No. 09-1476

In the Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, ET AL., PETITIONERS

v.

CHARLES J. GUARNIERI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the First Amendment protects a public employee from disciplinary action by his employer for petitioning the government on matters of purely private concern.

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INTEREST OF THE UNITED STATES

This case presents the question whether the First Amendment protects a public employee from disciplinary action by his employer for petitioning the government on matters of purely private concern. Because it is the nation's largest public employer, the United States has a substantial interest in the proper resolution of that question.

STATEMENT

1. In February 2003, the Duryea Borough Council, a local government entity in Pennsylvania, dismissed respondent from his position as chief of police. Pet. App. 4a, 57a. Respondent subsequently filed a union griev-

ance that challenged his termination. *Ibid.* Two years later, after an arbitration, respondent was reinstated as police chief. *Ibid.* Upon his return, the Council issued 11 directives to respondent, which provided instructions for carrying out his duties as police chief. *Id.* at 4a, 57a-59a.[1] In response, respondent filed a second union grievance, which led to another arbitration. *Id.* at 4a, 59a. The arbitrator ultimately directed the Council to modify or abandon some of the directives. *Ibid.*

Respondent also sued petitioners under 42 U.S.C. 1983, alleging, among other things, that petitioners had retaliated against him for having filed the initial grievance challenging his dismissal, thereby infringing his First Amendment right to petition the government. Pet. App. 4a-5a. Respondent's First Amendment retaliation claim rested largely on the issuance of the directives, but he later amended his complaint to include a subsequent denial of $338 in overtime pay as another retaliatory act. *Id.* at 5a.[2]

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[1] The directives provided that respondent: (1) should work no more than eight hours per day; (2) could attend Borough Council meetings as a private citizen, but would not be paid for attending the meetings as police chief; (3) should follow the purchase order system; (4) should ensure that the day shift officer observes arrival and dismissal of students at the Holy Rosary School; (5) should patrol for four to five hours of his shift; (6) should follow instructions relayed to him by the Borough solicitor; (7) should provide a weekly report of his activities to the Borough secretary; (8) should provide the Borough secretary with a monthly police department schedule; (9) could use the police car only for official business; (10) should enforce a municipal no-smoking rule within the police department; and (11) would work the 7 a.m. to 3 p.m. day shift. Pet. App. 57a-59a.

[2] Although the court of appeals stated that the amount at issue was $338, petitioners note that the actual amount in dispute was only $284,

2. a. Petitioners moved for summary judgment. The district court granted the motion in part, but denied summary judgment on respondent's Petition Clause retaliation claim. Pet. App. 55a-93a. The district court acknowledged that under this Court's precedent, when a public employee exercises his right to free speech, the First Amendment does not protect him from disciplinary action by his employer unless the speech addressed a matter of public concern. *Id.* at 76a (citing *Connick* v. *Myers*, 461 U.S. 138, 147 (1983)). Relying on the Third Circuit's decision in *San Filippo* v. *Bongiovanni*, 30 F.3d 424 (1994), cert. denied, 513 U.S. 1082 (1995), however, the district court held that when a public employee files a formal grievance pursuant to the Petition Clause, that action "is protected [by the First Amendment] without regard to whether the petition addresses a matter of public concern." Pet. App. 79a.

b. In *San Filippo*, a university professor filed a suit under 42 U.S.C. 1983 in which he alleged that he had been dismissed in retaliation for, among other things, having filed various grievances and lawsuits. A divided court of appeals held that, inasmuch as the plaintiff's "expressive conduct" included "activities that implicate the petition clause, rather than the free speech clause, of the first amendment," those activities were protected regardless of whether they addressed a matter of public concern. 30 F.3d at 434-435; see *id.* at 434-443; cf. *Connick*, 461 U.S. at 147. Although the court acknowledged that every other court of appeals to consider the issue had reached a contrary conclusion, it concluded that a public employee's lawsuit or grievance "of the sort that

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because $54 of the claim was for overtime requested by another employee. See Pet. Br. 8 n.4 (citing C.A. App. A00673, A00821).

constitutes a 'petition' within the meaning of the first amendment" enjoys categorical constitutional protection. *San Filippo*, 30 F.3d at 441-442. The court reasoned that "[i]f government could, *qua* employer, freely discharge an employee for the reason that the employee, in order to present a non-sham claim against the government-employer, invoked * * * a mechanism [that the government created], the petition clause of the first amendment would, for public employees seeking to vindicate their employee interests, be a trap for the unwary—and a dead letter." *Id.* at 442. The court further reasoned that "the right to petition has a pedigree independent of—and substantially more ancient—than the freedoms of speech and press," and that "[t]here is no persuasive reason for the right of petition to mean less today than it was intended to mean in England three centuries ago." *Id.* at 443.

Judge Becker dissented. In his view, the court of appeals' logic "pale[d] by comparison with the reasoning of the other circuits and with the inexorable logic of *McDonald* v. *Smith*, 472 U.S. 479 (1985)," which held that "there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *San Filippo*, 30 F.3d at 449 (Becker, J., dissenting). He further opined that the decision was "an invitation to the wary to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined." *Ibid.*

c. After a trial, the jury found that issuance of the employment directives and withholding of $338 in overtime pay constituted retaliation for protected First Amendment activity and awarded compensatory and punitive damages. Pet. App. 5a, 17a-18a. The district

court denied petitioners' motion for judgment as a matter of law and for a new trial. *Id.* at 16a-54a. Again relying on *San Filippo*, the court rejected petitioners' argument that they were entitled to judgment as a matter of law because respondent's petition did not address a matter of public concern. *Id.* at 27a.

3. The court of appeals affirmed. Pet. App. 1a-15a. Like the district court, the court of appeals held that petitioners' argument that "the First Amendment does not protect government employees from retaliation for the filing of petitions unless they address matters of public concern," *id.* at 7a, was foreclosed by the court of appeals' prior holding in *San Filippo, id.* at 8a-9a.

SUMMARY OF ARGUMENT

When the government acts as employer, its interests in regulating speech are far different than when it regulates the speech of the general public. It is well settled that the government does not violate the First Amendment by disciplining a public employee based on speech that does not involve a matter of public concern to the community. There is no basis for a different result in cases where a public employee petitions the government about a purely private matter.

A. Public employees do not relinquish all First Amendment rights when they accept employment with the government. Nevertheless, this Court has long recognized that when a public employee's expressive conduct does not implicate the basic concerns of the First Amendment, the employee's claimed right of expression must give way to the government's interests in efficient provision of public services. In the First Amendment context, the Court has identified as the "basic concern" of the First Amendment the assurance of an "unfettered

interchange of ideas for the bringing about of political and social change desired by the people." *Connick* v. *Myers*, 461 U.S. 138, 144-145 (1983). When a public employee's expression does not involve a matter of public concern, the employee is not protected from disciplinary action by the First Amendment.

This rule reflects this Court's recognition that the claimed constitutional rights of public employees must be considered in light of the government's interest in carrying out its function as a public employer. The government has a strong interest in promoting the efficiency of the public services that it performs through its employees. Private employment grievances brought by public employees do not implicate the basic concerns of the First Amendment, and the employee's interests therefore must give way to the government's need to efficiently perform its duties. Allowing First Amendment claims based on private employee grievances like those at issue here would constitutionalize the grievance process for public employees and make the federal courts arbiters of government employment disputes, a result this Court has refused to tolerate.

B. The court of appeals' extension of First Amendment protection to private grievances filed by public employees is not justified by any difference between the Speech Clause and the Petition Clause. To the contrary, this Court has held that "First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985). There is no reason for analyzing union grievances, arbitrations, or lawsuits differently.

The court of appeals' concern that refusing to afford First Amendment protection to public employee petitions would undermine the historical importance of the Petition Clause ignores this Court's careful preservation of the core rights of public employees as citizens in its public employment cases. Moreover, the court's concern that denying First Amendment protection to public employees for their invocation of formal remedial mechanisms would undermine the effectiveness of those mechanisms overlooks the alternative avenues under federal and state law for protecting workers' access to available remedies.

The court of appeals' decision is also unjustified by any difference in the balance of interests when public employee speech takes the form of a petition. In fact, expression through a petition may be more disruptive to the government's operations than expression through informal speech, because the government must expend time and resources responding to First Amendment-based grievances. Extending First Amendment protection to everyday employment grievances brought by public employees would also expand the constitutional rights of government workers far beyond those rights enjoyed by employees in the private sector, and it would create an anomalous distinction between employees who, perhaps fortuitously, express their private concerns in the form of a grievance and those who voice their concerns through other means.

ARGUMENT

THE PETITION CLAUSE OF THE FIRST AMENDMENT DOES NOT SHIELD PUBLIC EMPLOYEES FROM DISCIPLINARY ACTION WHEN THEY PETITION THE GOVERNMENT ON MATTERS NOT OF PUBLIC CONCERN

It is well established that "the government as employer * * * has far broader powers than does the government as sovereign." *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Waters* v. *Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)). In the context of freedom of speech, this Court has long recognized that the government's interests as an employer in regulating the expression of ideas by its employees "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968). The Court has accordingly made clear that, although the First Amendment protects "the rights of public employees to participate in public affairs," it does not prohibit the government from disciplining its employees based on their expression of views on purely private matters. *Connick* v. *Myers*, 461 U.S. 138, 144-147 (1983). With respect to the public employment context, therefore, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials * * * enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146.

Contrary to the holdings of every other court of appeals to have considered the issue,[3] the court of appeals

[3] See *Tang* v. *Department of Elderly Affairs*, 163 F.3d 7, 12 (1st Cir. 1998); *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1058-

in this case held that when a public employee's expression implicates another right guaranteed by the First Amendment—namely, the right to petition the government for the redress of grievances—the First Amendment shields the employee from disciplinary action regardless of whether the employee's petition relates to a matter of public concern. That holding is wrong. A public employee is entitled to no greater First Amendment protection when he files a petition for the redress of grievances than he possesses when he engages in other forms of First Amendment expression. The Petition Clause, like the Speech Clause, protects a public employee from disciplinary action imposed by his employer only if he petitions the government about a matter of public concern.

A. The First Amendment Does Not Protect Public Employees From Disciplinary Action Based On Speech About Matters Of Purely Private Interest

The First Amendment protects public employees from disciplinary action based on their speech only when that speech involves a matter of public concern. That

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1059 (2d Cir.), cert. denied, 510 U.S. 865 (1993); *Andrew* v. *Clark*, 561 F.3d 261, 269 (4th Cir. 2009); *Rathjen* v. *Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989); *Jenkins* v. *Rock Hill Local Sch. Dist.*, 513 F.3d 580, 587 (6th Cir.), cert. denied, 553 U.S. 1033 (2008); *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1262 (7th Cir. 1988); *Gunter* v. *Morrison*, 497 F.3d 868, 872 (8th Cir. 2007); *Rendish* v. *City of Tacoma*, 123 F.3d 1216, 1220-1221 (9th Cir. 1997), cert. denied, 524 U.S. 952 (1998); *Martin* v. *City of Del City*, 179 F.3d 882, 887-889 (10th Cir. 1999); *D'Angelo* v. *School Bd.*, 497 F.3d 1203, 1211 (11th Cir. 2007); see also *Pratt* v. *Ottum*, 761 A.2d 313, 321 (Me. 2000); *Harris* v. *Mississippi Valley State Univ.*, 873 So. 2d 970, 984 (Miss. 2004); *McDowell* v. *Napolitano*, 895 P.2d 218, 225-226 (N.M. 1995); *Smith* v. *Bates Technical Coll.*, 991 P.2d 1135, 1145-1147 (Wash. 2000).

rule preserves the core purpose of the First Amendment, and protects the interest of the government in efficiently running its offices and agencies.

1. This Court has consistently recognized that "there is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist*, 553 U.S. at 598 (quoting *Cafeteria & Rest. Workers, Local 473* v. *McElroy*, 367 U.S. 886, 896 (1961)) (brackets in original). In the context of public employment in particular, this Court has made clear that "'constitutional review of government employment decisions must rest on different principles than review of . . . restraints imposed by the government as sovereign.'" *Id.* at 599 (citation omitted).

2. As interpreted for most of the nation's history, the First Amendment placed no limitation on a public employer's ability to make personnel decisions on the basis of an employee's expression. The First Amendment was thought to apply when the government acted as sovereign with respect to citizens, but not when it acted as employer with respect to employees. "The classic formulation of this position was that of Justice Holmes, who, when sitting on the Supreme Judicial Court of Massachusetts, observed: '[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *Connick*, 461 U.S. at 143-144 (quoting *McAuliffe* v. *Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892))(brackets in original); see *id.* at 144 (citing decisions from first half of twentieth century).

The Court modified its view, however, in "a series of cases arising from the widespread efforts in the 1950's

and early 1960's to require public employees, particularly teachers, to swear oaths of loyalty to the State and reveal the groups with which they associated." *Connick*, 461 U.S. at 144; see *ibid*. (citing cases). In those cases, the Court invalidated statutes and actions that conditioned public employment on general oaths of loyalty and the disclosure of private associations, thereby "suppress[ing] the right of public employees to participate in public affairs." *Id*. at 144-145. Those decisions reflected the Court's understanding that the First Amendment accords special protection against "threats to the right of citizens to participate in political affairs." *Id.* at 145; see *ibid.* ("[T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.") (citation omitted).

The Court's decision in *Pickering*, *supra*, "followed from this understanding of the First Amendment." *Connick*, 461 U.S. at 145. The plaintiff in *Pickering* was a public-school teacher who was fired for writing a letter to a newspaper that criticized the way the school board had attempted to raise revenue. In upholding the teacher's First Amendment claim, this Court said that, insofar as the lower court had concluded that public-school teachers "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools," the decision rested on a premise that has been rejected by the Court. *Pickering*, 391 U.S. at 568. At the same time, the Court recognized that "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regula-

tion of the speech of the citizenry in general." *Ibid.* To resolve a First Amendment claim in a case of this type, the Court said, it is thus necessary to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern" and "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.*

Fifteen years after *Pickering*, in *Connick*, this Court "return[ed] to th[e] problem" of striking a balance between the interests of a public employee and those of a public employer. 461 U.S. at 140. In rejecting the First Amendment claim in *Connick*, the Court explained that "[t]he repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental." *Id.* at 143. That language, the Court said, "reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Ibid.* Thus, when a public employee is not speaking "as a citizen upon matters of public concern," his First Amendment claim should be rejected without any balancing of the interests of the employee and the employer. *Id.* at 147. This Court's responsibility, *Connick* makes clear, is merely to "ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Ibid.*

The plaintiff in *Connick* was an assistant district attorney who was told she would be transferred and then circulated a questionnaire soliciting the views of her colleagues on office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. She was fired as a result.

The Court held that, with one exception,[4] the questions in the questionnaire were "mere extensions" of the plaintiff's "dispute over her transfer," and thus did not "fall under the rubric of matters of 'public concern.'" 461 U.S. at 148. Because the questions did not address a matter of public concern, the Court found it "unnecessary * * * to scrutinize the reasons for [the plaintiff's] discharge." *Id.* at 146.

3. The rule articulated in *Connick* reflects this Court's recognition that public employees' assertion of First Amendment rights must be considered in light of "the realities of the employment context." *Engquist*, 553 U.S. at 600. As this Court explained in *Connick*:

> [T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

461 U.S. at 151 (quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)); see also *Garcetti* v. *Ceballos*, 547 U.S. 410, 418 (2006) ("Government

[4] The one question that did touch on a matter of public concern, in the Court's view, was whether assistant district attorneys ever felt pressured to work in political campaigns. The Court thus went on to balance the employee's interest in commenting on that matter against her employer's interest in workplace efficiency. Striking the balance in favor of the employer, the Court deferred to the district attorney's judgment that the questionnaire was "an act of insubordination which interfered with working relationships." *Connick*, 461 U.S. at 151.

employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services.").

The *Connick* rule strikes an appropriate balance between those practical realities and the rights of public employees by asking "whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer." *Engquist*, 553 U.S. at 600. In the context of the First Amendment rights of expression, whose basic concern is to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Connick*, 461 U.S. 144-145, an employee's asserted First Amendment right must "give way" to the government's interest as an employer unless the right concerns the employee's right as a citizen to participate in public affairs.

While the Court's "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government," the First Amendment "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state." *Connick*, 461 U.S. at 147. The Court has repeatedly admonished that "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision." *Id.* at 147; see *Garcetti*, 547 U.S. at 420 ("Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'") (citing *Connick*, 461 U.S. at 154); *Bishop* v. *Wood*, 426 U.S. 341, 349 (1976) ("[F]ederal court is not

the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."). Applying *Connick*'s public concern requirement to a public employee's expressive activities prevents this unwarranted result, and protects the careful balance achieved in this Court's public employment cases between the interests of public employees and the government's need to efficiently perform its duties.

B. The Public-Concern Requirement Applies To Petitions For The Redress Of Grievances As It Applies To Other Forms Of Employee Expression

The court of appeals in this case did not question the general principle that the First Amendment protects an employee from disciplinary action based on his speech only if that speech was expressed as a citizen on a matter of public concern. Relying on its earlier decision in *San Filippo*, however, the court held that the First Amendment protected respondent from disciplinary action based on his expression, regardless of whether it concerned a matter of public concern, because that expression took the form of a union grievance. Pet. App. 8a-9a. If that result is to be reconciled with this Court's cases, it must be based on some relevant distinction between the First Amendment right of free speech and the right to petition the government. No such distinction exists.

1. The Petition Clause of the First Amendment protects "the right of the people * * * to petition the Government for a redress of grievances." U.S. Const. Amend I. Like the other rights provided by the text of the First Amendment, "[t]he right to petition * * * is an assurance of a particular freedom of expression." *McDonald* v. *Smith*, 472 U.S. 479, 482 (1985).

This Court has never intimated that the right to petition the government is entitled to greater protection than any other right secured by the First Amendment. To the contrary, this Court has repeatedly stated that "[a]lthough the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis." *Wayte* v. *United States*, 470 U.S. 598, 610 n.11 (1985).

In *McDonald*, the Court rejected the petitioner's argument that the Petition Clause provided absolute immunity in a libel action concerning letters he had written to the President of the United States about a potential candidate for United States Attorney. The Court explained that accepting the petitioner's libel defense "would elevate the Petition Clause to special First Amendment status." 472 U.S. at 485. In refusing to do so, the Court explained that the Petition Clause "was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble," and that "[t]hese "First Amendment rights are inseparable." *Ibid.* The Court concluded that "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." *Ibid.*; see *id.* at 488-489 (Brennan, J., concurring) (stating that distinguishing between the Free Speech and the Petition Clauses is "untenable," and that "[t]he Framers envisioned the rights of speech, press, assembly, and petitioning as interrelated components of the public's exercise of its sovereign authority"); see also *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for

redress of grievances. All these though not identical, are inseparable. They are cognate rights, and therefore are united in the First [Amendment's] assurance.").

Respondent has attempted to reconcile the court of appeals' decision in this case with *McDonald* by emphasizing that the court of appeals' rule applies to a kind of petition not at issue in *McDonald*—namely, petitions that take the form of lawsuits or invocations of similar formal remedial mechanisms. Br. in Opp. 8-12, 27. The court of appeals' protection for such petitions, respondent notes, is "expressly rooted in this Court's repeated decisions that the Petition Clause guarantees access to the courts." *Id.* at 9; see *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972) (identifying access to the courts as one aspect of the right to petition).[5] But nothing in this Court's cases suggests that a petition implicating the right of access to the courts warrants greater First Amendment protection than any other type of petition. And while a public employee's exercise of the right to seek judicial redress of grievances certainly may implicate matters of public concern, see, *e.g.*, *NAACP* v. *Button*, 371 U.S. 415, 429-430 (1963) (concluding that litigation by NAACP is "a form of political expression" because it is "not a tech-

[5] Although this Court's cases make clear that the right of access to the courts is one aspect of the right to petition, historical evidence suggests that the central purpose of the Petition Clause was access to the legislature. See 1 Annals of Cong. 738 (1789) (James Madison explaining during congressional debate on the First Amendment that the Petition Clause ensures that people "may communicate their will" through direct petitions to the legislature and government officials); see also 2 Bernard Schwartz, *The Bill of Rights, A Documentary History* 1026 (1971) (stating that Petition Clause was designed to protect the peoples' right to apply "to the Legislature by petitions, or remonstrances, for redress of their grievances").

nique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment"), that will not invariably be so. Formal remedial mechanisms exist for the resolution of a wide variety of disputes, including disputes about terms and conditions of employment unrelated to "any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 147.

2. The court of appeals in *San Filippo* identified two bases for distinguishing between the Speech Clause and the Petition Clause in the context of retaliation claims brought by public employees. Neither is persuasive.

First, the court of appeals cited the distinct origins of the Petition Clause as justification for special treatment of the right to petition. Tracing the right to petition to "the Bill of Rights exacted of William and Mary," the court emphasized that Parliament provided that "all committments [*sic*] and prosecutions for such petitioning are illegal." *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 443 (3d Cir. 1994) (citations omitted; brackets in original), cert. denied, 513 U.S. 1082 (1995). The court concluded that "[t]here is no persuasive reason for the right of petition to mean less today than it was intended to mean in England three centuries ago." *Ibid*.

The court of appeals' emphasis on the historical significance of the Petition Clause ignores this Court's repeated observations that the Petition Clause was "cut from the same cloth as the other guarantees of [the First] Amendment," and that those guarantees are not subject to a constitutional hierarchy. *McDonald*, 472 U.S. at 482. Limiting First Amendment protection to matters of public concern in the public employment context would not, in any event, mean that the Petition Clause "mean[s] less today" than it did before the ratifi-

cation of the Bill of Rights. The rule articulated in *Connick* protects the "basic concerns" of the First Amendment, but recognizes that the Constitution does not apply in the same way when the government acts in the employment context (as opposed to as a sovereign) due to "the requirements of the government as employer." *Engquist*, 553 U.S. at 600.

Second, the *San Filippo* court stated that the Petition Clause would become a "trap for the unwary" or "a dead letter" if the government could discipline an employee who uses mechanisms that the government itself has created for the filing of grievances. 30 F.3d at 442. The concerns articulated by the court of appeals are wrong, as illustrated by the facts of this case. Respondent used the methods available to him to present his personal grievances to his employer, and he was successful at every turn. He filed a grievance challenging his dismissal, which resulted in his reinstatement. Pet. App. 4a, 57a. He filed a second grievance challenging the directives issued to him by the Council, which resulted in modification of some of the directives. *Id.* at 4a, 57a-59a. And when the Council subsequently refused to authorize $338 in overtime pay, respondent sought redress through the Department of Labor and the Council was ordered to pay him the overtime. *Id.* at 5a. As a general matter, as respondent himself has noted, "the retaliatory practices at issue" in *San Filippo* and subsequent cases "are often forbidden by state or federal law in order to safeguard those very mechanisms, and thus are already unavailable to the state and local employers at issue." Br. in Opp. 22. Placing a public concern limitation on the *constitutional* protection afforded to public employees who petition the government neither permits retaliation that is already forbidden by state or local

law, nor does it prevent state or local legislatures from enacting such laws. Rather, the public concern limitation simply ensures that these private employment disputes like the one in this case are not litigated in federal court as constitutional disputes.

3. In any event, whatever distinctions the court of appeals might have discerned between petitions and other forms of expression, the practical concerns underlying the rule articulated in *Connick* remain the same. To the extent that a public employee's expression threatens to disrupt the effective management of the government's offices and agencies, see *Connick*, 461 U.S. at 151, that expression is no less disruptive because it takes the form of a written grievance or lawsuit. Indeed, as Judge Becker noted in dissent in *San Filippo*, filing of a formal grievance may be more disruptive than speech, because expression through a lawsuit "still reache[s] the public (lawsuits, for example, are matters of public record) and, in addition, compel[s] the [government employer] to respond to the lawsuit and grievances." 30 F.3d at 449-450 (Becker, J., dissenting).

Moreover, to hold that the First Amendment categorically shields employees from discipline based on their private employment grievances would extend the rights of public employees far beyond those enjoyed by their privately employed counterparts. A private employer could certainly issue a set of job-related employment directives to a previously fired employee, or decide that overtime pay was unauthorized, without raising First Amendment concerns. If the employer's decision was unlawful under, for example, state or federal labor laws, the employee could seek redress through appropriate administrative or judicial channels. And indeed, respondent took advantage of just such procedures in

this case. See p. 19, *supra*. Respondent's status as a public employee should not allow him to take the *additional* step of suing his employer for damages under 42 U.S.C. 1983 for actions that he perceives as retaliatory or unfair, and to seek attorney's fees under 42 U.S.C. 1988 should he prevail. Such a rule places public employees in a far better position than private sector workers, effectively affording public employees a "First Amendment right to dictate to the state how they will do their jobs." *Urofsky* v. *Gilmore*, 216 F.3d 401, 407 (4th Cir. 2000), cert. denied, 531 U.S. 1070 (2001).

Dispensing with the public concern requirement in this context would also create an anomalous distinction between employees who express their private concerns in the form of a formal grievance and those who voice their concerns by other means. See *San Filippo*, 30 F.3d at 449 (Becker, J., dissenting) (stating that majority opinion was "an invitation to the wary to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined"). As other circuits have acknowledged, "special treatment of the right to petition would unjustly favor those who through foresight or mere fortuity present their speech as a grievance rather than in some other form." *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1262 (7th Cir. 1988); accord *Hoffmann* v. *Mayor, Councilmen & Citizens of Liberty*, 905 F.2d 229, 234 (8th Cir. 1990); *Day* v. *South Park Indep. Sch. Dist.*, 768 F.2d 696, 703 (5th Cir. 1985), cert. denied, 474 U.S. 1101 (1986). The special status afforded to the Petition Clause by the court of appeals elevates form over substance, and the result is unjustified by any distinction between those forms of expression.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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