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December 2, 2013

Hon. George Jepsen
Attorney General
Office of the Attorney General
55 Elm Street
Hartford, CT 06106

Re: State Employees Bargaining Coalition, et al v. Rowland, et al

Dear General Jepsen:

As you know, this firm represents the plaintiffs in the above matter. Plaintiffs believe that the present circumstances of the case offer a meaningful opportunity for the parties to engage in discussions to resolve the parties' disputes, without prejudicing either side's right and ability to go forward with the case if an agreement cannot be reached. I am writing to suggest an approach to resolving the case that plaintiffs believe would be in the best interests of all parties.

As the case stands now, plaintiffs have prevailed on their First Amendment claims in the Second Circuit, which has directed the case returned to the district court for determination of appropriate relief. The State has a filed a petition for *certiorari* seeking Supreme Court review (and, if review is granted, reversal) of the Second Circuit's holding.

Plaintiffs believe that it is unlikely that the Supreme Court will decide to hear the case or reverse the Second Circuit. As a general matter, the Supreme Court declines to hear 99% of the cases in which *certiorari* is sought. (During the 2011-12 Term, the last full Term for which statistics are available, the Court received over 7,000 petitions and issued only 64 signed opinions.) Moreover, the likelihood of Supreme Court review is dramatically lessened in this case by three significant considerations: (1) the absence of any dissent by any member of the Second Circuit panel, which was comprised of ideologically diverse judges; (2) the absence of any decision in any other court of appeals conflicting with the holding of the Second Circuit; and (3) the interlocutory nature of the Second Circuit's ruling and the lack of a final judgment in the case.

The second factor mentioned above is particularly important since the existence of conflicting decisions among the circuits is generally considered the principal ground for the grant of a petition seeking review of a federal court of appeals decision. Supreme Court Rule 10(a). Here, as the Second Circuit noted, the United States Supreme Court and every federal appeals court that has considered the issue has ruled that the First Amendment protects public employees from adverse action based on their union membership. *See* Op. at 13-14 & n. 10.[1] There is no "conflict among the circuits," and plaintiffs do not understand the State to be contending to the contrary in its petition for *certiorari*.

The third factor mentioned above is also important. The State's petition for *certiorari* seeks interlocutory review of the Second Circuit's decision – *i.e.*, review prior to the entry of a final judgment in the district court. While the Supreme Court is *permitted* to review the case at this time, the Court has long noted that "except in extraordinary cases, the writ is not to be issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *accord American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893) ("This court should not issue a writ of *certiorari* to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."); *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R.* Co., 389 U.S. 327, 328 (1967) (denying *certiorari* "because the Court of Appeals remanded the case [and thus it is] not yet ripe for review").

There is, moreover, an additional reason why it makes sense to try to resolve the parties' disputes now, as there appears to be no dispute between the parties that the Governor has the authority to orders layoffs in a future budget crisis provided the layoffs are done in a non-discriminatory manner. Plaintiffs' brief to the Second Circuit expressly conceded that although layoffs may not be the wisest or the best choice for either the workers or the State, a Governor has the constitutional authority to make such a choice:

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[1] *See e.g.*, *Smith v. Ark. State Highway Emps.*, 441 U.S. 463, 465-66 (1979) (public employees "are protected by the First Amendment from retaliation" for union membership, and government may not "take steps to prohibit or discourage union membership or association"); *Hanover Twp. Fed'n of Teachers v. Hanover Cmty. Sch. Corp.*, 457 F.2d 456, 460 (7th Cir. 1972) ("a discharge because of union membership [violates] the general constitutional right of free association"); *Am. Fed'n of State, Cnty., & Mun. Emps. v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969) (city could not fire employees because they joined a labor union as "[u]nion membership is protected by the right of association under the First and Fourteenth Amendments"); *Lontine v. VanCleave*, 483 F.2d 966, 967-68 (10th Cir. 1973) (public employee had "a First Amendment right to participate and retain membership in a union [and] could not be suspended or dismissed for the exercise of his constitutional rights").

> Plaintiffs acknowledge that defendants have the right to manage the size of the State's work force and may make decisions to lay off state employees based upon constitutionally-neutral determinations as to the work force needs and budgetary factors. In the face of economic necessity, defendants undeniably have the right to implement neutral layoffs of state employees – without regard to union membership or other protected classifications – in order to alleviate a financial crisis. (Appellants' Brief at 43).

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

> Plaintiffs concede that defendants have the right to manage the size of the State's work force, and may lay off employees based on constitutionally-neutral determinations of work force needs and budgetary constraints. (Op. at 8)

Indeed, during the recent budget crisis in 2011, layoff notices were issued in a manner consistent with the Second Circuit's decision. The notices were clearly constitutionally valid under the Second Circuit's holding because the layoff decisions were based on the need for savings and did not discriminate on the basis of union membership. Likewise, during the budget crisis in 1991, layoff notices were issued in a manner consistent with the Second Circuit's decision. And, of course, the plaintiff unions did not challenge the constitutionality of the layoffs in either 2011 or 1991.

As you know, the case was decided by the Second Circuit on the basis of a highly-particularized stipulation of facts entered into for tactical reasons by the prior Administration and prior counsel. The Second Circuit's decision in plaintiffs' favor was based on defendants' stipulation that this is not a case in which work force layoffs were ordered to obtain the budgetary savings that the rejected concessions would have achieved.

The agreed factual record specifically included the following stipulated facts:

1. There was no correlation between the amount of the concessions demanded by Rowland and any savings from the terminations. [A.194, ¶ 59].

2. The terminations were not based on any calculation of which and how many job reductions were necessary to achieve the budgetary savings sought by the concessions. [A.194, ¶ 58].

3. Many of the terminations had absolutely no effect on budgetary expenses. [A.195, ¶ 62]. For example, defendants terminated the employment of union employees whose positions were fully funded by private industry or the federal government. [A.195, ¶ 65]. Many of the layoffs cost the State money in advance payment of accrued vacation and sick pay. [A.195, ¶ 66]. Many of the ordered layoffs were not even scheduled to take effect during the applicable budget year. [A.195, ¶ 63].

The Second Circuit's decision in plaintiffs' favor was also based on defendants' stipulation that this is not a case in which work force layoffs were ordered based on an evaluation of the staffing needs of the State's work force or based on a general desire to reduce the cost of the work by reducing the size of the work force. Again, defendants stipulated to facts on this precise issue:

1. The layoffs were not based on any evaluations by OPM of the staffing needs of each agency for the performance of the agency's functions. [A.194, ¶ 57].

2. The decisions about which and how many union workers were to be terminated were not based upon any analysis of the staffing needs of the State's work force or savings that could be achieved through terminations of non-union employees. [A.193-94, ¶¶ 49, 57-58].

Consistent with these stipulated facts, defendants offered no evidence in the district court or in the Second Circuit to support a contention that the layoffs were ordered to achieve the savings sought in the contract concessions or that the layoffs were ordered as part of an overall plan to reduce the size (or cost) of the work force.

And, most important, defendants further stipulated that the layoff decisions in this case were based solely on defendants' view of how many layoffs would be necessary to pressure the unions to agree to demanded contract changes that defendants could not lawfully require:

1. The unions' collective bargaining agreements had all been approved by the Connecticut General Assembly and had the force of law. The unions had the statutory right under Connecticut law to decline to agree to the concessions sought by defendants. [A.192, ¶¶ 42-43.]

2. As of November 2002, the State's work force had approximately 50,000 employees – approximately 37,500 (75%) members of state unions, 12,500 (25%) non-unionized. Non-unionized employees hold management and non-management positions and, in some instances, hold the same non-management positions as unionized employees. [A.191, ¶ 40].

3. The layoffs were limited to unionized state employees, [A.193, ¶ 53], and were "based on [the Governor's] determination of what it would take to compel the unions to agree to the demanded concessions." [A.193-94, ¶¶ 48-49, 57-58; A.195. ¶ 67].

Plaintiffs are aware of no other instance in which a state official (in or out of Connecticut) has stipulated that layoffs were ordered without regard to the savings they would produce[2] and without regard to the staffing needs of a state's work force; were limited solely to unionized employees;[3] and were ordered solely to coerce modifications to the unions' legislatively-approved, binding agreements irrespective of whether or not the layoffs themselves produced any savings. It is difficult to believe that any other state official will ever enter into a similar set of stipulations or that the conduct stipulated to by defendants will ever occur again.

In sum, the fact scenario presented by this case has never occurred before, was based upon a highly unique (and unusual) set of stipulated facts, and is unlikely to occur again, thus further obviating the need for Supreme Court review. *See e.g.*, *Curry v. Baker*, 479 U.S. 1301, 1302 (1986) (Powell, J., denying application to stay mandate pending decision on *certiorari*, where case unlikely to recur and no conflict among the circuits made grant of *certiorari* unlikely).

All of this reasonably suggests that, from the State's standpoint, there is, at best, substantial uncertainty as to whether the Supreme Court will agree to review and reverse the Second Circuit's decision. And, it must be remembered that even if the Supreme Court were to reverse the Second Circuit, plaintiffs' undecided Fourteenth Amendment and Contract Clause claims, which the Second Circuit did not address because of its holding in plaintiffs' favor on their First Amendment claims, would still remain to be litigated and would provide plaintiffs with alternative possible grounds for relief.

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[2] As Governor Malloy's July 15, 2011 Balanced Budget Plan made clear, the potential savings resulting from his layoff decisions in 2011 were specifically designed to help balance the budget. (*See* www.ct.gov/opm/lib/opm/budget/2012_midterm/budget_balancing_plan_July_15). By contrast, defendants stipulated that Governor Rowland's December 6, 2002 Balanced Budget Plan did not include savings from any of the layoffs in the measures to balance the budget. [A196, ¶ 72].

[3] In 1991, Governor Weicker ordered and implemented layoffs of unionized and non-unionized employees before a concessions agreement with the unions was reached. In 2011, Governor Malloy issued layoff notices for union and non-union employees that were rescinded when a concessions agreement was reached.

At the same time, while plaintiffs are confident they will prevail, plaintiffs recognize that there is a possibility that *certiorari* will be granted, and there is a possibility, if *certiorari* is granted, that the decision of the Second Circuit may be reversed, with no guarantee that plaintiffs would prevail on any of their claims. And plaintiffs are also sensitive to the likely time needed to conclude the case through litigation, whether or not Supreme Court review occurs.

There is, thus, at this point in time, uncertainty of outcome for both sides. And both sides are facing potentially years more of litigation – in the United States Supreme Court and in the lower courts. During the years this case has been pending, there has never been a serious discussion between the parties of a possible resolution of their disputes. Plaintiffs believe that these circumstances – both sides facing uncertainty of outcome and the prospect of years more of litigation – give both sides an incentive to try to resolve this case at this time.

Based on all of the above, plaintiffs propose that the parties agree to undertake efforts to mediate this dispute, utilizing the assistance of an agreed Special Master, such as a retired state or federal court judge or a professional mediator (such as a JAMS mediator), and hold further proceedings in the case in abeyance pending the outcome of such efforts. To this end, plaintiffs propose that the State withdraw its pending petition for *certiorari* without prejudice to refiling if settlement talks are unsuccessful and that the parties refrain from going forward with proceedings in the district court pending the outcome of discussions.

The State will suffer no prejudice from this proposed course since, if the case does not settle, the State will, upon entry of a final judgment, be fully entitled to seek Supreme Court review of any issues decided in earlier appeals in the action. *See Major League Baseball Players Association v. Garvey*, 532 U.S. 504, 508 n. 1 (2001) ("we have authority to consider questions determined in earlier stages of the litigation where *certiorari* is sought from the most recent of the judgments of the Court of Appeals"); *accord Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J, respecting the denial of the petition for writ of *certiorari*).

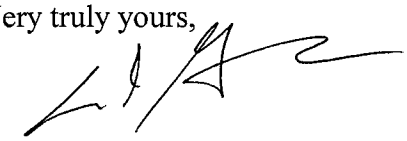
As Justice Scalia stated in *Virginia Military Institute*, in concurring in the denial of *certiorari* sought by the State of Virginia in a civil rights case where, as here, the court of appeals reversed a district court judgment for the State and remanded for entry of remedial orders:

> We generally await final judgment in the lower courts before exercising our certiorari jurisdiction. [citations omitted]. I think it prudent to take that course here. Our action does not, of course, preclude [the State of Virginia] from raising the same issues in a later petition, after final judgment has been rendered. [508 U.S. at 946].

Indeed, the Court subsequently granted *certiorari* after entry of final judgment in the *Virginia Military Institute* case. *United States v. Virginia*, 518 U.S. 515 (1986).

I would appreciate your contacting me to discuss the proposal set forth above after you have had an opportunity to review and consider this letter.

Very truly yours,



DAVID S. GOLUB

DSG/ds

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