No. 07-

IN THE
Supreme Court of the United States

AMIRI BARAKA,

Petitioner,

v.

JAMES E. MCGREEVEY, individually; JON CORZINE, in his official capacity as Governor of the State of New Jersey, *et al.,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are the former governor of New Jersey and former chairperson of the New Jersey State Council on the Arts entitled to absolute legislative immunity from suit in their individual capacities for orchestrating and directing the elimination of petitioner Amiri Baraka's position as Poet Laureate of New Jersey, and for their actions leading up to that elimination, in response to Baraka's public reading of a controversial poem written by him? Moreover, in determining whether state officials have engaged in legislative acts, must a court evaluate whether their acts are substantively, as well as formally, legislative, and if so, what test should be used to assess whether an act is substantively legislative?

2. Even assuming that the former governor and former agency chairperson are entitled to absolute legislative immunity from suit in their individual capacities, does that immunity block Baraka's claims seeking prospective injunctive relief against these executive officials and their successors in their official capacities? In other words, can a personal immunity, such as absolute legislative immunity, *ever* bar a claim for prospective injunctive relief against a state official in his or her official capacity?

PARTIES

Petitioner Amiri Baraka was the plaintiff in the district court proceedings and the appellant in the court of appeals proceedings.

The defendants in the district court were respondents James E. McGreevey, individually and in his then-official capacity as Governor of the State of New Jersey; the State of New Jersey; the New Jersey State Council on the Arts; Sharon Harrington, individually and in her then-official capacity as chairperson of the New Jersey State Council on the Arts; John Does 1-10, in their individual and official capacities; Mary Does 1-10, in their individual and official capacities; and unknown agencies and government entities 1-10. These same defendants were also appellees in the court of appeals proceedings, except that Richard J. Codey, in his official capacity as Acting Governor of the State of New Jersey, was substituted for former Governor James E. McGreevey, in his official capacity.

In this Court, pursuant to this Court's Rule 35.3, respondent Jon Corzine, the current Governor of New Jersey, in his official capacity, is substituted for respondent former acting Governor Richard J. Codey. Similarly, respondent Carol Ann Herbert, the current chair of the New Jersey State Council on the Arts, in her official capacity, is substituted for respondent former chair Sharon Harrington. Former Governor McGreevey and former chairperson Harrington, in their individual capacities, are also respondents in this Court, along with the other defendants/appellees from the proceedings below.

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INTRODUCTION

Petitioner Amiri Baraka respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. That court held, over a strenuous dissent, that former Governor James E. McGreevey and former chairperson of the New Jersey State Council on the Arts, Sharon Harrington, were entitled to absolute legislative immunity for directing and orchestrating an effort, culminating in legislation, to eliminate Amiri Baraka's position as Poet Laureate of New Jersey in retaliation for his public reading of the controversial poem he wrote regarding the attacks against the United States on September 11, 2001. As the dissenting judge recognized, the Third Circuit's decision extended legislative immunity far beyond the bounds set by this Court, effectively conferring absolute legislative immunity on any activity by executive officials with even a slight connection to the legislative process. Moreover, in expanding legislative immunity to actions by executive officials that are not "integral steps in the legislative process" and that target a particular individual for differential treatment, the Third Circuit's decision creates a conflict among the courts of appeals that should be resolved by this Court.

The court of appeals held not only that Governor McGreevey and Harrington were entitled to legislative immunity in their individual capacities, but also that legislative immunity barred Baraka's claims for reinstatement against them in their *official* capacities. In ruling that absolute legislative immunity can block an official-capacity suit for prospective injunctive relief, the Third Circuit deepened an already existing conflict in the circuits between the Eleventh Circuit, whose side the Third Circuit—and just last week, the Second Circuit—has joined, and several other Circuits, which have recognized, consistent with this Court's precedents, that personal immunities such as absolute legislative immunity do

not apply to actions for prospective injunctive or declaratory relief against state or local officials in their official capacities.

OPINIONS BELOW

The opinion of the court appeals, Pet. App. 1a-43a, is reported at 481 F.3d 187 (3d Cir. 2007). The district court's memorandum opinion, *id.* at 46a-58a, and accompanying order dismissing the case, *id.* at 59a, are not reported.

JURISDICTION

The court of appeals entered its judgment on March 21, 2007. Pet. App. 44a-45a. On May 30, 2007, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including July 19, 2007. *Id.* at 63a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth at Pet. App. 60a-62a.

STATEMENT OF THE CASE

A. The Facts

1. In 1999, the New Jersey legislature established the New Jersey William Carlos Williams Citation of Merit, to be presented to a distinguished poet from New Jersey, who would serve as the Poet Laureate of the State of New Jersey for a period of two years and receive an honorarium of $10,000. N.J. Stat. Ann. § 52:16A-26.9(1)(a), P.L. 1999, c. 228 (Pet. App. 60a-61a). Under the statute, the New Jersey Council for the Humanities, in consultation with the New Jersey State Council on the Arts ("Arts Council"), was required biennially to appoint an expert panel to select the poet to whom the governor would present the citation of merit and who would serve as poet laureate for a two-year term. § 52:16A-26.9(1)(b). The poet laureate was required to "engage in activities to promote and

encourage poetry within the State and . . . give no fewer than two public readings within the State each year while the poet holds the laureate designation." § 52:16A-26.9(1)(d).

2. In July 2002, New Jersey Governor James E. McGreevey presented the William Carlos Williams Citation of Merit to internationally renowned poet Amiri Baraka, who began serving his two-year term as Poet Laureate of the State of New Jersey. Second Amended Complaint (R. 3) ("2d Am. Cmplt.") ¶ 12.[1] On September 19, 2002, Baraka attended the 2002 Geraldine R. Dodge Poetry Festival in Stanhope, New Jersey, and read his poem, "Somebody Blew Up America," a poetic assessment of the September 11 attacks against the United States. *Id.* ¶ 14. The poem criticized America's policies and actions in society and international politics, expressing views that Baraka had stated before and after his appointment as poet laureate. *Id.* ¶ 26. The poem included the lines:

> Who knew the World Trade Center was gonna get bombed
> Who told 4000 Israeli workers at the Twin Towers
> To stay home that day
> Why did Sharon stay away?

Id. ¶ 14.[2]

Baraka's reading of the poem provoked an immediate outcry and was widely publicized in the press. Numerous organizations called on the State of New Jersey and respondent Governor McGreevey to "fire" or "remove" petitioner from his

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[1] These facts are drawn from the Second Amended Complaint, which the district court dismissed before discovery.

[2] The full text of the poem, dated October 2001, is in petitioner's Brief and Appendix Volume I in the court of appeals. It is also available at http://www.amiribaraka.com/blew.html.

position as poet laureate. *Id.* The governor was outraged at what he called the "anti-Semitic" tone of the poem and publicly demanded that Baraka resign as poet laureate. The governor's spokesperson stated: "The governor strictly criticizes any racist or anti-Semite behavior. The style of Baraka's recent verse implies that Israelis had known about the September 11 terrorism attacks." *Id.* ¶ 15. Baraka denied his poem was anti-Semitic, refused to resign, and declared his intention to complete his term as poet laureate. *Id.* ¶ 16.

In response to Baraka's refusal to resign, Governor McGreevey directed respondent Sharon Harrington, chairperson of the Arts Council, the agency with administrative responsibility for paying the honorarium to the poet laureate and coordinating his activities, *id.* ¶ 8, to withhold payment of Baraka's $10,000 honorarium. *Id.* ¶ 17. Lacking statutory authority to remove Baraka formally, Governor McGreevey, together with other defendants, commenced "a concerted campaign" to abolish Baraka's position as poet laureate altogether. *Id.* ¶ 18. Governor McGreevey, along with his agents and staff, "orchestrated and directed" this campaign. *Id.* ¶ 20. At "the urging, direction and request" of the governor and other defendants, the New Jersey legislature passed legislation in July 2003 abolishing Baraka's position as poet laureate, effective immediately, P.L. 2003, c. 123 (Pet. App. 62a), in retaliation for Baraka's reading of his poem. 2d Am. Cmplt. ¶ 19. Thereafter, Baraka was denied the opportunity to complete the second year of his term as poet laureate, along with his $10,000 honorarium. *Id.* ¶ 24.

3. Legislative events and statements accompanying the statute leave no doubt that its purpose was to remove Baraka specifically from the position of poet laureate. An array of bills and resolutions condemning Baraka and calling for his resignation or proposing to eliminate the poet laureate's honorarium, give the Governor authority to remove the current poet laureate, or abolish the poet laureate position altogether

were introduced in the New Jersey legislature as soon as October 2002.[3] Statements accompanying many of the bills made clear that their purpose was to renounce Baraka's views by removing him as poet laureate. For example, as introduced, the Senate bill that ultimately became law would have given the Governor the power to rescind the citation of merit and remove the poet laureate, including the then-serving poet laureate. *See* Senate Bill No. 21, as introduced on October 17, 2002. The Statement accompanying that bill explains in part:

> The bill provides that the poet laureate will be appointed by and serve at the pleasure of the Governor, ensuring the selection of a poet laureate who can serve this State in a civil and positive manner, and giving the Governor the ability to remove a poet laureate when that person acts inappropriately, for example by bringing shame upon the government and people of this State.
>
> The law creating the New Jersey William Carlos Williams Citation of Merit was enacted as a means to educate, ennoble, and enrich the society of this State.

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[3] *See, e.g.,* Assembly Resolution No. 192 (calling "for the resignation of New Jersey's poet laureate, Amiri Baraka") (introduced Oct. 10, 2002); Assembly Bill No. 2864 (proposing to eliminate the $10,000 honorarium, which act would "apply to the poet laureate holding the designation on the effective date of this act") (introduced Oct. 10, 2002); Senate Bill No. 1981 & Assembly Bill No. 2907 (proposing a procedure for removing a poet laureate "if the person is not fulfilling the duties of the position or for actions that are determined to negatively impact the dignity, integrity, and reputation of the position of poet laureate and serve to denigrate in any way the good name, status, and reputation of this State and its people") (both introduced Oct. 17, 2002); Assembly Bill No. 2859 (authorizing the Governor to remove the poet laureate) (introduced Oct. 10, 2002); Assembly Resolution No. 237 (denouncing the Newark school board "for appointing Amiri Baraka as poet laureate of the Newark school district") (introduced Feb. 3, 2003). The bills, resolutions, and committee statement cited herein are available at http://www.njleg.state.nj.us.

> The poet laureate should promote humaneness, compassion, and good will. The position has instead, despite these intentions, become a State-sanctioned and subsidized means to espouse some of the most hateful and bigoted sentiments ever uttered by a resident of this State.

Senate Bill No. 21 (2002); *accord* Assembly Bill No. 2857 (including same Statement) (introduced Oct. 10, 2002).

Ultimately, the legislature enacted a substitute for Senate Bill No. 21 reported out by the Senate State Government Committee. The substitute repealed the law creating the position of poet laureate and was accompanied by the Senate committee's statement that "[b]y repealing the statute, [the substitute] terminates the position of the current State poet laureate." Senate State Government Committee Statement to Senate Committee Substitute for Senate Bills Nos. 21 and 1981 (Dec. 12, 2002); *accord* Assembly Bill No. 3313, accompanying Statement (introduced Feb. 6, 2003).

Proponents of the bill stated during floor debates that the measure was not about "readjusting or restructuring a minor post" in New Jersey, but about whether Baraka's "views are going to be repudiated." Statement of Sen. Byron Baer (Jan. 23, 2003) [01:32:10 / 02:38:39].[4] The bill's primary Senate sponsor, as he moved for a vote, maintained that discussions were ongoing in an attempt to reach agreement on how best to convey the "sense of displeasure and lack of confidence in the legislature with regard to the current poet laureate." Statement of Sen. Peter Inverso (Jan. 23, 2003) [02:35:10 / 02:38:39].

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[4] Recordings of the legislative debates are available on the New Jersey Legislature's website. The Senate debates are at http://www.njleg.state.nj.us/media/archive_audio2.asp?KEY=S&SESSION=2002, and Assembly debates at http://www.njleg.state.nj.us/media/archive_audio2.asp?KEY=A&SESSION=2002. The times of the cited recordings are provided in brackets.

Similarly, in moving the bill for a vote in the Assembly, the principal Assembly sponsor rued that it was "unfortunate that Mr. Baraka did not heed calls . . . to step down, necessitating this particular legislation to eliminate the position." She urged her colleagues "to join [her] in standing up against anti-Semitism and the perpetuation of hurtful lies—and dangerous lies" by voting for the measure. Statement of Assemblywoman Linda Greenstein (June 30, 2003) [05:51:10 / 06:07:04].

B. Proceedings Below

1. On April 26, 2004, petitioner filed a complaint in the U.S. District Court for the District of New Jersey, naming as defendants Governor McGreevey in his individual and official capacities; Arts Council Chairperson Harrington, in her individual and official capacities; the State of New Jersey; the Arts Council; and individuals and agencies unknown to petitioner. The complaint sought relief pursuant to 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. § 2201 *et seq*. Jurisdiction was based on 28 U.S.C. § 1331. Petitioner alleged that the defendants' actions in abolishing his position as poet laureate on the basis of "Somebody Blew Up America" violated his right to free speech under the First Amendment and that the defendants' suspension of payment of the statutorily authorized honorarium without a prior hearing violated Baraka's Fourteenth Amendment right to due process. 2d Am. Cmplt. ¶¶ 28-44, 50. He also alleged supplemental state-law claims. *Id.* ¶¶ 45-48, 51-71. Baraka requested as relief, *inter alia,* payment of his $10,000 honorarium, immediate reinstatement to the position of poet laureate for his full two-year term, and attorneys' fees. *Id.* (prayer for relief).

2. The district court dismissed the complaint. The court held that Baraka's claims against the State of New Jersey and the Arts Council were barred by the Eleventh Amendment. Pet. App. 50a. It dismissed his claim against Governor McGreevey and Harrington challenging the elimination of his position as

poet laureate on the ground that they were entitled to absolute legislative immunity, *id.* at 50a-54a, and his claims relating to the withholding of his $10,000 honorarium because the legislature had not appropriated the funds for disbursement. *Id.* at 55a-57a. The court rejected Baraka's request for injunctive relief because it believed that "[i]n order to reinstate Plaintiff to the position of Poet Laureate, this Court must order the Legislature to rescind their votes repealing Section 52:16A-26.9 . . . *and* enact legislation recreating the position of Poet Laureate." *Id.* at 54a. The court declined to exercise supplemental jurisdiction over Baraka's state-law claims. *Id.* at 57a.

3.a. In a 2-1 decision, the court of appeals affirmed. The Third Circuit majority ruled that Governor McGreevey's and Harrington's actions were "legislative" and, therefore, that these officials were entitled to absolute legislative immunity. Pet. App. 7a. The court perceived the "gravamen" of Baraka's complaint to be that Governor McGreevey and Harrington "orchestrated and directed" the New Jersey legislature to abolish the position of Poet Laureate. These actions, the court stated, were "an integral part of the deliberative and communicative processes . . . by which the repealer was enacted" and fell "squarely 'within the sphere of legitimate, legislative activity.'" *Id.* at 9a (citations omitted). And although Baraka had specifically declined to base his claims on Governor McGreevey's action in signing the bill into law, the majority maintained that Baraka's cause of action "also necessarily encompasses the Governor's actions in signing the repealer into law." *Id.* at 10a. As for Harrington, the majority explained that "[a]s the Governor's appointee, Harrington's actions in advising and counseling Governor McGreevey and the Legislature are also legislative." *Id.*

The court rejected Baraka's contention that respondents' actions were administrative, not legislative. Under Third Circuit precedent, the court acknowledged, an activity must be

"both substantively and procedurally legislative in nature" to merit legislative immunity. *Id.* at 11a (citations omitted). The majority believed, however, that the respondent's actions in recommending and, in the Governor's case, signing, the repealer were similar to those of the defendants in *Bogan v. Scott-Harris,* 523 U.S. 44 (1998), and thus qualified as procedurally legislative. Pet. App. 9a-11a, 14a. The majority also reasoned that the officials' actions were substantively legislative because the law eliminated the position of poet laureate, which "constitutes the type of 'policy-making' that traditional legislation entails." *Id.* at 15a. The court ruled that *Bogan*'s rejection of inquiries into legislators' subjective motives foreclosed Baraka's argument that the actual purpose of the repealer was to remove him specifically as poet laureate. *Id.* at 15a-17a.

The Third Circuit held that legislative immunity barred not only Baraka's claims against Governor McGreevey and Harrington in their individual capacities, but also his claim for injunctive relief against them in their *official* capacities. *Id.* at 19a-21a. The court rejected Baraka's argument that legislative immunity is a personal immunity defense and relied on an earlier Third Circuit case that had interpreted *Supreme Court of Virginia v. Consumers Union of United States, Inc.,* 446 U.S. 719 (1980), to hold that in "appropriate cases," "legislative immunity can apply to claims for declaratory and injunctive relief against officials in their official capacities." *Id.* at 20a (citing *Larsen v. Senate of Commonwealth of Pa.,* 152 F.3d 240, 253 (3d Cir. 1998)). According to the court of appeals, the reinstatement remedy sought by Baraka "would infringe on the role of the New Jersey Legislature" by "seek[ing] to require New Jersey legislators to rescind their votes repealing the

statute and to enact legislation recreating the position." *Id.* at 21a.[5]

b. Judge Nygaard dissented. Pet. App. 36a-43a. In his view, "the majority holding expands the legislative immunity privilege to insulate almost every action taken by executive branch officials having some connection, however remote, with the passage of legislative acts, subsumes in part the qualified immunity doctrine, and effectively abolishes accepted causes of action against executive branch officials who meddle in the affairs of, or otherwise insinuate themselves into, the legislative process." *Id.* at 36a. Legislative immunity, the dissent contended, is limited to activities that constitute "integral steps in the legislative process," *id.* at 41a, and does not extend to "practices that merely *relate* to legislative activities." *Id.* at 40a-41a. "[A]ctivities such as 'orchestrat[ing] and direct[ing]' the New Jersey legislature into passing a personally targeted piece of legislation—be they undertaken by a governor or ordinary citizen—are activities which may be casually and incidentally related to legislative affairs, but are not part of the legislative process itself." *Id.* at 40a.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Decision Granting Respondents Absolute Legislative Immunity Is Contrary to this Court's Precedents and Creates a Conflict Among the Circuits on an Important Question of Federal Law.

In *Supreme Court of Virginia v. Consumers Union of United States, Inc.,* 446 U.S. 719, 731-34 (1980), and *Bogan v. Scott-Harris,* 523 U.S. 44, 55-56 (1998), this Court held that

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[5] The Third Circuit also affirmed the dismissal of Baraka's claim for the honorarium and his claim that the defendants denied him constitutionally protected property and liberty interests without due process and its refusal to exercise supplemental jurisdiction over his state-law claims. Pet. App. 21a-34a. These rulings are not at issue here.

officials outside the legislative branch may be entitled to legislative immunity, but only when they perform legislative functions. In *Consumers Union,* the Court held that the Virginia Supreme Court and its chief justice were absolutely immune from suit for issuing or failing to amend the Virginia State Bar Code because propounding the Code was an act of rulemaking. In *Bogan,* the Court held a mayor entitled to absolute legislative immunity for introducing a budget and signing into law an ordinance enacting it. Both cases involved challenges to actions that were formal steps in the legislative or rulemaking process.

The Third Circuit's decision that Governor McGreevey and Harrington were entitled to absolute legislative immunity because their acts, as alleged in the complaint, likewise were integral to the legislative process, is not only contrary to this Court's precedents, but creates a conflict among the circuits. Other courts of appeals, consistent with this Court's cases, have generally extended absolute legislative immunity to executive officials only when they have performed formally legislative functions, such as introducing budgets, signing bills into law, and vetoing bills—not for acts that are merely *related to* the legislative process. Moreover, other circuits have refused to find activities to be substantively legislative when, as here, they target a particular individual for differential treatment.

A. The Third Circuit's Decision is Contrary to this Court's Precedents on Legislative Immunity.

As Judge Nygaard emphasized in his dissenting opinion, the Speech and Debate Clause, which this Court has generally equated with the legislative immunity accorded state legislators under § 1983, *see Consumers Union,* 446 U.S. at 733, "was intended to preserve the independence and integrity of the Legislature *from* the Executive." Pet. App. 37a. And while "the courts have extended the privilege to matters beyond pure speech or debate in either House," they have done so "only

when necessary to prevent indirect impairment of such deliberations." *Id.* at 38a (quoting *Gravel v. United States,* 408 U.S. 606, 625 (1972)). This Court has found it neither "sound [n]or wise . . . to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process." *United States v. Brewster,* 408 U.S. 501, 516 (1972). Because "the shield does not extend beyond what is necessary to preserve the integrity of the legislative process," *id.* at 517; *accord Hutchinson v. Proxmire,* 443 U.S. 111, 127 (1979), legislative immunity "does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *Brewster,* 408 U.S. at 528.

Accordingly, this Court has extended legislative immunity to such formal acts as voting for a resolution, *Powell v. McCormack,* 395 U.S. 486, 504-06 (1969); issuing subpoenas for a committee hearing, *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 507 (1975), and *Dombrowski v. Eastland,* 387 U.S. 82, 84-85 (1967); preparing committee investigative reports, *Doe v. McMillan,* 412 U.S. 306, 312-13 (1973); addressing a legislative committee, *Gravel,* 408 U.S. at 616; engaging in rulemaking, *Consumers Union,* 446 U.S. at 731-34; and, of course, making a speech before the legislative body, *United States v. Johnson,* 383 U.S. 169, 184-85 (1966). Taking a "functional" approach to immunity questions, *Forrester v. White,* 484 U.S. 219, 224 (1988), the Court has recognized that executive officials also enjoy absolute legislative immunity for their legislative acts. Thus, the Court extended legislative immunity to Mayor Bogan for his formal legislative acts of introducing and signing legislation into law, 523 U.S. at 55, and has recognized that the President and state governors act legislatively when signing or vetoing bills. *See Edwards v. United States,* 286 U.S. 482, 490 (1932); *Smiley v. Holm,* 285 U.S. 355, 372-73 (1932).

The circuits have followed suit by conferring legislative immunity on executive officials who have undertaken similar formal legislative actions, such as introducing budgets, voting on bills (more typical at the local level), and signing and vetoing bills.[6] The Seventh Circuit, for example, has applied a highly formal analysis, extending legislative immunity to a government official only when he is "acting in his 'legislative capacity.'" *Hansen v. Bennett,* 948 F.2d 397, 401 (7th Cir. 1991) (citation omitted). In the Seventh Circuit's view, this Court "has construed the legislative capacity narrowly, holding that legislative immunity 'does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not *a part of the legislative process itself*.'" *Id.* at 402 (quoting *United States v. Brewster,* 408 U.S. 501, 528 (1972)). In denying the mayor legislative immunity in *Hansen*, the court emphasized that legislative immunity has been granted for such formal actions as voting on a resolution, speaking on legislation or in a legislative hearing, or subpoenaing records for use in a legislative hearing, *id.,* actions in which the mayor had not engaged. *Id.* at 402-03; *see also De la Biblia Abierta v. Banks,* 129 F.3d 899, 904 (7th Cir. 1997) (focusing on acts that are "elements of the core legislative

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[6] *See, e.g., Torres-Rivera v. Calderón-Serra,* 412 F.3d 205, 212-14 (1st Cir. 2005) (governor entitled to legislative immunity for signing legislation into law); *Nisenbaum v. Milwaukee County,* 333 F.3d 804, 808 (7th Cir. 2003) (county executive entitled to legislative immunity for transmitting budget to County Board); *Women's Emergency Network v. Bush,* 323 F.3d 937, 950 (11th Cir. 2003) (governor has legislative immunity for signing bill into law); *Figueroa-Serrano v. Ramos-Alverio,* 221 F.3d 1, 5 (1st Cir. 2000) (mayor entitled to absolute immunity for signing ordinance into law); *Bryan v. City of Madison,* 213 F.3d 267, 272, 274 (5th Cir. 2000) (mayor entitled to legislative immunity for vote with board of aldermen to rezone property); *Compton Police Officers Ass'n v. City of Compton,* 55 Fed. Appx. 482, 482 (9th Cir. 2003) (mayor entitled to legislative immunity for vote to disband police department); *Hernandez v. City of Lafayette,* 643 F.2d 1188, 1193-94 (5th Cir. Unit A May 1981) (mayor entitled to legislative immunity for veto of ordinance).

process"); *see also Kamplain v. Curry County Bd. of Comm'rs,* 159 F.3d 1248, 1251-52 (10th Cir. 1998) (citing the Seventh Circuit's narrow formal approach). Under this formal approach, McGreevey and Harrington would be denied legislative immunity.

Counsel for petitioner is unaware of any court of appeals decision (at least since *Scheuer v. Rhodes,* 416 U.S. 232 (1974) announced that executive officers are generally entitled to qualified, not absolute, immunity) that has done what the Third Circuit did here—grant a governor legislative immunity for an action other than signing or vetoing legislation. What the Court said in *Brewster* remains true today: "In every case thus far before this Court, [legislative immunity] has been limited to an act which was clearly a part of the legislative process," 408 U.S. at 515-16; *see also Gravel,* 408 U.S. at 626 ("part and parcel of the legislative process"), or, as the Court put it in *Bogan*, an act that constituted an "integral step[] in the legislative process." 523 U.S. at 55.

Where the Third Circuit has departed from this Court's cases and the approach of other circuits and where guidance from this Court is needed is on the question whether executive officers are entitled to absolute legislative immunity for actions that are related to the legislative process but are not formal, integral steps in that process. As the dissent below explained, the majority "ignore[d] the question of whether McGreevey's and Harrington's actions [were] 'integral steps in the legislative process,' focusing instead on whether their actions were undertaken within the 'sphere of legislative activity.'" Pet. App. 41a, n.21.

Here, the court of appeals majority transmuted Governor McGreevey's *political* action of instituting a concerted campaign to oust Baraka from his post into an integral step in the legislative process by pointing to the New Jersey Constitution, which gives the Governor authority to

"recommend such measures as he may deem desirable" to the legislature. *Id.* at 10a, 19a (citing N.J. Const. art. V, § 1). But the court of appeals overlooked that the New Jersey Constitution envisions a formal procedure by which the governor recommends measures to the legislature:

> The Governor shall communicate to the Legislature, by message at the opening of each regular session and at such other times as he may deem necessary, the condition of the State, *and shall in like manner* recommend such measures as he may deem desirable. He may convene the Legislature, or the Senate alone, whenever in his opinion the public interest shall require.

N.J. Const. art. V, § 1, ¶ 12 (emphasis added). The complaint does not allege that the governor carried out his campaign through such a formal message, and in fact, no such formal message from the Governor to the legislature was delivered.

Ultimately, the majority's view that respondents' alleged actions were procedurally legislative boils down to nothing more than the notion that they communicated their views to legislators, leading the dissenting judge to respond that he "would not take garden variety lobbying activity, even if undertaken by a state governor and his representative, and place such activity under the absolute protection of the privilege." Pet. App. 40a (Nygaard, J., dissenting). The Third Circuit majority did not even attempt to identify a formal legislative role for Harrington, but simply asserted that, as the governor's appointee, her actions "in advising and counseling Governor McGreevey and the Legislature are also legislative." *Id.* at 10a. Judge Nygaard was right to protest that "activities such as 'orchestrat[ing] and direct[ing]' the New Jersey legislature into passing a personally targeted piece of legislation . . . are activities which may be casually and incidentally related to

legislative affairs, but are not part of the legislative process itself." *Id.* at 40a.

By granting absolute immunity to every action undertaken within the "sphere of legitimate legislative activity," *id.* at 7a-8a, 9a, 13a & n.8, 18a; *see also id.* at 41a, n.21 (Nygaard, J., dissenting), the Third Circuit has run afoul of the care this Court has taken "not to extend the scope of the protection further than its purposes require." *Forrester,* 484 U.S. at 224. Qualified immunity, the norm for executive officials, *see Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982), is sufficient to protect McGreevey and Harrington, Pet. App. 43a (Nygaard, J., dissenting), if, after Baraka has been given the opportunity to engage in discovery, it turns out that their conduct merits it.

B. The Third Circuit's Decision Conflicts with Decisions of Other Circuits Regarding the Test That Governs Whether an Act Is Substantively Legislative for Legislative Immunity Purposes.

This case presents a related question: whether, in the wake of *Bogan*, which reserved judgment on the issue, 523 U.S. at 55, an activity, in addition to being formally, or procedurally, legislative, must be "substantively" legislative to cloak its participants with legislative immunity, and, if so, what test applies in evaluating whether an act bears "all the hallmarks of traditional legislation." *Id.*[7] If the New Jersey legislature's elimination of the poet laureate position was not a substantively legislative act, then it follows that respondents' actions directing and orchestrating that act likewise were not substantively legislative. The circuits disagree regarding the appropriate test.

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[7] Despite reserving judgment in *Bogan,* the Court has previously suggested that whether actions are legislative "depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" *See INS v. Chadha,* 462 U.S. 919, 952 (1983).

Several circuits, including the Third, impose some sort of requirement that an act be substantively, in addition to procedurally, legislative to qualify for absolute immunity, but the tests used by the circuits differ markedly and in a way that would have been dispositive here.

The Third Circuit maintained that McGreevey's and Harrington's actions leading up to the repeal of the statute were "substantively legislative." Pet. App. 15a. In the majority's view, "[e]liminating the position of poet laureate constitutes the type of 'policy-making' that traditional legislation entails." *Id.* The majority analyzed the issue only superficially. In deciding whether the repeal amounted to traditional legislation, the court of appeals looked only to the face of the statute without considering the act's purpose, its legislative history, legislative statements accompanying its passage, whether the statute reflected policy-making and line-drawing as opposed to an administrative action directed at an individual, or whether the statute singled out a particular individual for differential treatment. The Second Circuit's analysis is similar. *See State Employees Bargaining Agent Coalition v. Rowland,* --- F.3d ---, 2007 WL 1976148, at *13, *15 (2d Cir. July 10, 2007). The Tenth Circuit appears to agree with the Third Circuit that the number of persons affected should play no role in the analysis. *Kamplain,* 159 F.3d at 1251.[8]

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[8] In earlier cases, the Third Circuit considered important whether a decision affected a small number or a single individual, in which case it was administrative, *see, e.g., Ryan v. Burlington County,* 889 F.2d 1286, 1291 (3d Cir. 1989), but the court has since retreated from emphasizing this factor. *See Acierno v. Cloutier,* 40 F.3d 597, 610-13 (3d Cir. 1994). Although here the Third Circuit quoted language from its earlier decision in *Gallas v. Supreme Court of Pennsylvania,* 211 F.3d 760, 774 (3d Cir. 2000) (quoting *Ryan,* 889 F.2d at 1291), that "[w]here the decision affects a small number or a single individual, the legislative power is not implicated," Pet. App. 12a, the court ultimately gave that consideration no weight.

Other circuits employ a broader, more probing inquiry in assessing whether an act is substantively legislative. The First Circuit's two-part analysis, announced in *Cutting v. Muzzey,* 724 F.2d 259 (1st Cir. 1984), for determining whether an action is legislative or administrative represents one of the primary alternative approaches. "First, if the facts underlying the decision are 'generalizations concerning a policy or state of affairs,' the decision is legislative. If the decision stems from specific facts relating to particular individuals or situations, the act is administrative." *Acevedo-Garcia v. Vera-Monroig,* 204 F.3d 1, 9 (1st Cir. 2000) (quoting *Cutting,* 724 F.2d at 261). "Second, the court must consider the 'particularity of the impact of the state of action.' 'If the action involves establishment of a general policy, it is legislative; if it 'single[s] out specifiable individuals and affect[s] them differently from others,' it is administrative." *Id.*

Accordingly, in *Acevedo-Garcia,* the First Circuit held that a Puerto Rican mayor was not entitled to legislative immunity for implementing a layoff plan in a politically partisan manner even though the legislature subsequently ratified the mayor's actions. The First Circuit held that although legislation provided a framework for the decisions of the mayor, his acts of political discrimination were not "prospective"—that is, they did not "reach well beyond the particular occupant of the office"—but instead, targeted specific individuals affiliated with the party out of power. *Id.* at 8-9; *see also Haskell v. Washington Township,* 864 F.2d 1266, 1278 (6th Cir. 1988) (if "the action 'single[s] out specifiable individuals and affect[s] them differently from others,' it is administrative") (quoting *Cutting,* 724 F.2d at 261).

The Fifth Circuit also has applied the First Circuit's two-part test, holding that seemingly formal acts—the mayor's vetoes of zoning determinations—were not substantively legislative because the actions vetoed by the mayor did not involve a "determination of a policy" but were "based on

specific, particular facts" that affected plaintiff's development alone. *Bryan v. City of Madison,* 213 F.3d 267, 273 (5th Cir. 2000). Of various challenged actions, the Fifth Circuit found that only the mayor's vote to rezone the property—a decision that was general, prospective, and affected the entire community—deserved legislative immunity. *Id.* at 273-74; *see also Hughes v. Tarrant County,* 948 F.2d 918, 921 (5th Cir. 1991) (applying the First Circuit test).

The Fourth Circuit, too, has relied on the First Circuit analysis to hold that the elimination of the salary of the Clerk to the Board of Commissioners was administrative because the commissioners "were not engaged in the process of adopting prospective, legislative-type rules" and the underlying facts and impact were "specific, rather than general, in nature." *Alexander v. Holden,* 66 F.3d 62, 67 (4th Cir. 1995). Similarly, the Ninth Circuit has announced a test taking a hard look at the substance of activities before determining that they are legislative, considering four factors: (1) whether the act involves ad hoc decisionmaking or the formulation of policy; (2) whether the act applies to a few individuals or to the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears all the hallmarks of traditional legislation. *Kaahumanu v. County of Maui,* 315 F.3d 1215, 1220 (9th Cir. 2003); *see also Bechard v. Rappold,* 287 F.3d 827, 829 (9th Cir. 2002).

The Third Circuit's approach in determining whether the repeal of Baraka's position was a legislative or an administrative act differs from that of other circuits not only in its analysis of what constitutes "substantively" legislative action, but in its unwillingness to look beyond the text of the statute to determine the true "nature of the act." *Bogan,* 523 U.S. at 54. The court of appeals rejected Baraka's claim that the purpose of eliminating the position was to remove *him* specifically as poet laureate, Pet. App. 15a-17a, reasoning that *Bogan* prohibited reliance on defendants' "subjective intent in

resolving the logically prior question of whether their acts are legislative." *Id.* at 16a (quoting *Bogan,* 523 U.S. at 54). The court of appeals missed Baraka's point. Evaluating whether an enactment's *purpose* or *character* is legislative or administrative is not the same as inquiring into individual officials' subjective intent or motives. Petitioner submits that it was the latter, and not the former, that concerned this Court in *Bogan*. Suppose the statute contained a preamble stating: "Because the legislature of New Jersey has concluded that Amiri Baraka should no longer hold the position of poet laureate, we hereby abolish that position." Even though the action taken would still be the repeal of a position, it is difficult to envision a majority of circuits holding that such an act would be substantively legislative, rather than administrative action.

What actually occurred here is little different from the hypothetical, except that the legislative purpose was expressed in official statements accompanying the various bills proposed to remove Mr. Baraka from his position (including in the bill that became law) and during the legislative debates on the bill, as well as by the Governor. *See supra* pages 3-7. The Third Circuit, however, looked no further than the fact that the statute eliminated his position, ignoring the fact that the repealer, by taking effect during Baraka's tenure, singled him out for disciplinary action—as was the act's purpose. By contrast, in evaluating whether an act is legislative or administrative, other circuits, such as the Sixth and Ninth, look to legislative deliberations and history to aid in evaluating the nature or purpose of the challenged act. *See, e.g., Canary v. Osborn,* 211 F.3d 324, 330 (6th Cir. 2000) ("[T]he minutes indicate that the Board went into executive session for the specific purpose of 'discuss[ing] the employment of public employees.' Moreover, the circumstances of the one-hour executive session . . . suggest that the Board was making personalized assessments of individual employees, not engaging in an impersonal budgetary analysis of various positions."); *Bechard,* 287 F.3d at 828-32

(evaluating proceedings before county commissioners to determine that their termination of plaintiff and his position involved ad hoc decisionmaking initially affecting only plaintiff, rather than the formulation of policy).

Thus, under various approaches applied by the First, Fourth, Fifth, Sixth, and Ninth Circuits, Governor McGreevey and Harrington likely would have been denied legislative immunity on substantive (as well as procedural) grounds. Their actions and the statute passed by the New Jersey legislature would not qualify as substantively legislative under the tests discussed above because they represented an ad hoc decision, not the formulation of policy; applied not only prospectively to would-be poet laureates, but singled out *one* individual, the then-current poet laureate Amiri Baraka, to treat him differently from others by stripping him of his position and his honorarium in the middle of his term; and were based on specific facts relating to one individual and one particular situation. The choice of the proper test would have made all the difference in Baraka's case, and this Court should grant review to determine the appropriate analysis.

II. The Third Circuit's Decision That Legislative Immunity Bars Petitioner's Claim for Prospective Injunctive Relief Against Respondents in Their Official Capacities Deepens a Conflict in the Circuits and Is Contrary to this Court's Precedents.

The Third Circuit held that the doctrine of legislative immunity barred even Baraka's claim for prospective injunctive relief against Governor McGreevey and Harrington (or, now, against their successors) in their *official* capacities. Pet. App. 19a-21a. That ruling flies in the face of this Court's precedents and deepens an already existing conflict in the circuits, with the Third and Eleventh Circuits—and, as of last week, the Second Circuit—arrayed against several other circuits, regarding whether a personal immunity, such as absolute legislative

immunity, can *ever* bar a claim for prospective injunctive relief against state officials in their official capacities.

The Third Circuit held that in "appropriate cases," legislative immunity can apply to claims for declaratory and injunctive relief against officials in their official capacities. *Id.* at 20a; *accord Larsen v. Senate of Commonwealth of Pa.,* 152 F.3d 240, 252-54 (3d Cir. 1998). The Eleventh Circuit agrees. *See Scott v. Taylor,* 405 F.3d 1251, 1254-57 (11th Cir. 2005) (officials entitled to legislative immunity in their individual capacities also immune from suit seeking prospective injunctive relief against them in their official capacities). And last week, relying in part on the Third and Eleventh Circuits' decisions, the Second Circuit joined their side of the circuit split. *See Rowland,* 2007 WL 1976148, at *1, *6-*11 (claims for injunctive relief against state officials sued in their official capacities may be barred by legislative immunity).[9]

The Second, Third, and Eleventh Circuits' rulings that absolute legislative immunity *can* block an official-capacity suit for prospective injunctive relief have sweeping ramifications by potentially stripping individuals targeted by

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[9] In previous cases involving legislative immunity, the Second Circuit had held that "[i]mmunity, either absolute or qualified, is a *personal* defense that is available only when officials are sued in their individual capacities." *Almonte v. City of Long Beach,* 478 F.3d 100, 106 (2d Cir. 2007); *accord Morris v. Lindau,* 196 F.3d 102, 111 (2d Cir. 1999); *Goldberg v. Town of Rocky Hill,* 973 F.2d 70, 73 (2d Cir. 1992). In *Rowland,* the Second Circuit attempted to reconcile these cases with its new holding that legislative immunity can bar a suit seeking injunctive relief from an official in his official capacity by distinguishing the earlier cases as involving official-capacity claims against local-level officials rather than state officials. The Second Circuit maintained that this Court has never held that personal immunities from suit are unavailable to *state* officials sued in their official capacities. *Rowland,* 2007 WL 1976148, at *9. The Eleventh Circuit likewise distinguished between official-capacity claims against local officials and official-capacity claims against state officials. *Scott,* 405 F.3d at 1254-57 & n.6.

"legislative" actions of the right to secure any judicial remedy against the enforcement of an unconstitutional action or statute. The Court's landmark decision in *Ex parte Young,* 209 U.S. 123 (1908), and its progeny were designed to avoid just such a result. *See, e.g., Sterling v. Constantin,* 287 U.S. 378, 393 (1932) (holding that a governor "is in no different position from that of other state officials" in that, under *Ex parte Young,* "where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief"); *see also Kilbourn v. Thompson,* 103 U.S. 168 (1881) (Kilbourn entitled to bring false imprisonment claim against the House Sergeant at Arms who executed the warrant the House voted on to authorize his arrest); *accord Powell,* 395 U.S. at 503-05; *cf. Franklin v. Massachusetts,* 505 U.S. 788, 828 (1992) (Scalia, J., concurring) (Presidential immunity does not "in any way suggest[] that Presidential action is *unreviewable*. . . . Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.").

In contrast to the Second, Third, and Eleventh Circuits, the Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have held that personal immunities (such as legislative immunity) are available *only* to officials sued in their individual, not their official, capacities. *See, e.g., Turner v. Houma Mun. Fire & Police Civil Serv. Bd.,* 229 F.3d 478, 483 (5th Cir. 2000) ("[A] § 1983 suit naming defendants only in their 'official capacity' does not involve personal liability to the individual defendant[; thus,] defenses such as absolute quasi-judicial immunity . . . are unavailable in official-capacity suits.");[10] *Denton v.*

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[10] *See also Burge v. Parish of St. Tammany,* 187 F.3d 452, 466-68 (5th Cir. 1999) (official-capacity suit against District Attorney not barred by prosecutorial immunity); *Minton v. St. Bernard Parish Sch. Bd.,* 803 F.2d

Bedinghaus, 40 Fed. Appx. 974, 979 (6th Cir. 2002) (defendants sued in their official capacities not shielded by immunity defenses applicable to individual capacity suits); *Redwood Village Partnership v. Graham,* 26 F.3d 839, 842 (8th Cir. 1994) (state officials' absolute immunity for rulemaking did not bar declaratory and injunctive relief to challenge the regulations); *Hogan v. Von Raab,* 959 F.2d 240, 1992 WL 61893, at *2 n.2 (9th Cir. Mar. 31, 1992) (Table) (qualified immunity does not apply to official-capacity suits seeking declaratory and injunctive relief); *Akins v. Board of Governors,* 840 F.2d 1371, 1377-78 (7th Cir.) (an action for prospective injunctive relief against a state official is brought properly in his official capacity; qualified immunity applies only to suits for damages), *vacated and remanded on other grounds,* 488 U.S. 920 (1988); *see also Supreme Video, Inc. v. Schauz,* 15 F.3d 1435, 1442-43 (7th Cir. 1994) (qualified immunity not a defense in official-capacity suits seeking declaratory relief).

The decisions of the Second, Third, and Eleventh Circuits have left this area of the law in a profound state of uncertainty. As one district court observed, even before the Second and Third Circuit rulings added to the confusion: Although "[t]here has been a strong indication" that in § 1983 actions, "legislative immunity is not applicable to official capacity claims," "the current state of the law on legislative immunity" still leaves unanswered whether "if an action is a legislative activity," legislative immunity is "available to protect the defendant in only their official capacity or in only their individual capacity or in both capacities or in neither capacity." *Parker v. Laurel County Detention Ctr.,* No. Civ.A. 605-113-DCR, 2005 WL 1917149, at *3 (E.D. Ky. Aug. 9, 2005) (citing *Scott v. Taylor,*

129, 134 (5th Cir. 1986) (official immunity doctrines do not "bar injunctive relief or suits in which officials are sued only in their official capacities and, therefore, cannot be held personally liable") (footnotes omitted).

405 F.3d 1251, 1256 (11th Cir. 2005)). The Second Circuit forthrightly recognized that "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." *Rowland,* 2007 WL 1976148, at *6.

The circuits that have rejected personal immunity defenses to official capacity suits for injunctive relief against the implementation of unlawful legislative actions have, unlike the Second, Third, and Eleventh Circuits, been faithful to this Court's precedents. In *Supreme Court of Virginia v. Consumers Union of the United States, Inc.,* 446 U.S. 719 (1980), this Court held that the Virginia Supreme Court and its chief justice enjoyed absolute legislative immunity from damages, declaratory, and injunctive relief for either issuing or refusing to amend the Bar Code to eliminate its unconstitutional provisions. *Id.* at 731-34. At the same time, however, the Court recognized that the Virginia court and its chief justice were not immune from a suit to enjoin them from *enforcing* the rules, but were "proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were." *Id.* at 736. The Court specifically noted that "prospective relief was properly awarded against the chief justice in his official capacity." *Id.* at 737 n.16.

In *Kentucky v. Graham,* 473 U.S. 159 (1985), the Court elaborated on the distinction between personal- and official-capacity suits and the defenses available in each. The Court explained: "Personal-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.'" *Id.* at 165 (citing *Monell v. Dep't of Social Servs. of New York,* 436 U.S. 658, 690, n.55 (1978)). "[A]n official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses . . . ." *Id.* at 166-67. "*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 167 (emphasis added; citations omitted)[11]; *accord Hafer v. Melo,* 502 U.S. 21, 25 (1991); *see also Board of County Comm'rs v. Umbehr,* 518 U.S. 668, 677 n.* (1996) ("Because only claims against the Board members in their *official* capacities are before us, and because immunity from suit under § 1983 extends to public servants only in their *individual* capacities," "the legislative immunity claim is moot"). The Second Circuit acknowledged that its ruling was in tension with "arguably contradictory *dicta* in *Graham* and *Umbehr*." *Rowland,* 2007 WL 1976148, at *11; *see also id.* at 8.

In ruling that Baraka's claim for injunctive relief against respondents in their official capacities was barred by legislative immunity, the Third Circuit relied heavily on its earlier ruling in *Larsen*, 152 F.3d at 253, which had held that the legislative immunity enjoyed by state legislators for impeaching and removing from office a Pennsylvania Supreme Court Justice also barred a claim for prospective injunctive relief against the legislators in their official capacities. Pet. App. 20a-21a. In *Larsen,* the court sought to reconcile its holding with this Court's precedents by pointing to the Court's ruling in

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[11] The Court in *Graham* also reaffirmed that, under the *Ex parte Young* doctrine, a governmental entity's Eleventh Amendment immunity does not bar an official-capacity action for injunctive relief against a state officer. *Id.* at 167 n.14; *see also Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71 & n.10 (1989). As the Second Circuit recognized, every circuit to have considered the issue has held that claims for reinstatement are appropriate subjects for *Ex parte Young* actions. *Rowland,* 2007 WL 1976148, at *19; *see, e.g., Meiners v. University of Kansas,* 359 F.3d 1222, 1232-33 (10th Cir. 2004); *Carten v. Kent State Univ.,* 282 F.3d 391, 396 (6th Cir. 2002); *Doe v. Lawrence Livermore Nat'l Lab.,* 131 F.3d 836, 939-42 (9th Cir. 1997); *Coakley v. Welch,* 877 F.2d 304, 306-07 (4th Cir. 1989); *Elliott v. Hinds,* 786 F.2d 298, 301-02 (7th Cir. 1986).

Consumers Union that legislative immunity barred prospective injunctive relief against the Virginia court and its chief justice for actions taken in their legislative capacity, *see* 152 F.3d at 252-53—such as an order compelling them to amend the Bar Code. *See Consumers Union,* 446 U.S. at 731-34. Even assuming that efforts to compel legislators to enact particular legislation may fall within an exception to the general rule that legislative immunity does not bar prospective injunctive relief in an official-capacity action, the Third Circuit badly erred in failing to appreciate the difference between a lawsuit seeking to compel a legislator to cast or rescind a vote and an action against an appropriate official seeking injunctive or declaratory relief to prevent the *enforcement* of (or to redress the consequences of) an unconstitutional action, statute, or regulation. *See Graham,* 473 U.S. at 164 n.8 (reaffirming *Consumers Union*'s holding that the Virginia chief justice in his official capacity could be enjoined from enforcing the Bar Code); *Consumers Union,* 446 U.S. at 736-37 & n.16. Here, analogizing to its ruling in *Larsen*, the Third Circuit asserted that the relief sought by Baraka would "require New Jersey legislators to rescind their votes repealing the statute and to enact legislation recreating the position." Pet. App. 21a.[12]

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[12] The possibility that *Consumers Union* supports an exception to the general rule that legislative immunity does not bar prospective injunctive relief in an official-capacity action is undermined by the Court's flat statements in later cases, including *Graham*, *Hafer*, and *Umbehr*, that personal immunities do not apply in official-capacity suits. Limitations on a federal court's power to compel legislators to cast particular votes more likely stem from general separation-of-powers principles and appropriate limits on injunctive relief, as well as from the fact that, in most cases, legislators are not proper defendants in an *Ex parte Young* action because they play no role in enforcing the legislation they enact. *See Ex parte Young,* 209 U.S. at 157; *see, e.g., Scott,* 405 F.3d at 1254 n.3, 1256 n.8 (noting that legislator defendants had no role in implementing the challenged redistricting). If no state official with the appropriate enforcement authority is named in a lawsuit, the action is barred *not* by a personal immunity, but instead by Eleventh Amendment immunity because it is effectively an action

By that strange logic, many lawsuits seeking prospective injunctive relief from state officials under *Ex parte Young* to enjoin the enforcement of unconstitutional legislative actions would fail on legislative immunity grounds on the theory that legislators would have to rescind their votes or cast new ones. But effective relief against an executive officer to redress a constitutional violation can be devised without enjoining legislators to recast their votes, and Baraka never sought an injunction ordering New Jersey legislators to re-vote. The court's assumption that the only way to afford Baraka relief would be to order the legislature to vote again, instead of simply ordering McGreevey and Harrington, state officials with enforcement authority over the poet laureate position, to reinstate him to his position as poet laureate, is refuted by *Spallone v. United States,* 493 U.S. 265 (1990). There, this Court held that there was no need for a district court to impose contempt sanctions against individual city council members for failing to adopt an ordinance as required by a consent decree when it had the power to impose contempt sanctions against the city itself. *Id.* at 278-80. Similarly, here, Baraka neither needed nor sought relief against individual legislators to redress his injuries.

In light of the deep circuit split regarding whether prospective injunctive relief against a state official sued in his official capacity may be barred by the official's legislative immunity and the inconsistency of the Third Circuit's ruling on that issue with this Court's precedents, the Court should grant certiorari to address the second question presented.

CONCLUSION

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

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against the state to which the *Ex parte Young* doctrine is inapplicable.

Respectfully submitted,

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