No. 09-1476

In the Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,
v.
CHARLES J. GUARNIERI, Jr.
Respondent.

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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Can public employees sue their employers under the Petition Clause for adverse employment actions allegedly resulting from the employees' petitioning on matters of purely private concern?

PARTIES TO THE PROCEEDING

In addition to the party identified in the caption, petitioners also include Duryea Borough Council; Ann Dommes, Individually and in her Official Capacity as Council President; Lois Morreale, Individually and in her Official Capacity as Borough Secretary; Frank Groblewski, Individually and in his Official Capacity as Councilman; Edward Orkwis, Individually and in his Official Capacity as Councilman; Robert Webb, Individually and in his Official Capacity as Councilman; Audrey Yager, Individually and in her Official Capacity as Councilwoman; Joan Orloski, Individually and in her Official Capacity as Councilwoman; and Alfred Akulonis, Individually and in his Official Capacity as Councilman.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-15a, is available at 364 F. App'x 749. The district court's memorandum and order granting in part and denying in part petitioners' motion for summary judgment, Pet. App. 55a-95a, is reported at 2007 WL 4085563. The district court's memorandum and order denying petitioners' motion for a new trial and judgment as a matter of law, Pet. App. 16a-54a, is available at 2008 WL 4132035.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2010. Petitioners timely filed a petition for rehearing and rehearing en banc, which was denied on March 4, 2010. Pet. App. 97a-98a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT

This case concerns whether public employees may sue their employers under the Petition Clause of the First Amendment, U.S. Const. amend. I, cl. 6, for adverse employment actions resulting from the

employees' having petitioned on matters of purely private concern. The Third Circuit, alone among the federal circuits, has held that they can. See, *e.g.*, Pet. App. 8a; *Foraker* v. *Chaffinch*, 501 F.3d 231, 236 (3d Cir. 2007); *Hill* v. *Borough of Kutztown*, 455 F.3d 225, 242 n.24 (3d. Cir. 2006); *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 442-443 (3d Cir. 1994).

The Third Circuit's decision is wrong for two reasons. First, public employees' similar *speech-based* claims are not actionable unless their speech concerns a matter of public interest, *Connick* v. *Myers*, 461 U.S. 138, 147 (1983), and this Court's precedents make clear that the Petition Clause affords no "greater constitutional protection" than the Speech Clause and should be subject to the same modes of constitutional analysis. *McDonald* v. *Smith,* 472 U.S. 479, 485 (1985). Second, this Court has long recognized that government entities have "far broader" powers when acting as an employer rather than as a sovereign, *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Waters* v. *Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)), and that governmental employers accordingly "enjoy wide latitude" in addressing employment disputes that "cannot be fairly considered as relating to any matter of political, social, or other concern to the community." *Id.* at 599-600 (quoting *Connick*, 461 U.S. at 146). Allowing adverse employment action claims involving matters of purely private concern to be litigated in federal court—whether they implicate the Petition Clause or the Free Speech Clause—would dramatically increase judicial supervision of garden-variety workplace disputes, disrupt the

effective operation of government, and displace state and local governments' own carefully crafted protections.

A. Constitutional Background

The First Amendment guarantees "the right of the people * * * to petition the Government for a redress of grievances." U.S. Const. amend. I, cl. 6. This Court has noted that this "[c]lause * * * was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985). Recognizing that "[t]hese First Amendment rights are inseparable," it has held that "there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *Ibid.*

In *Connick* v. *Myers*, 461 U.S. 138, 147 (1983), this Court held that the First Amendment's Free Speech Clause does not protect a public employee from adverse employment action taken because of her speech on a matter not of public concern. Resting on "the common sense realization that government offices could not function if every employment decision became a constitutional matter," *id.* at 143, this Court held that when a public employee speaks "upon matters only of personal interest * * * a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior," *id.* at 147.

In *San Filippo* v. *Bongiovanni*, the Third Circuit refused to apply *Connick*'s public concern requirement to Petition Clause cases. 30 F.3d at 443-444. Rejecting the uniform view of all other circuits that had considered the issue, the *San Filippo* majority distinguished petition claims from free speech claims. "When one files a 'petition,'" the majority held, "one is not appealing over government's head to the general citizenry: when one files a 'petition' one is addressing government and asking government to fix what, allegedly, government has broken or has failed in its duty to repair." *Id.* at 442. To disallow a claim for adverse employment action because the petitioning that led to it addressed purely private concerns, the majority asserted, would make "the petition clause * * * a trap for the unwary—and a dead letter." *Ibid.*

Judge Becker dissented vigorously on this point. He observed "that a public employee plaintiff who has 'petitioned' is in no better position than one who has merely exercised free speech." *San Filippo*, 30 F.3d at 449 (Becker, J., concurring and dissenting). The majority's position, he concluded, defied "the inexorable logic of *McDonald* v. *Smith*," invited "wary [public employees] to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined[, and] would undermine the government's special role as an employer." *Ibid.*

The ten other federal circuits, as well as the four state supreme courts, that have addressed this question, have uniformly held that claims like respondent's are not cognizable. *Tang* v. *R.I. Dep't of*

Elderly Affairs, 163 F.3d 7, 12 (1st Cir. 1998); *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1058-1059 (2d Cir. 1993); *Andrew* v. *Clark*, 561 F.3d 261, 269 (4th Cir. 2009); *Rathjen* v. *Litchfield*, 878 F.2d 836, 841-842 (5th Cir. 1989); *Jenkins* v. *Rock Hill Local Sch. Dist.*, 513 F.3d 580, 587 (6th Cir. 2008); *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1261-1262 (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, 1222 (9th Cir. 1997); *Martin* v. *City of Del City*, 179 F.3d 882, 887-889 (10th Cir. 1999); *D'Angelo* v. *Sch. Bd.*, 497 F.3d 1203, 1211 (11th Cir. 2007); *Pratt* v. *Ottum*, 761 A.2d 313, 321 (Me. 2000); *Harris* v. *Miss. 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).

B. Factual Background

1. The Borough of Duryea (the "Borough" or "Duryea") is a small municipality in northeastern Pennsylvania with a population of approximately 4,634. See U.S. Census Bureau, American FactFinder, http://factfinder.census.gov (2000 figures; last accessed November 29, 2010). The Borough government consists of a seven-member Borough Council (the "Council") and a mayor (the "Mayor"), all of whom are elected and serve part-time. C.A. App. A00174 & A00448. The Council is responsible for hiring and firing Borough employees, *id.* at A00175, establishing policies for the Borough government's operation, and setting its annual budget (which, in 2010, is $1.17 million, including

$12,000 for annual legal expenses, see C.A. App. A00661). The Mayor is the Borough's chief executive and supervises the chief of police in accordance with Council policies. J.A. 14; see also *id.* at 69, 71-72. The day-to-day operations of the Borough are managed by a full-time Borough manager. C.A. App. A00614-A00615.

2. In 2000, the Borough hired respondent Charles J. Guarnieri, Jr. to serve as chief of police. Pet. App. 56a. Guarnieri supervised a police force consisting of between one and three full-time officers (including himself) and approximately nine part-time officers. C.A. App. A00177-A00178. In 2002, the Borough issued three written reprimands to Guarnieri in connection with a series of budget overruns and his failure to produce a requested written statement of his job duties. J.A. 26-28. On February 7, 2003, the Council dismissed Guarnieri for disciplinary reasons. *Id.* at 14-19. He responded by filing a grievance, which led to arbitration proceedings. *Id.* at 15.

In December 2004, the arbitrator concluded that because of Guarnieri's "many" instances of misconduct, J.A. 31, including "ignor[ing] discrepancies between police schedules and police timecards, making it difficult to audit expenditures," and "display[ing] a non-cooperative attitude and a general reluctance to comply with requests and directives," *id.* at 32, "[c]ertainly his conduct deserved discipline," *id.* at 37. But because the Borough had not consistently reprimanded Guarnieri promptly to convey "its expectations and the consequences of" misconduct, *ibid.*, and because

of "procedural errors" "in initiating and completing the termination," the arbitrator concluded that the Borough lacked just cause for his termination, see generally *ibid.* ("In only three instances prior to [termination], however, was he cited promptly for violations and then formally disciplined."). The arbitrator ordered Guarnieri reinstated with back pay for the period beginning in February 2004, *id.* at 38, but he also held that the first twelve months after Guarnieri's termination should be considered an unpaid "disciplinary suspension." *Ibid.*

When Guarnieri returned to work on January 21, 2005, the Council issued eleven directives instructing him how to perform specific aspects of his job.[1] Pet. App. 57a. In response, Guarnieri filed another grievance, which proceeded to arbitration. *Id.* at 59a. On February 15, 2006, the arbitrator held that some of the directives were improper for various reasons, concluding that some were vague, infringed upon the Mayor's authority to supervise the day-to-day operations of the Police Department, or violated the Collective Bargaining Agreement with the police union. J.A. 72-79. The arbitral award ordered the Council to clarify and reissue or

[1] The directives instructed Guarnieri, among other things, (1) not to work more than eight hours a day or forty hours per week, (2) to follow Duryea's purchase order system, (3) to personally patrol four to five hours during every shift, (4) to provide an officer for the arrival and dismissal of students at the Borough's only school, (5) to use the police car only for official business, and (6) to enforce the Borough government's no-smoking policy at the police department offices. Pet. App. 57a-59a.

rescind the directives. *Id*. at 79. The Council issued revised directives in June 2006. Pet. App. 60a.

C. District Court Proceedings

1. While the matter was pending before the arbitrator, the relationship between Guarnieri and the council grew increasingly fractious.[2] Guarnieri filed this lawsuit in July 2005, claiming that the directives and other acts of the Council constituted retaliation in violation of the Petition Clause based on his having filed and won his initial grievance. Pet. App. 4a-5a; J.A. 4. The suit named as defendants the Borough, the Borough Council, the Borough manager (individually and officially), and each of the seven members then serving on the Council (individually and officially).[3]

2. In December 2006, Guarnieri filed a request for approximately $284 in overtime.[4] The Borough denied the request because Guarnieri had not explained why the overtime was necessary. Pet.

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[2] For example, the Council directed Guarnieri not to participate in truancy and seat belt programs although they did not require expenditure of Borough funds and the Borough secretary asked Guarnieri to submit additional paperwork beyond a marriage license when he attempted to enroll his wife in the Borough's health insurance. Pet. App. 4a-5a & n.1.

[3] Only four of the defendant Council members remain in office today. See Duryea Borough Public Officials, http://www.duryeaborough.com/officials.htm (last visited November 29, 2010). The three former members remain as defendants.

[4] Although the court of appeals opinion states that the amount at issue was $338, that figure includes approximately $54 in overtime sought by another officer in a separate claim. See C.A. App. A00673, A00821.

App. 5a. An investigation by the federal Department of Labor concluded that the Borough was required to pay the overtime, though Guarnieri refused to accept the check when presented. *Ibid.*; C.A. App. A0649-A0652. Guarnieri then amended his complaint to add the denial of overtime pay as an additional retaliatory act. Pet. App. 5a.

3. The district court denied petitioners' summary judgment motion on the petition claim, concluding that "[t]he filing of a formal petition is protected without regard to whether the petition addresses a matter of public concern." Pet. App. 79a (citing *San Filippo*, 30 F.3d at 442). After trial, a jury concluded that the Council's directives and withholding of overtime were in reaction to Guarnieri's exercise of his right to petition. *Id.* at 5a-6a.[5] With respect to the directives, the jury awarded $5,000 in compensatory damages and $3,000 in punitive damages against each defendant. *Ibid.* On the overtime claim, the jury awarded $350 in compensatory damages from the Borough, plus one dollar from each individual defendant, but imposed a punitive damage award of $3,500 against each individual defendant. *Ibid.* In calculating petitioner's statutory attorney's fees under 42 U.S.C. § 1988, the district court found the lodestar to be $102,110.25, after reducing the requested sum by 91 hours because of duplication with a similar claim Guarnieri's counsel had brought previously. The district court then made a further reduction of over

[5] The jury rejected Guarnieri's claim that the delay in extending health insurance benefits to his wife constituted retaliation. Pet. App. 5a-6a.

50 percent and awarded petitioner $45,000 in attorney's fees. *Id.* at 7a.

The district court denied the Borough's renewed motion for judgment as a matter of law and a motion for a new trial. Pet. App. 16a-43a.

D. Court of Appeals Proceedings

The court of appeals affirmed the finding of liability but vacated in part with respect to the award of damages and attorney's fees. Pet. App. 1a-15a. While acknowledging that the disputes between the parties were "often petty," *id.* at 4a, the Third Circuit rejected Duryea's argument that it should adopt the uniform position of the other courts of appeals and decline to recognize a federal cause of action where the petition concerns a matter of purely private concern, saying that it was "bound by" *San Filippo*, Pet. App. 8a.

The court vacated the award of punitive damages. The court concluded that while some of Duryea's actions were "petty and careless," they were not "malicious" or "reckless[ly] or callous[ly] indifferen[t]" to Guarnieri's rights and therefore did not warrant imposing punitive damages. Pet. App. 12a. The court also concluded that the district court had erred by reducing the award of attorney's fees to $102,110.25 and later to $45,000. The court noted that the factors the district court had considered in reducing the fee award (such as duplication of work, the difficulty of the case, and counsel's experience), were the same factors it had considered in

establishing the lodestar. It then remanded for recalculation of attorneys' fees. Pet. App. 13a-15a.[6]

The Third Circuit denied Duryea's petition for rehearing and rehearing en banc. Pet. App. 97a-98a.

SUMMARY OF ARGUMENT

I. This Court has recognized repeatedly that the Speech and Petition Clauses foster the same ideals of self-government and free expression and thus are "generally subject to the same constitutional analysis." *Wayte* v. *United States*, 470 U.S. 598, 611 n.11 (1985). This Court ruled in *McDonald* v. *Smith* that neither the text nor history of the Petition Clause affords any basis for "granting greater constitutional protection to statements made in a petition." 472 U.S. 479, 485 (1985). Because speech and petition rights are overlapping and complementary, the substantive rules that govern one apply with equal force to the other. In cases implicating both rights, this Court has not engaged in separate analysis, and, in cases implicating primarily the petition right, this Court has freely applied Speech Clause doctrines.

The Third Circuit has rejected this Court's reading of the Petition Clause in *McDonald* in favor of its own revisionist theory, which treats petitioning

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[6] On remand, respondent's counsel has requested additional fees and costs associated with the appeal of the case. These total between $27,189.81 and $34,525.31, depending on the hourly rate used, and do not include proceedings in this Court. See Fourth Aff. of Cynthia Pollick, Esq., in Support of Plaintiff Guarnieri's Motion for Attorney Fees and Costs ¶ 4. Fee proceedings are ongoing in the district court.

as a right superior to speech. Under that theory, the right to petition deserves its own freestanding constitutional doctrine because it is older than the right to speech and concerns appeals to the government rather than to the people. In essence, because England recognized a freedom to petition in the centuries before the Framers enshrined the freedom of speech, the Third Circuit believes expression in a petition warrants "special treatment" (*San Filippo,* 30 F.3d at 441), vis-à-vis other forms of expression. That conclusion misinterprets history, would require overruling this Court's holding in *McDonald* that petitioning and speech should presumptively receive the same constitutional protection, and would call into question many long-settled precedents applying speech doctrine to petition claims. In addition, respondent's proposed rule would give central importance to the difficult matter of distinguishing between "speech" and "petitions."

II.A. This Court has consistently held that government is entitled to broader discretion when acting as an employer than as sovereign, whether an employee's challenges arise under the Equal Protection Clause, the Due Process Clause, or the Free Speech Clause. The same conclusion is warranted here. Although government employees do not sacrifice their First Amendment rights by accepting public employment, they can sue under the First Amendment Speech Clause for adverse employment action only when expressing a view "as a citizen upon matters of public concern." *Connick* v. *Myers*, 461 U.S. 138, 147 (1983). This threshold public-concern requirement springs from two

sources: government agencies' need, like any employer, to have broad discretion in responding to employees' purely work-related complaints, and the First Amendment's primary focus on fostering democratic self-governance. Neither rationale applies with less force simply because an employee chooses to state his complaint in a petition. Indeed, the principles of *Connick* apply with special force to petitions, which are likely to be more costly and disruptive than an employee's mere comments about workplace affairs. Respondent's proposed standard could transform a garden-variety public employment dispute into a federal constitutional case and thereby hamstring the operation of agencies from the FBI to the Duryea Police Department.

B. If petition claims concerning private matters are actionable but speech claims are not, public employees could (and will) easily sidestep *Connick* by characterizing their claims as arising under the Petition Clause.

Such easy evasion of *Connick* would encourage an onslaught of burdensome litigation and costly settlements and judgments. Government employers would face increased complexity and uncertainty in addressing employee complaints, creating an obvious risk that public employers will retain unproductive or disruptive employees simply to avoid crippling defense costs and judgments.

C. Applying the public concern requirement to the Petition Clause affords proper respect to existing—and effective—remedial schemes. State and federal laws, along with collective-bargaining agreements, already provide robust remedies for

public employees disciplined for filing work-related lawsuits or grievances. Many states have adopted remedies that are carefully tailored to consider the job type, employer size, reason for discipline, and other factors. Dispensing with *Connick*'s public concern requirement would impose a one-size-fits-all remedy that ignores distinctions state legislatures have recognized as important and reward employees who bypass informal grievance processes. The result would be a serious judicial intrusion upon states and localities' freedom to manage personnel matters.

ARGUMENT

I. THE THIRD CIRCUIT'S RULE VIOLATES FUNDAMENTAL PRINCIPLES OF PARITY BETWEEN SPEECH AND PETITIONS

In *McDonald* v. *Smith*, this Court rejected the claim that the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), should not apply to libelous expressions contained in petitions to government. 472 U.S. 479, 485 (1985). It held that "there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than [to] other First Amendment expressions." *Ibid.* Because the Speech and Petition Clauses serve the same First Amendment interest and are both necessary to effectuate that interest, the Petition Clause deserves no "special First Amendment status." *Ibid.* This Court's precedents have for decades embodied parity in its treatment of the two clauses that has fostered a First Amendment jurisprudence that (1) elevates neither clause over the other, (2) applies a uniform standard to claims involving both speech and petitions, and (3) freely

cross-applies substantive doctrine between cases involving the two clauses.

Accordingly, "[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*," especially when the rights to speech and petition have not been "burdened * * * differently." *Wayte* v. *United States*, 470 U.S. 598, 611 n.11 (1985) (emphasis added). As all the federal courts of appeals and state supreme courts that have addressed the issue recognize, *McDonald*'s reasoning and holding require—or at least create a strong presumption—that the substantive standards governing the Petition and Speech Clauses closely track one another when addressing the same governmental conduct. See Pet. at 8-10. When a public employee's expression takes the form of both speech and a petition, these courts seamlessly apply the Speech Clause's public concern requirement to review adverse employment action claims under the Petition Clause. *Ibid*.

The Third Circuit and respondent, however, deny the clauses' fundamental parity. Distorting *McDonald*, they maintain that the Petition Clause gives disgruntled public employees a cause of action for adverse employment actions taken in response to expression implicating matters of purely private concern—an argument this Court has specifically rejected for the neighboring Speech Clause. See *Connick* v. *Myers*, 461 U.S. 138, 147 (1983). To do so, they adopt a revisionist history of the Petition Clause that *McDonald* firmly rejected.

A. *McDonald* Recognized That The Original Understanding Of The Petition Clause Cannot Support A Hierarchy Of First Amendment Rights

The right to petition initially emerged in England not as a guarantor of autonomy or accountability but as a mechanism for reinforcing the Crown's authority over its subjects. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153, 2163-2165 (1998). For example, although Magna Carta protected the barons' right to petition, it also conditioned formal action on petitions upon the barons' allegiance to the Crown. *Ibid.* Likewise, the Crown and Parliament could dismiss a petition whose language was disrespectful of their authority without any consideration at all. *Id.* at 2170. In the seventeenth century, as Parliament more readily asserted its authority, petitioning became a means of controlling the Crown itself. Parliament began to condition allocation of funds to the King upon his considering the petitions it forwarded. *Id.* at 2167-2168. The need to quell civil unrest gave the Crown further incentive to act on petitions. Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 Nw. U. L. Rev. 739, 751-752 (1999). What began as a means through which the sovereign maintained its authority thus evolved into a principal mechanism for a "wide[] spectrum of society" to "participat[e] in English political life." Mark, *supra*, at 2169-2170. The resulting "web of mutual obligation" helped legitimize the authority of the Crown and the Parliament by providing the English people a potent means of political participation. *Ibid.*

To promote and protect popular sovereignty in America, our Constitution guarantees not only the right to petition, but also the rights to speak, maintain a free press, and peaceably assemble. Although its first draft separated the right to petition from the freedoms of speech and press, see 1 Annals of Cong. 434 (June 8, 1789) (Joseph Gales ed., 1834) (James Madison) (separating the right to "apply[] to the Legislature by petitions" from the freedoms of speech and press), the First Amendment as ratified consolidated all three of these protections, along with the right to peaceably assemble.

The Petition Clause was thus "cut from the same cloth" as these companion clauses, *McDonald*, 472 U.S. at 482, and shares their central aim: fostering democratic self-government, *id.* at 483 ("[T]he values in the right of petition as an important aspect of self-government are beyond question."). The right to petition serves an important expressive function as one of the primary "ways [the people] may communicate their will" to the government. 1 Annals of Cong. 738 (Aug. 15, 1789) (Joseph Gales ed., 1834) (James Madison); accord *Cook* v. *Gralike*, 531 U.S. 510, 529 (2001) (Kennedy, J., concurring) (recognizing that "when the Constitution was enacted, respectful petitions to legislators were an accepted mode of urging legislative action"). As this Court has recognized, the Petition Clause and its companion First Amendment clauses addressing expression "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 604 (1982). Those companion clauses, "every bit as much as the

Petition Clause, were included in the First Amendment to ensure the growth and preservation of democratic self-governance." *McDonald*, 472 U.S. at 489 (Brennan, J., concurring). "[T]hough not identical, [these] are inseparable cognate rights." *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945).

More specifically, the rights of speech and petition are both indispensible for self-government. Neither the Speech nor the Petition Clause can effectively secure democratic self-governance without the other. Take the Speech Clause. It protects at bottom the people's ability to form their own views of government. If government can punish or restrict expression, it can slow or prevent the formation of public opinions hostile to it and thus promote its own interests at the expense of the public interest. The Speech Clause thus allows for the robust exchange of views on what action is appropriate free from government interference.

The Petition Clause serves a related but somewhat different function. Although it too protects expression, it protects primarily expression from the public to the government. Once the public has, through the mechanism of free speech, framed its grievances, the right to petition ensures it can communicate those grievances to the government. *E. R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961) ("In a representative democracy * * * government act[s] on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."). The speech right thus

protects primarily the free formation of public opinion (although the debate also informs those in government of the public's views), while the petition right primarily protects the public's ability to register its opinions. Each is necessary to ensure the people's sovereignty over the government. *Stromberg* v. *California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

As a result, when expression takes the form of both speech and a petition, this Court has recognized that although the Petition Clause illuminates one dimension of the First Amendment interest, it does not demand separate analysis. In *Edwards* v. *South Carolina*, for example, this Court reversed the criminal convictions of 187 defendants, who had "peaceably assembled at the site of the State Government and there peaceably expressed their grievances 'to the citizens of South Carolina, along with the legislative Bodies of South Carolina,'" which were then in session. 372 U.S. 229, 235 & n.10 (1963). Their actions implicated the rights of assembly, free speech, and petition and, indeed, this Court held that all three expression rights were violated. *Id.* at 235 ("[I]t is clear to us that * * * South Carolina infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances."). The Court, however, performed no

separate analysis under each clause. Rather, it relied exclusively on free speech precedents, *id.* at 236-238, to hold that defendants had exercised "these [three] basic constitutional rights in their most pristine and classic form," *id.* at 235.

In *United States* v. *Harriss*, 347 U.S. 612 (1954), this Court analyzed the constitutionality of the Federal Regulation of Lobbying Act. In holding that the relevant provisions did "not violate the freedoms guaranteed by the First Amendment—freedom to speak, publish and petition the Government," *id.* at 625, it similarly eschewed a clause-by-clause analysis. Rather, it applied a single uniform and holistic analysis across all three clauses to find that the Act's purpose—"maintain[ing] the integrity of a basic governmental process," *ibid.*—justified the required disclosures. *Id*. at 626.

Recognizing the Speech and Petition Clauses' deep interdependence, this Court has repeatedly applied reasoning and doctrine from precedents discussing one clause in opinions construing the other. In *Bill Johnson's Restaurants, Inc.* v. *National Labor Relations Board*, this Court noted that "[j]ust as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition." 461 U.S. 731, 743 (1983) (citing two Speech Clause cases, *Herbert* v. *Lando*, 441 U.S. 153, 171 (1979), and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)). Similarly, when this Court considered whether the Petition Clause protects an employer who files an unsuccessful retaliatory suit against a union from an

unfair labor practice, it reasoned by analogy to familiar Speech Clause doctrines like "prior restraint," *BE & K Constr. Co.* v. *NLRB*, 536 U.S. 516, 530 (2002) (citing *Alexander* v. *United States*, 509 U.S. 544, 553-554 (1993)), "false statements," *id.* at 530-531 (citing *Bill Johnson's Rests.*, 461 U.S. at 743), the need for "breathing space," *id.* at 531 (citing *Gertz,* 418 U.S. at 341, and *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280, 285 (1964)), and the irrelevance of ill will to the question of whether regulating demonstrably false expression is constitutional, *id.* at 534 (citing *Garrison* v. *Louisiana*, 379 U.S. 64, 73-74 (1964), *Phila. Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 776-777 (1986), and *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 53 (1988)). Most importantly, in *McDonald* itself, when this Court considered the extent to which the Petition Clause protects false statements made in a letter to the President, it relied on *New York Times Co.* v. *Sullivan* and applied the Speech Clause's "actual malice" standard to the Petition Clause, 472 U.S. at 485.

Recognizing these clauses' parity under *McDonald*, the courts of appeals have routinely borrowed Speech Clause doctrine for use in Petition Clause cases. In *White* v. *Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000), for example, the Ninth Circuit held that petitions advocating unlawful but nonviolent activity receive the same protection that similar speech would under *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). In *Thorne* v. *Bailey*, 846 F.2d 241, 244-245 (4th Cir. 1988), the Fourth Circuit held that overbreadth analysis applies the same to statutes

touching the right to petition as to those touching on the right of free speech.

To jettison this Court's commitment to a non-hierarchical First Amendment would not only do violence to the meaning of *McDonald*, but "necessarily unsettle many [other] precedents." *CBOCS West, Inc.* v. *Humphries*, 553 U.S. 442, 452 (2008). As this Court has long recognized, important considerations of stare decisis counsel against overruling a principle that is "well embedded in the law." *Id.* at 451. Exempting adverse job action claims arising under the Petition Clause from *Connick*'s public concern requirement would throw into disarray all this law resting on *McDonald*'s principle of parity. Instead of harmonizing standards across the First Amendment, it would create discord.

The Third Circuit's rule reads the Petition Clause in a way that cannot be squared with history. While this Court has acknowledged that "the historical roots of the Petition Clause long antedate the Constitution," *McDonald*, 472 U.S. at 482, it has also recognized that the right to petition must be understood in light of the "ideals of liberty and democracy" present at the Founding. *Id.* at 485. Under the Third Circuit's revisionist understanding, however, the framing and ratification of the First Amendment are largely irrelevant. Insofar as the Third Circuit focused on historical precedent, it considered only what "the right to petition * * * was intended to mean in England three centuries ago," *San Filippo*, 30 F.3d at 443, at the time of the Glorious Revolution, not here at the time of our

Founding. And even then, the lesson it gleaned was idiosyncratic. Finding that the right to petition was "independent of—and substantially more ancient—than the freedoms of speech and press," it concluded that its "pedigree" entitled it to preferential status. See *id.* at 441, 443.

This view of the Petition Clause is indefensible. First, this Court has already put the Third Circuit's revisionist historical theory to rest. Foreshadowing the reasoning in *San Filippo*, the petitioner in *McDonald* insisted that the right to petition was "[u]nlike the more general freedoms of speech and press" due to its "rich and ancient history." Pet. Br. at 7-8, *McDonald* v. *Smith*, 472 U.S. 479 (1985) (No. 84-476). But drawing on Madison's view of the First Amendment, both the majority and concurrence in *McDonald* dispatched this argument without hesitation; in fact, not a single Justice supported it. See 472 U.S. at 482; *id.* at 488-490 (Brennan, J., concurring) (calling this distinction between the clauses "untenable" in light of the First Amendment's history). Since then, *McDonald*'s understanding has worked its way into the larger fabric of constitutional law, see pp.19-22, *supra*, and this Court has relied upon its analysis in other contexts, see *Dist. of Columbia* v. *Heller*, 128 S. Ct. 2783, 2790 n.5 (2008) (citing *McDonald*'s description of "the historical origins of right to petition" in discussing individual rights).

Rather than follow what this Court has identified as the proper reading of history, the Third Circuit has criticized this Court's understanding of the Petition Clause. See *Foraker* v. *Chaffinch*, 501 F.3d

231, 235-236 (3d Cir. 2007) (claiming that "the right to petition has undergone a significant transformation since its inclusion in the Bill of Rights" because this Court has "ignor[ed] the varied histories of the right to petition and the freedoms of speech, religion, and press"); cf. Eric Schnapper, *"Libelous" Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 Iowa L. Rev. 303, 345-347 (1989) (attacking this Court's conclusion that First Amendment rights should "afford comparable degrees of protection").

Second, the Third Circuit fails to understand that the fact the Petition Clause serves an independent purpose does not mean it deserves special treatment. As the Third Circuit recognizes, the Petition and Speech Clauses protect different aspects of political expression: the former safeguards primarily the right to address the government, the latter primarily the right to address the people (including speech designed to influence government policies). See *Foraker*, 501 F.3d at 237. But this unremarkable premise does not imply, much less compel, the startling conclusion that courts should prefer one form of expression over the other. If the clauses' distinctive functions actually required "separate analysis for each clause," *Foraker*, 501 F.3d at 237, surely this Court would have performed one in *McDonald* and its other related cases, see pp 21-23, *supra*. Instead, this Court understands that while the Petition Clause guarantees "a particular freedom of expression," 472 U.S. at 482, that does not mean it deserves "special First Amendment status," *id.* at 485. Far from being constitutionally compelled, the

Third Circuit's position rests on an unsupported leap of logic.

Third, even if it were permissible to grant one right special treatment over the other, freedom of speech—not the right to petition—would be the more natural candidate. Under the Third Circuit's hierarchy of expression, "asking government to fix what * * * [it] has broken" merits more constitutional protection than "appealing over government's head to the general citizenry." *San Filippo*, 30 F.3d at 442. While this priority may accord with ancient English practice, which placed sovereignty in the Crown, it cannot be reconciled with our constitutional tradition. The older British view rests on the belief that the state—rather than the people—is the guardian of individual liberty. But as Madison noted in his report for the Virginia Resolutions of 1798, our government is "altogether different" from the British model in that "[t]he people, not the government, possess the absolute sovereignty." 4 Elliot's Debates on the Federal Constitution 569-570 (1876). For this reason, the Virginia Resolutions declared that "free communication among the people * * * has ever been justly deemed the only effectual guardian of every other right." *Id.* at 553-554. Heeding the lessons of history, this Court has recognized both that speech on public affairs is "a fundamental principle of our constitutional system," *Stromberg*, 283 U.S. at 369, and "the essence of self-government," *Garrison*, 379 U.S. at 75, and that other mechanisms serve even better than petitions to register popular opinion with government, *Minn. State Bd. For Cm'ty Colls.* v. *Knight*, 465 U.S. 271, 285 (1984) ("Disagreement

with public policy and disapproval of officials' responsiveness * * * is to be registered principally at the polls"). If, contrary to this Court's teachings, the Speech and Petition Clauses must have a hierarchy, speech, not petitioning, should receive more protection.

Perhaps realizing the impossibility of rehabilitating the Third Circuit's theory, respondent offers two new arguments, neither of which is convincing. First, recasting the Petition Clause as a guarantee of "access to the courts," Br. in Opp. 9, he argues that "[n]othing in *McDonald* suggested that the right of access to the courts * * * is limited to lawsuits regarding matters of public concern," *id.* at 28. But this novel understanding of the Petition Clause cannot survive a close reading of *McDonald*. While this Court has stated that "the right of access to the courts is * * * *but one* aspect of the right of petition," *Cal. Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 511 (1972) (emphasis added), that statement does not undermine this Court's refusal in *McDonald* to accord the Petition Clause preferential status see 472 U.S. at 485. For, as respondent admits, *McDonald* itself cited the two cases he relies upon for his theory of "the right of access to the courts." Br. in Opp. 28; see also *McDonald*, 472 U.S. at 484 (citing *Bill Johnson's Rests.*, 461 U.S. at 741; *Cal. Motor Transp. Co.*, 404 U.S. at 513). Given that this Court drew on these precedents while simultaneously refusing to prioritize the Petition Clause, there is no reason why a "right of access to the courts" requires a different conclusion here.

Nor do rights of court access define the core of the Petition Clause or warrant special rules for lawsuits, as respondent contends. Br. in Opp. 9-10. Access to the legislature, not to the courts, was the central object of the Petition Clause's protection. Thus, as James Madison explained when he introduced what became the First Amendment, "[it is] proper to be recommended by Congress to the State Legislatures [that t]he people shall not be restrained * * * from applying *to the Legislature* by petitions, or remonstrances, for redress of their grievances." 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1026 (1971) (emphasis added); see generally Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 156 (1986) ("The express function of the * * * petition clause was to protect citizens applying to the Legislature.") (internal quotation marks omitted).

Respondent appears to recognize, moreover, that even his ahistorical vision of the Petition Clause cannot quite do the work he needs of it. He thus repeatedly supersizes his access-to-the-courts interpretation of the Petition Clause to cover everyday workplace grievances and arbitrations, which, of course, occur entirely outside the courts. See, *e.g.*, Br. in Opp. 9-10 ("Because the Third Circuit rule derives from the right of access to the courts, it is expressly limited to invocation of some 'formal mechanism for redress of grievances,' such as a lawsuit or a formal grievance and arbitration process under a collective bargaining agreement.") (citation omitted). Why he does so is clear. Without putting grievances and arbitrations at the heart of

the clause, he cannot justify even his "narrow" version of *San Filippo* or the Third Circuit's application of its rule to his own case, which concerns not just a lawsuit but grievances. But putting them there undermines his overarching claim that *Connick* should not apply to petitions because the Petition Clause offers special protection to lawsuits. Respondent cannot have it both ways. This case concerns the Petition Clause, not a more particularized right of access to the courts.

Second, respondent seeks to paint as dicta this Court's understanding of the Petition and Speech Clauses' interrelationship. He begins by recasting *McDonald*'s repeated admonitions against granting the Petition Clause special treatment as solely the product of "the specific history of libel claims." Br. in Opp. 27-28. This assertion cannot be squared with this Court's precedents. If this Court's opposition to a hierarchical First Amendment stemmed solely from the common law of libel, it is unclear why it has adopted this position in such diverse contexts as soliciting workers for union membership, *Thomas*, 323 U.S. at 530-531, and refusing to register for the Selective Service, *Wayte*, 470 U.S. at 611 n.11.

Even less convincing is respondent's suggestion that this Court's holding in *McDonald* is somehow limited to appeals "to the President." Br. in Opp. 29. Aside from suffering from the same flaws as his attempt to confine *McDonald* to libel, this theory ignores the facts of the case. The defendant in *McDonald* petitioned several congressmen and other executive branch officials in addition to the President about a key federal appointment. 472 U.S.

at 481 n.2. His actions represented core petitioning activity, not mere missive-writing to people who just happened to occupy positions in government. No more than the Third Circuit can respondent escape "the inexorable logic of *McDonald*," *San Filippo*, 30 F.3d at 449 (Becker, J., concurring and dissenting).

B. Respondent's Proposed Rule Would Give Central Importance To Unworkable Distinctions Between "Speech" and "Petitions"

In addition to unsettling many past decisions, see pp. 20-22, *supra*, prioritizing petition over speech claims threatens to burden courts and public employers with many issues about what forms of expression constitute petitions. So long as the Speech and Petition Clauses both require a showing of public concern, public employees will have little reason to argue that conduct that is more naturally considered "speech" falls within the scope of the right to petition, because it would be subject to the same standard. But if this Court exempts the Petition Clause from *Connick*'s threshold public concern requirement, much would turn on whether an employee's conduct constitutes a cognizable "petition" in addition to "speech." Courts and public employers will become enmeshed in the inquiry into whether conduct is appropriately deemed "speech" or a "petition," an inquiry that would otherwise be irrelevant. There are at least four possible ways to define a "petition" in the retaliation context, not one of which is coherent or workable.

First, this Court could decide that a public employee's right to petition should actually cover *all*

petitions. As respondent admits, "[t]his Court's decisions make clear that the Petition Clause applies to a far wider range of activities" than invoking formal mechanisms to redress grievances. Br. in Opp. 10. Indeed, this Court has held that many informal activities constitute a "petition," such as writing a letter, *McDonald*, 472 U.S. at 480-482, hiring an attorney, *United Mine Workers* v. *Ill. State Bar Ass'n*, 389 U.S. 217, 221-222 (1967), boycotting, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913-914 (1982), and protesting, *Edwards*, 372 U.S. at 235. Such a broad interpretation would create two problems. First, it would encompass nearly everything that could reach an employer's attention. Second, it would render the Speech Clause largely irrelevant in this area. If informal forms of expression qualify as constitutionally protected "petitions," it is unclear what role would be left for the Speech Clause here, other than to create arbitrary distinctions. Protecting a public employee for writing a letter but not for circulating a questionnaire is hardly a sensible application of the First Amendment.

Second, this Court could adopt the Third Circuit's approach, which limits "petitions" to complaints that "invok[e] a mechanism for redress of grievances against the government." *San Filippo*, 30 F.3d at 439 n.18; *id.* at 442. But the purported reason for this restriction does not justify excluding informal complaints. According to the Third Circuit, this limitation is based on the assumption that appeals to the state deserve more protection than appeals to the people. See *id.* at 442. Even if this distinction were correct, which it is not, see p. 23-24, *supra*, it

would not justify excluding informal letters to public officials complaining of a wrong and asking for some remedy. The libelous letter in *McDonald* apparently would not qualify as a petition under the Third Circuit's standard. See 472 U.S. at 481.

Unsurprisingly, the experience of federal courts within the Third Circuit shows that this arbitrary distinction creates much confusion in practice. Whatever its advantages, clarity is not among them. While email complaints to government officials may not constitute a protected "petition," *Foraker*, 501 F.3d at 237-238, the following activities do: giving notice of intent to file a lawsuit, *Bradshaw* v. *Twp. of Middletown*, 296 F. Supp. 2d 526, 546 (D.N.J. 2003); see also *Anderson* v. *Davila*, 125 F.3d 148, 162 (3d Cir. 1997), consulting with an attorney, *Cipriani* v. *Lycoming County Hous. Auth.*, 177 F. Supp. 2d 303, 324 n.17 (M.D. Pa. 2001), requesting a public hearing, *Morgan* v. *Covington Twp.*, No. 3:07-cv-1972, 2009 WL 585480, at *10-11 (M.D. Pa. Mar. 6, 2009), and assisting another employee in filing a grievance, *Lohman* v. *Duryea Borough*, Civil Action No. 3:05-CV-1423, 2007 U.S. Dist. LEXIS 87720, at *32-33 (M.D. Pa. Nov. 29, 2007).

Perhaps recognizing these deficiencies, respondent offers yet a third approach—a "narrow limitation to petitions invoking some *formal* remedial mechanism," Br. in Opp. 13 (emphasis added), which he tries to root in a general "right of access to the courts," *id.* at 9. He offers no basis for drawing the line there other than it avoids some of the pitfalls of other approaches. But it suffers from an equally serious defect: its grounding principle, the

"right of access to *courts*," cannot support the reach respondent needs from it. It offers no reason why the Petition Clause should cover employment grievances leading to arbitrations, which occur entirely outside the courts, much less why it should cover grievance procedures that may never even result in arbitration.

Fourth, this Court could tether the Petition Clause to the principle respondent offers for it and recognize only lawsuits as petitions for purposes of adverse job actions. That view of petitions would not cover much of respondent's own case, of course, but it would have the virtue of fitting the theory that supposedly supports it. Its other defects, however, would clearly outweigh this single benefit. Even this seemingly limited standard would logically include less formal aspects of a lawsuit, such as announcing an intention to file a claim. See *Bradshaw*, 296 F. Supp. 2d. at 546. That would mean that a simple oral "I'll sue!"—perhaps never to be acted on—would receive more protection than more formal, written communications to government bodies seeking to invoke formal redress procedures other than a lawsuit. More importantly, this "narrow" rule would undercut many public employment dispute resolution mechanisms which rely on informal methods to avoid divisive formal disputes that can be damaging to work morale. If only those who sued—or threatened to sue—to resolve a disagreement could make out a later constitutional claim, public employees would seek initial resolution through the court system, not informal mechanisms.

Most of these approaches to the threshold inquiry of what counts as a cognizable petition will, moreover, impose substantial burdens on courts and public employers. Courts will be forced to devote scarce judicial resources to determining whether a particular employee gripe constitutes a "petition." In many situations, this will be no easy task. As experience with the Third Circuit's own standard shows, judges frequently cannot agree over this basic issue. Compare *Foraker*, 501 F.3d at 237-238 (internal email complaints are not petitions), with *id.* at 247-248 (Greenberg, J., concurring) (internal email complaints are petitions); compare *Karchnak* v. *Swatara Twp.*, No. 07-CV-1405, 2009 U.S. Dist. LEXIS 58834, at *35-36 n.11 (M.D. Pa. July 10, 2009) (supporting another employee's lawsuit is not petitioning), with *Lohman*, 2007 U.S. Dist. LEXIS 87720, at *33 (assisting another employee in filing a grievance is petitioning); compare *Perna* v. *Twp. of Montclair*, No. 05-4464 (JLL), 2006 U.S. Dist. LEXIS 70518, at *23-25 (D.N.J. Sept. 27, 2006), dismissed, 2009 U.S. Dist. LEXIS 78173 (D.N.J. Aug. 26, 2009) (having an attorney send a letter warning of possible claims is not petitioning), with *Cipriani*, 177 F. Supp. 2d at 324 n.17 (consulting with an attorney qualifies as petitioning). Others simply refuse to address a difficult issue of application. See, *e.g.*, *Snavely* v. *Arnold*, No. 1:08-cv-2165, 2009 U.S. Dist. LEXIS 51415, at *9-10 (M.D. Pa. June 18, 2009) (declining to decide whether a claim for unemployment benefits constitutes a petition).

It is unfortunate that one circuit now labors under such uncertainty; expanding the confusion to all jurisdictions would be intolerable. If this Court

exempts adverse job action claims brought under the Petition Clause from *Connick*'s public concern requirement, courts everywhere, including this one, will soon face the myriad questions of the new constitutional law of public employee frustration, which will require a sprawling "jurisprudence of minutiae," see *County of Allegheny* v. *ACLU*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring in the judgment and dissenting in part), to answer.

While courts wrestle with these uncertainties, public employers will have to predict what constitutes a petition in order to manage their risk of litigation. This would add yet another level of uncertainly to making an adverse personnel decision. Answering incorrectly would either result in employer liability or deter the making of a legitimate employment decision. As set forth below, see *infra* at 51, the risk of guessing incorrectly may lead employers to avoid taking necessary adverse personnel actions, and the necessity of having to decide the question will impose costs for the lawyers who must consider it. Maintaining parity among the First Amendment's Petition and Speech Clauses, by contrast, avoids burdening both courts and public employers with unprincipled, uncertain, and unworkable standards.

II. WHERE A PUBLIC EMPLOYEE HAS PETITIONED THE GOVERNMENT ABOUT A MATTER OF PURELY PRIVATE INTEREST, ANY RESULTING ADVERSE EMPLOYMENT ACTION IS NOT SUBJECT TO FIRST AMENDMENT REVIEW

This Court has long recognized the "crucial difference * * * between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Cafeteria & Rest Workers* v. *McElroy*, 367 U.S. 886, 896 (1961)). As this Court recently explained:

> [T]he extra power the government has in this area comes from the nature of the government's mission as employer. * * * The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.

Ibid. (quoting *Waters* v. *Churchill*, 511 U.S. 661, 674-675 (1994) (plurality opinion)). Thus, "the government as employer indeed has far broader powers than does the government as sovereign," *ibid.* (quoting *Waters*, 511 U.S. at 674 (plurality opinion)), and "constitutional review of government employment decisions must rest on different principles than review of * * * restraints imposed by the government as sovereign." *Waters*, 511 U.S. at 674 (plurality opinion). This Court has consistently adhered to that bedrock principle whether an employee's claim is brought under the Equal

Protection Clause of the Fourteenth Amendment, see, *e.g.*, *Engquist*, 553 U.S. at 598, the Due Process Clauses of the Fifth and Fourteenth Amendments, see, *e.g.*, *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), or the Speech Clause of the First Amendment, see, *e.g.*, *Connick* v. *Myers*, 461 U.S. 138 (1983).

The Third Circuit and respondent would have the Court disregard this crucial distinction when an employee alleges a violation of the Petition Clause of the First Amendment, arguing that a public employee's claims of adverse action in reaction to the filing of a grievance, lawsuit, or other petition should not be subject to the "public concern" requirement of *Connick* v. *Myers*, 461 U.S. at 147. That argument fundamentally misunderstands this Court's precedents. The rationales underlying *Connick* and its progeny apply with equal force to Petition Clause claims. Moreover, because public employees could easily recast informal complaints as official grievances or lawsuits, respondent's proposed standard would open an end-run around *Connick*'s public concern requirement. Adopting such a rule would "constitutionalize the employee grievance," *id.* at 154, invite unprecedented judicial involvement in routine employment decisions, dramatically increase the volume and cost of public employment litigation, and compromise the government's ability to serve the public.

A. This Court's Public Employee Speech Cases Counsel Applying *Connick* v. *Myers*'s Public Concern Requirement To Petition Clause Claims

Though "public employees do not surrender all their First Amendment rights by reason of their employment," *Garcetti* v. *Ceballos*, 547 U.S. 410, 417 (2006), this Court's precedents embody the "common sense realization that government offices could not function if every employment decision became a constitutional matter," *Connick*, 461 U.S. at 143. In *Engquist*, this Court identified two principles that underlie its public employment decisions:

> First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, we consider 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.

553 U.S. 591, 600 (2008). In *Engquist*, these principles required rejecting "class-of-one" equal protection claims in public employment. *Id*. at 594-596. Here, they require that public employee petitions address a matter of public concern before an employee will be entitled to First Amendment review of an adverse employment action.

The "basic concern" of the First Amendment is expression "relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. This special solicitude for expression on matters of public concern follows from the First Amendment's underlying goal of "assur[ing] unfettered exchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 145 (quoting *Roth* v. *United States*, 354 U.S. 476, 484 (1957)). This understanding of the First Amendment is evident in this Court's employee speech framework, established in *Pickering* v. *Bd. of Educ.*, 391 U.S. 563 (1968), *Connick*, and *Garcetti*. The first part of the inquiry under that framework considers whether an employee allegedly subject to adverse job action because of expression was speaking "as a citizen upon matters of public concern." *Connick*, 461 U.S. at 147. If so, a court proceeds to so-called *Pickering* balancing, in which the full measure of the employee's interests as a citizen is weighed against the government's interests as employer. *Pickering*, 391 U.S. at 568.

Where, however, an employee was not speaking as a citizen or was speaking on matters of private concern, the adverse employment action is not subject to First Amendment review in federal court. *Connick*, 461 U.S. at 146. This rule honors the "crucial difference" between the government as sovereign and the government as employer. When an employee speaks "as a citizen," the risk that the government as sovereign may be "leverag[ing] the employment relationship," *Garcetti*, 547 U.S. at 419, to restrict speech necessitates judicial review; but "[w]hen employee expression cannot be fairly

considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices," *Engquist*, 553 U.S. at 600 (quoting *Connick*, 461 U.S. at 146). When acting as employer, the government must, like a private employer, be free to act decisively and effectively. See *Garcetti*, 547 U.S. at 418 ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for efficient provision of public services."). This Court reaffirmed this principle in *Garcetti*, warning against giving courts "a new, permanent, and intrusive role, mandating judicial oversight" of public employment, writing that "[t]his displacement of managerial discretion by judicial supervision finds no support in our precedents." *Id.* at 423.

The rationale underlying the employee speech cases applies with equal, if not greater, force to expression covered by the Petition Clause. First, as explained in Section I.A., *supra*, the Petition and Free Speech Clauses are "intimately connected both in origin and in purpose." *United Mine Workers* v. *Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967); accord *McDonald*, 472 U.S. at 482. The Clauses thus share the same basic First Amendment goal of "assur[ing] unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Connick*, 461 U.S. at 145. It follows from this shared goal that the Petition Clause, like the Speech Clause, has as its basic concern expression "relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at

147. Because this same basic concern animates the Free Speech and Petition Clauses, it makes no sense to strike a different constitutional balance, particularly in the narrow context of public employment.[7] Accordingly, as with Free Speech Clause claims, when an employee does not petition for redress as a citizen on a matter of public concern, that employee's interests "can more readily give way to the requirements of the government as employer," *Engquist*, 553 U.S. at 600.

Second, the practical challenges of the government's role as employer are at least as substantial when an employee files a formal grievance or lawsuit as when that employee lodges

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[7] In public employment cases, this Court has typically identified the "basic concerns" of a constitutional provision at a high level of generality. See, *e.g.*, *Connick*, 461 U.S. at 147 (identifying expression on a matter "of political, social, or other concern to the community" as the primary concern of the First Amendment generally); *Engquist*, 553 U.S. at 601 (internal quotations omitted) (identifying "governmental classifications that affect some groups of citizens differently than others" as the basic concern of the Equal Protection Clause). Even if the basic concerns of the Petition Clause were drawn more narrowly, respondent points to nothing to suggest that the right to petition one's employer on purely private matters would implicate them. Indeed, the central focus of the Framers was on petitioning the *legislature*, not one's employer. See Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 156 (1986) (citing 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1026 (1971) (quoting James Madison)). Put simply, any construction of the Petition Clause's basic concerns narrow enough to distinguish it from the Speech Clause is still nowhere near broad enough to embrace respondent's activity.

an informal complaint or simply engages in speech. Indeed, even the Third Circuit, the lone court of appeals to reject a public concern requirement, recognized that "employee lawsuits and grievances against a public employer can * * * be divisive in much the same way that employee speech can." *San Filippo*, 30 F.3d at 441. The consequences of "constitutionaliz[ing] the employee grievance," *Garcetti*, 547 U.S. at 420, are thus just as serious—if not more so—in the context of the Petition Clause.

This Court has cautioned that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick*, 461 U.S. at 149. Yet that is exactly what would occur in this context in the absence of a public concern requirement. The availability of judicial review will encourage employees to fashion routine complaints as formal grievances or lawsuits. See pp. 45-47, *infra*. Grievances and lawsuits are likely to be even more disruptive and polarizing than less formal communication, whose very informality can lead to consensus or voluntary compromise. Even the most mundane workplace dispute could—and, in the Third Circuit, often *has*—become a federal case. The fear of litigation will forseeably force public officials to focus on the risk of constitutional tort liability at the expense of effectively and efficiently managing the workplace. And the demands of litigation will simultaneously distract managers from their duties. See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 (1982) ("[O]ur decisions consistently have held that government officials are entitled to some form of immunity from suits * * * to shield them from undue

interference with their duties and from potentially disabling threats of liability.").

Lastly, the litigation costs of Petition Clause claims could be crippling, particularly for local governments, like the Borough, with modest budgets. Without a public concern requirement, every dispute over adverse employment action in a case in which an employee is deemed to have filed a "petition" could result in complicated, often fact-intensive litigation. At the least, numerous cases would result in some variation of *Pickering* balancing, requiring courts to weigh the interests of the employee against the government's interests as employer.[8] One of *Connick*'s underlying goals, however, was to screen out certain employment disputes without resort to such balancing, because "[t]o require *Pickering* balancing in every case where speech by a public employee is at issue * * * could compromise the proper functioning of government offices." *City of San Diego* v. *Roe*, 543 U.S. 77, 82 (2004) (per curiam).

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[8] In *Pickering*, this Court directed lower courts 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." *Pickering*, 391 U.S. at 568. Of course, if Petition Clause retaliation claims were not subject to a threshold public concern requirement, *Pickering*'s directive to weigh an employee's "interests * * * as a citizen, in commenting on *matters of public concern*" would be nonsensical. A Petition Clause standard without a public concern requirement would presumably require some new formulation of the balance between employee and employer interests.

The Third Circuit's approach is more onerous still, because it does not even consider the government's interests as employer before allowing a claim to proceed. See, *e.g.*, *Marrero* v. *Camden County Bd. of Soc. Servs.*, 164 F. Supp. 2d 455, 468 (D.N.J. 2001). Courts in the Third Circuit thus must always undertake a fact-intensive inquiry into whether a public employer's adverse action was motivated by an employee's petition. Resolving such factbound disputes can create a significant drain on public resources. In this case, for example, respondent appears poised to collect over $100,000 in attorneys' fees from Duryea, representing over a tenth of the total Borough budget, and that sum does not even include the tens of thousands of dollars Duryea spent defending itself. See pp. 9-11 & n.6, *supra*. Simply arbitrating Guarnieri's *first grievance* cost Duryea $30,000 in legal fees—nearly three times its entire annual litigation budget—and required the Borough to dip into its capital improvement funds. C.A. App. A00661. Opening the door to lawsuits related to such grievances, and to the attorneys' fees that come with them, could impose a crippling burden on local governments.

Simply put, there is no basis for holding that the government's interests as employer are not entitled to determinative weight when an employee has petitioned about a subject of purely private interest. To the contrary, in a wide variety of contexts, see pp. 37-39, *supra*, this Court has accommodated the government's interests so long as the government is not using its power over public employees to suppress speech unrelated to its interests as an employer.

Respondent's proposed standard would ignore these similarities because of purported doctrinal distinctions between the Petition and Free Speech Clauses. But those distinctions—for example, that the Petition Clause, unlike the Speech Clause, "encompasses only activity directed to a government audience," *Foraker*, 501 F.3d at 237, or that the Clause is intrinsically concerned with access to the courts—are irrelevant here. Ultimately, the only considerations that carry weight in the public employee context are the "basic concerns of the relevant constitutional provision," *Engquist*, 553 U.S. at 600, and the government's interests as employer. As demonstrated above, these questions yield identical answers for both provisions. Accordingly, even if respondent were correct that the Free Speech and Petition Clauses differ in some respects, respondent presents no compelling reason that adverse employment action claims under the Petition Clause should not be subject to the same standard as similar Free Speech claims. Exempting employees' Petition Clause claims from the public concern requirement would be inconsistent with the principles this Court has consistently applied in the public employee context and would hobble governments' ability to serve the public.

B. Recognizing Petition Clause Claims For Adverse Job Action Taken In Response To Petitioning About Matters Of Purely Private Concern Would Permit Circumvention of *Connick*

Permitting claims under the Petition Clause to proceed even if they do not involve matters of public concern would have implications far beyond the narrow context of that clause. Because plaintiffs could easily recast other types of disputes as Petition Clause claims, circumventing *Connick*'s public concern requirement would become a simple matter, which would threaten to constitutionalize routine employment disputes and undermine the efficiency of government agencies.

In order to constitutionalize a dispute with a government employer, an employee would need merely to formalize his complaint as a petition. He could then characterize any subsequent adverse action by the employer in response to the initial dispute as retaliation for the petition. Thus, through the simple expedient of formalizing a complaint, a disagreement involving a matter of purely private concern would suddenly gain access to federal court and become entitled to full First Amendment protection. The threshold for a formal complaint to qualify as a "petition" can be quite low. While respondent suggests that only formal grievances and lawsuits would qualify as "petitions," see Br. in Opp. 9-10, he identifies no principled basis for that limitation, and, in fact, courts have held that far less significant steps suffice, see p. 31, *supra*. An employee has nothing to lose and everything to gain

by filing a petition, which essentially serves as a hedge against a judicial determination that what would otherwise be a Free Speech case involves a matter of only private concern.

It is difficult to overstate the scope of claims that employees could transform in this way. It is not just those savvy enough to immediately formalize an incipient employment dispute who could capitalize on the absence of a public concern requirement; in many such disputes the employee will already have communicated in a way that could be recast as a petition. See, *e.g.*, Br. in Opp. 1a-2a (citing to *Cicchiello* v. *Beard*, No. 3:07cv2338, 2010 WL 2891523 (M.D. Pa. July 21, 2010) (written complaint); *Clayton* v. *City of Atl. City*, Civil Action No. 09-3045 (JEI), 2010 WL 2674526 (D.N.J. June 30, 2010) (unfair labor claim to New Jersey Public Employee Relation Commission); *Karchnak* v. *Swatara Twp.*, No. 07-CV-1405, 2009 WL 2139280 (M.D. Pa. July 10, 2009) (internal affairs report); *Ravitch* v. *City of Phila.*, Civil Action No. 06-3726, 2009 WL 878631 (E.D. Pa. Mar. 31, 2009) (grievance)). In such situations, all a disgruntled employee must do is identify a sufficiently petition-like communication before he can characterize every subsequent adverse government action as taken in response to his "petitioning."

Such a result would be contrary to this Court's repeated admonitions that "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop* v. *Wood*, 426 U.S. 341, 349 (1976); accord *Garcetti*, 547 U.S. at 420 ("[W]hile the First

Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" (quoting *Connick*, 461 U.S. at 154)); *Connick*, 461 U.S. at 149 ("To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark * * * would plant the seed of a constitutional case."); see also *Engquist*, 553 U.S. at 607. This Court has declined to transform the Fourteenth Amendment into a "font of tort law," *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 768 (2005); there is no warrant for making the Petition Clause a font of public employment law.

The dynamics of the employment context make it uniquely contentious and thus likely to spawn litigation. The "workplace is full of friction, discomforts, and hierarchy." *DeHart* v. *Baker Hughes Oilfield Operations*, No. Civ.A. H-04-2233, 2005 WL 3005641, at *4 (S.D. Tex. Nov. 8, 2005). Personnel decisions are "quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify," *Engquist*, 553 U.S. at 604, which can make even legitimate decisions seem arbitrary to the affected employee. As a result, "practically every employee * * * is bound to be convinced at some point that he or she is getting the short end of the stick." *Campagna* v. *Mass. Dep't of Envtl. Prot.*, 206 F. Supp. 2d 120, 127 (D. Mass. 2002). The close daily interactions required by the workplace can aggravate the friction from an adverse employment action. In most torts, parties may interact neither before nor after the incident. But as this case illustrates, in the employment context, existing

disputes may color every subsequent interaction. See *Lauth* v. *McCollum*, 424 F.3d 631, 633 (7th Cir. 2005) (Posner, J.) ("[P]ersonal motives [cannot] be purged from all official action, especially in the frequently tense setting of labor relations."). Permitting every dissatisfied public employee alleging retaliation for a formal complaint an opportunity to seek redress in federal court will foreseeably lead to a significant increase in litigation over garden-variety disputes.

Connick's public concern requirement was designed to alleviate the burden of litigation on public employers. Allowing suits to proceed only in cases involving issues of public concern places a practical limit on the amount of litigation a public employer will confront. But if any adverse job action claim involving a petition on a matter of private concern can become a federal case, the potential for litigation will expand exponentially. Thus, allowing such private disputes into federal court through the back door—through the contrivance of filing a grievance, lawsuit, or other petition—"would open the federal floodgates to all manner of petty personnel disputes." *Altman* v. *Hurst*, 734 F.2d 1240, 1244 (7th Cir. 1984). "[G]overnments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack." *Engquist*, 553 U.S. at 608.

Contrary to respondent's claim, Br. in Opp. 19, the concern that public employees will bring petty disputes in federal court is not a hypothetical one. In the Third Circuit, district courts have had to

entertain Petition Clause claims arising out of (1) an internal affairs complaint for the recovery of unpaid towing service invoices, *Schlier* v. *Rice*, 630 F. Supp. 2d 458 (M.D. Pa. 2007); (2) a tort claim notice involving alleged dress code violations, *Marrero*, 164 F. Supp. 2d at 460; (3) a lawsuit challenging a police force suspension arising from an incident in which a policeman's ex-girlfriend wrongly accused a private security employee of having sex with her ex-boyfriend, *Morgan* v. *Covington Twp.*, No. 3:07-cv-1972, 2009 WL 585480 (M.D. Pa. Mar. 6, 2009); (4) a workmen's compensation claim for a work-related injury, *Diana* v. *Oliphant*, No. 3:05-CV-2338, 2007 WL 3491856 (M.D. Pa. Nov. 13, 2007); and (5) a municipal court criminal complaint for assault stemming from a fight outside a bar, *McGovern* v. *City of Jersey City*, No. 98-5186 (JLL), 2007 WL 2893323 (D.N.J. Sept. 28, 2007).

Although respondent claims that public employees would be unable to afford a lawyer to litigate such a case or to obtain one on a contingency basis, Br. in Opp. 19, the examples above prove otherwise. That is hardly surprising. Federal law gives lawyers an incentive to provide representation so long as a claim is cognizable under federal law. Section 1988(b) of Title 42 gives courts discretion to award attorney's fees to prevailing plaintiffs on § 1983 claims, and under such circumstances, there is essentially a presumption in favor of an award. *Unus* v. *Kane*, 565 F.3d 103, 126 (4th Cir. 2009); see also *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983). Attorney's fees are likewise available for cases settled by entry of a consent decree. *Maher* v. *Gagne*, 448 U.S. 122, 129-130 (1980). Respondent's

award is a telling indication of the powerful incentive given to trial lawyers. The jury awarded $45,358 in compensatory damages, but the district court determined the lodestar for respondent's attorney's fees to be $102,110.25, Pet. App. 5a-7a, a sum that continues to grow as this case is litigated, see note 6, *supra*.

Moreover, permitting ready circumvention of the public concern requirement would allow more such suits to survive motions to dismiss and thus to proceed to discovery. An adverse job action claim alleging First Amendment protection is a "fact-intensive inquiry" to begin with, *Thompson* v. *Dist. of Columbia*, 428 F.3d 283, 286 (D.C. Cir. 2005); see also *Suarez Corp. Indus.* v. *McGraw*, 202 F.3d 676, 686 (4th Cir. 2000) (emphasizing the particular difficulties in the public employment context), so if a case is not dismissed because it does not concern a matter of public concern, it is unlikely that a court will be able resolve it before the summary judgment stage. See *Peacock* v. *Duval*, 694 F.2d 644, 646 (9th Cir. 1982). If such a claim survives a motion to dismiss because there is no public concern requirement, a public employer may feel compelled to settle a case simply to avoid the expense and distraction of litigation. It is well established that "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975).

Nationalizing the Third Circuit's rule risks over-deterrence. As this Court has recognized in the qualified immunity context, it is not only litigation itself that acts as a drag on public entities, but the mere threat of it as well. Employers considering adverse action against an employee must consider both the odds that it would precipitate a First Amendment lawsuit and the costs if such a suit is filed. Allowing plaintiffs to circumvent *Connick* increases both. Adopting such a rule thus may cause employers to opt against necessary employment actions because the risk of protracted and highly public litigation is too high to bear. Worse, the "most capable candidates * * * might be deterred from seeking" government managerial and elected positions if every employment decision carries the threat of constitutional litigation. *Wood* v. *Strickland*, 420 U.S. 308, 320 (1975). This is particularly true, as here, when the government is a small locality that must depend on the supervision of part-time elected officials. If public employers face the specter of prolonged federal litigation and constitutional liability whenever they take adverse employment action against an employee who has formalized a dispute, they would naturally respond with timidity. The public concern requirement thus serves as an important protection to prevent public employers from adopting a passive stance to avoid litigation. See *Scheuer* v. *Rhodes*, 416 U.S. 232, 241-242 (1974) ("Public officials * * * who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices.").

This Court has consistently warned against adopting rules that would commit "federal courts to a new, permanent, and intrusive role," requiring "permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Garcetti*, 547 U.S. at 423. Administrative and, when appropriate, state-law remedies provide an appropriate mechanism for resolving garden-variety employment disputes. The form of the complaint—whether it be an official grievance or a casual conversation with one's supervisor—should not make a difference to the level of protection it is afforded, or to the forum that will address the allegations. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146.

C. Recognizing A Constitutional Claim For Adverse Employment Action Resulting From Petitioning On Matters Of Private Interest Would Displace Carefully Crafted State Remedies

In recognition of their status as equal sovereigns, the states are afforded substantial "free[dom] to regulate their labor relationships with their public employees." *Davenport* v. *Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007). Using that freedom, states have designed robust protections for public employees through whistleblower, labor, and civil-

service statutes—many of which contain specialized provisions that would apply here. In contrast to a one-size-fits-all cause of action under the Petition Clause, states often tailor employee rights and remedies to take into consideration the particular responsibilities of the employee and the types of conduct at issue. In addition, employer-specific collective bargaining agreements also shield public employees from adverse job action taken for seeking redress of work-related grievances. This case thus presents the question "whether an elaborate remedial system that has been constructed step-by-step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy." *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983).

The "existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights," *Bush*, 462 U.S. at 388, counsel against recognizing a constitutional right to damages for claims by public employees that adverse job action was taken against them in reaction to their having petitioned government regarding purely private matters. Injecting a new, judicial remedy into this structure would both displace careful legislative judgments and disrupt the administration of existing processes. Even coverage *gaps* in the existing web of remedies presumably reflect legislative balancing of the "numerous and complex" considerations of labor-management relations. See *Ry. Employees' Dep't* v. *Hanson*, 351 U.S. 225, 234 (1956).

Pennsylvania readily illustrates the remedies afforded by state and municipal law. Pennsylvania generally prohibits public employers from "[d]ischarging or otherwise discriminating against an employe [sic] because he has signed or filed an affidavit, petition or complaint or given any information or testimony under [the Pennsylvania Public Employe [sic] Relations Act]." 43 Pa. Stat. § 1101.1201(a)(4) (2010). Public employees alleging such actions may complain to the Pennsylvania Labor Relations Board, *id.* § 1101.1302, which has exclusive jurisdiction over such matters. *Id.* § 1101.1301. This remedial structure serves Pennsylvania's public policy of promoting "orderly and constructive relationships between all public employers and their employes [sic] subject * * * to the paramount right of the citizens of [the] Commonwealth to keep inviolate the guarantees for their health, safety and welfare." *Id.* § 1101.101.

Balancing these interests, the Pennsylvania legislature also created exceptions to the comprehensive civil-service statute. Police officers and firefighters are not covered by the general anti-retaliation statute, 43 Pa. Stat. § 1101.301 (2010), and must instead rely on general civil-service protections, union arbitration, and whatever additional safeguards may exist under their collective-bargaining agreements. See *id.* § 217. Police civil service protections in Pennsylvania are further refined based on population and department size. In Pittsburgh and Scranton, for example, officers cannot be disciplined "except for just cause which shall not be religious or political." *Id.* § 23539.1(a). In boroughs, however, police officers

cannot be fired except for reasons enumerated by the legislature. See *id*. §§ 812, 46190 (2010).[9]

For boroughs with a police force smaller than three members, the civil-service protections apply only to "regular full time police officer[s]." 53 Pa. Stat. §§ 811, 812 (2010). Officers discharged from these one- or two-person forces are entitled to a reinstatement hearing from the authority that appointed them and may appeal to the court of common pleas. *Id*. §§ 814-815. If the borough has more than two officers, civil-service protections cover *all* persons employed by the police force. *Id*. §§ 46171, 46190. In addition, the borough must create a civil-service commission to conduct reinstatement hearings upon the request of fired, suspended, or demoted officers. See *id*. §§ 46172, 46191. Appeal to the court of common pleas remains available to disciplined officers and may also be pursued by the borough. *Id*. § 46191 (2010).

Regardless of the size of the police force, however, borough officers cannot be terminated for filing a

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[9] If the borough police force has fewer than three members, reasons for discipline are limited to "(1) physical or mental disability affecting his ability to continue in service, in which case the person shall receive an honorable discharge from service; (2) neglect or violation of any official duty; (3) violating of any law which provides that such violation constitutes a misdemeanor or felony; (4) inefficiency, neglect, intemperance, disobedience of orders, or conduct unbecoming an officer; (5) intoxication while on duty." 53 Pa. Stat. § 811, 812 (2010). If the borough police force has three or more members, an additional reason for discipline is "[e]ngaging or participating in conducting of any political or election campaign otherwise than to exercise his own right of suffrage." *Id*. §§ 46171, 46190(6).

lawsuit or internal grievance because neither action is among the grounds for discipline enumerated by the legislature. See 53 Pa. Stat. §§ 812, 46190 (2010). In addition, employees protected by a just-cause standard—whether by statute or under a collective-bargaining agreement—ordinarily cannot be subject to retaliation for the mere act of filing a lawsuit or grievance because that act does not constitute "just cause" for discipline within the meaning of most employment contracts. See, *e.g.*, *Tacket* v. *Delco Remy*, 959 F.2d 650, 653-654 (7th Cir. 1992) (describing Indiana law). Deeming employees' written grievances to be "petitions" imbued with constitutional significance thus often creates no extra substantive protection for employees; it merely allows them to evade administrative procedures the legislature has carefully tailored for their circumstances and to sidestep arbitration remedies, which both state and federal law prefer as a matter of public policy. See 9 U.S.C. § 2; 43 Pa. Stat. § 217.2 (2010).

As this Court has recognized, "[t]he ingredients of industrial peace and stabilized labor-management relations * * * may well vary from age to age and from industry to industry," but "[t]he decision rests with the policy makers, not with the judiciary." *Hanson*, 351 U.S. at 234. The Pennsylvania legislature has made its decision and Guarnieri now seeks to evade its considered judgment by pursuing a judicially created federal remedy. Permitting Guarnieri to do so would replace the State's carefully tailored remedial scheme with a one-size-fits-all remedy that allows recovery even under circumstances for which the legislature has

determined that none should be available. Moreover, as experience demonstrates, see, e.g., p. 49, *supra*, dispensing with the public concern requirement for public employee petitions requires courts to serve as "general-purpose second-guessers of the reasonableness of broad areas of state and local decisionmaking: a role that is both ill-suited to the federal courts and offensive to state and local autonomy in our federal system." *Jennings* v. *City of Stillwater*, 383 F.3d 1199, 1211 (10th Cir. 2004) (McConnell, J.).

Even where current remedies are not all-encompassing, "special factors" may render inappropriate any "new kind of federal litigation." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007) (quoting *Bush*, 462 U.S. at 378). Among these factors are "sound principles of federalism and the separation of powers," according to which judicial intrusion into public employment should be minimal. *Garcetti*, 547 U.S. at 423. Principles of federalism apply with particular force to "the special concerns of States and localities with respect to [law enforcement personnel]" such as Guarnieri. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 n.17 (1985). Moreover, Congress's consistent judgment that states should manage relations with their own employees, see *id.* at 553, suggests that a new constitutional cause of action would be particularly inappropriate for public employees who have petitioned their employers merely about private, work-related dissatisfaction.

Federal workers likewise could invoke an expansive judicially created cause of action under the Petition Clause to circumvent the carefully

tailored remedial provisions of the Civil Service Reform Act of 1978, 5 U.S.C. § 2301 *et seq*. Congress has decided, for example, that certain remedies for workplace discipline should be off limits to most intelligence officers, certain National Guard technicians, and employees of the Tennessee Valley Authority. See 5 U.S.C. § 7511(b). In addition, Congress determined that some forms of adverse action do not warrant any judicial remedy. See, *e.g.*, *id*. § 7503(a) (suspensions of fourteen days of less); *id*. § 7511(a)(1)(A)(i) (adverse action against probationary employees). Just as the Third Circuit's approach to the Petition Clause would allow state and municipal employees to bypass finely drawn anti-retaliation statutes, it would allow many federal workers to pursue remedies that Congress has expressly withdrawn from them.

CONCLUSION

The decision below should be vacated and the case remanded for proceedings consistent with an opinion holding that public employees cannot sue their employers for retaliation under the Petition Clause unless their petitions involved matters of public concern.

Respectfully submitted.

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