. Specifically, this decision fundamentally and negatively changes the balance between management and labor in the public sector; grants to the federal courts the power to make decisions that are reserved to the states and best left to the political branches therein; and chills participation in the political process by exposing elected officials to protracted litigation over lawful decisions made in office and thus discouraging people from seeking said office.

A. The Case.

In 2002, the State of Connecticut faced a budget crisis of uncertain duration. *See State Empls. Bargaining Agent Coalition v. Rowland*, 494 F.3d 71, 78 (2007) (taking judicial notice of state's budget crisis); App. 55-56. Under the terms of its collective bargaining agreement negotiated with the respondent State Employees Bargaining Agent (SEBAC)

the State could not alter the terms of certain collective bargaining contracts unilaterally. The petitioner, then Governor John G. Rowland (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). Governor Rowland 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. As previously stated, however, the respondents' assent was required. It was not forthcoming. Upon the respondents' refusal to meet the State's requested concessions, Governor Rowland followed through on his demands and reduced the size of their workforce. Specifically, the petitioner instructed State agencies to reduce staffing levels by making specific reductions in the number of positions in each bargaining unit represented by a union that refused to agree to the requested concessions. Pet. Brief pp. 6-7. These reductions were requested and made in accordance with the applicable collective bargaining agreements. Pet. Brief pp. 6-8.

The respondents then sued the governor claiming that the afore-described layoffs were retaliatory in nature. Pet. Brief pp. 8-9. Specifically, the respondents claim that the layoffs were retaliation against them due to their lack of support for him in his 2002 re-election campaign and “anti-union animus.” *Id.* The respondents sought reinstatement and money damages. After several iterations of dismissal, appeal, and remand the parties submitted cross-motions for summary judgment on most of the contested issues. The district court granted the State summary judgment.

On appeal, 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, is legally equivalent to hiring and firing specific individuals based solely on their political party affiliation. Pet. Brief pp. 14-16. The Second Circuit held that when a state eliminates positions in bargaining units, its actions are subject to strict scrutiny, which it said the State failed to satisfy. *Id.* 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. *Id.* Because subjective motive remained an element of the respondents’ affirmative claims the Second Circuit 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.*

Applying strict scrutiny 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. *Id.* 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.*

B. Strong Legal and Policy Reasons Support Reviewing The Decision of the Second Circuit.

The Court should grant the petition for a variety of reasons. Most compelling to the Yankee Institute are the public policy implications of letting the decision of the lower court stand. The decision of the Second Circuit: (1) fundamentally and negatively alters the balance of power between management and labor in the public sector; (2) grants to the federal courts the power to make decisions that are reserved to the states and, in the case of Connecticut, the legislative and executive branches therein; and (3) has a chilling

effect on participation in the political process by exposing elected officials to personal liability for objectively lawful decisions made while in office and thus discouraging people from seeking said office.

1. The Second Circuit Fundamentally and Negatively Altered the Balance of Power in Public Sector Labor Law

By taking layoffs, and the threat of layoffs, away from public sector management as a negotiating tool, the Second Circuit has altered the relationship between management and labor in the public sector in a way that puts a thumb on the scale in labor's favor. As the petitioner notes, if this decision stands it will undermine the ability of every public sector executive to negotiate effectively with a unionized workforce by taking away the fundamental negotiating power of management: threats of workforce reduction.

The petitioner notes that the decision alters this relationship between public sector labor and management in two ways. First, it transforms a state's objectively lawful policy decision to reduce the size of its workforce into a motive-based constitutional tort. Pet. Brief pp. 17-18. To recap, the Second Circuit decision states that a union can sue a governor personally and force him or her to submit to the costs and burdens of litigation to determine whether his or her subjective motives for following through on a negotiating position were his or her "true" motivations. It is important to note that this ruling has sweeping

implications beyond the governor's office. It affects not only governors, but also mayors, first selectmen, county executives, school boards – any executive board that employs unionized public workers. Second, the petitioner notes that 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 cannot now meet unless it also terminates management employees proportionally, even though – as here – the bargaining positions of the two groups are fundamentally different.

What the petitioner doesn't explore as a fundamental change in labor and management relations, is that this ruling goes beyond any collective bargaining agreement. Because the court assigned strict scrutiny analysis to any distinction between unionized and non-unionized employees, what happens when a collective bargaining agreement expires and a chief executive is negotiating a new agreement with labor? If a chief executive, in negotiating a new agreement seeks a reduction in workforce or benefits and labor disagrees, the failure on management's part to renew that collective bargaining agreement under the same terms would seemingly be subject to strict scrutiny and expose him or her to a lawsuit. Beyond handcuffing management in negotiations, it effectively creates a right to employment beyond the terms of a collective bargaining agreement unless every employee in a state or other political jurisdiction were classified as unionized. This ruling takes away the ability of public executives to manage their workforce by laying off

employees and – in the case of a non-expired collective bargaining agreement – voids specific sections of negotiated and agreed upon contracts. This means that an executive can never layoff a unionized worker, because an affected employee can claim the layoff was due to supposed bias. Hiring a unionized employee becomes, in effect, hiring for life.

2. The Second Circuit Improperly Granted the Federal Courts Political Powers That Are Best Left to the Political Branches

The Second Circuit's decision doesn't merely alter the bargaining positions of labor and management in the public sector, but effectively places the decision making process in such matters squarely in the hands of the federal courts. By inquiring into the subjective motives of elected government officials executing their constitutional duties, the federal courts have intruded into a domain that is exclusively that of the states, and in the case of labor/management relations, management.

As the petitioner notes, this Court has 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. Pet. Brief pp. 31. 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. As the petitioner notes, allowing inquiry into motives in cases such as this one also turns federal courts into the ultimate arbiters of political – and more specifically, management – decisions. *Id.* As the petitioner further notes, 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. *Id.*

Additionally, the political question doctrine is one that touches on the issues resolved by the Second Circuit. Generally, the political question doctrine may be invoked by the Court “where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.” *See, e.g., Nixon v. United States*, 506 U.S. 224, 228 (1993) (Internal citations omitted; internal quotation marks omitted.) In such cases, the Court has noted that it lacks the authority to decide the dispute before it. *See id.* Without invoking the Tenth Amendment to resolve the former standard, it is clear that this dispute involves a lack of judicially discoverable and manageable standards for resolving it.

Practically speaking, the Second Circuit’s decision greatly slows the power of an executive exercising a legislative function well beyond the emergent circumstance that may require such action. As happened here, Governor Rowland exercised his powers in 2002, yet over a decade later those decisions are

still being reviewed – and yet may still be reviewed – regarding his subjective intentions. This completely defeats the purpose of being able to make such decisions in the first instance. This case arose from an acute – yet temporal – budget crisis. The governor negotiated with the respondents in order to reduce costs under valid collective bargaining agreements. Judicial review of the subjective intentions of one side of these negotiations and decisions that flowed from them cannot be subject to strict scrutiny review or it defeats the whole purpose of engaging in negotiations to reduce labor costs. Put another way, the budget crisis in question has long passed yet the parties are still arguing over whether the remedy was proper. If this decision stands then parties could prevent these remedies from ever taking place by seeking a preliminary injunction until the case is heard thereby effectively defeating the purpose of even attempting to reduce labor costs under a valid collective bargaining agreement.

3. The Second Circuit Chilled Participation in the Political Process

By exposing governors and other executives in the public sector to these inquiries and potential lawsuits the Second Circuit has effectively chilled participation in the political process. As the petitioner notes, “[t]he 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 in the petition, 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 acts are challenged will still subject the officials to the burdens of litigation.

This may not only, as the petitioners suggest, chill their willingness to make important policy-making decisions, particularly decisions implicating budgetary priorities, but will also likely chill their involvement in the political process and in running for office. *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 609 (1998) (“[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).



CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

JUSTIN R. CLARK
DAVIS & CLARK LLC
148 Eastern Blvd., Suite 100
Glastonbury, CT 06033
Tel.: (860) 430-9200
Fax: (860) 812-2039
jclark@davisclarklaw.com

*Counsel for Amicus Curiae,
Yankee Institute for Public Policy*