No.

In the Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit erred in holding that state and local government employees may sue their employers for retaliation under the First Amendment's Petition Clause when they petitioned the government on matters of purely private concern, contrary to decisions by all ten other federal circuits and four state supreme courts that have ruled on the issue.

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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OPINIONS BELOW

The opinion of the Third Circuit, App., *infra*, 1a-15a, is available at 2010 WL 381398. The district court's memorandum and order granting in part and denying in part petitioners' motion for summary judgment is unreported. App., *infra*, 55a-95a. The district court's memorandum and order denying petitioners' motion for a new trial and judgment as a matter of law, App., *infra*, 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. App., *infra*, 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 the right of the people * * * to petition the Government for a redress of grievances."

STATEMENT

This case concerns whether state and local government employees may sue their employers for retaliation under the Petition Clause of the First Amendment, U.S. Const. Amend. I, cl. 6, when they petition on matters of purely private concern. The Third Circuit has repeatedly held that they can. See, *e.g.*, App., *infra*, 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 below conflicts with decisions of this Court, which have held that when "a public employee speaks * * * as an employee upon matters only of personal interest, absent the most unusual circumstances, 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." *Connick* v. *Myers*, 461 U.S. 138, 147 (1982). It is also contrary to the uniform rule of other appellate courts.

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. *Department 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, 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, 1262 (7th Cir. 1988); *Gunter* v. *Morrison*, 497 F.3d 868, 872 (8th Cir. 2007); *Rendish* v. *City of Tacoma*, 123 F.3d 1216, 1220-1221 (9th Cir. 1997); *Martin* v. *City of Del City*, 179 F.3d 882, 887-889 (10th Cir. 1999); *D'Angelo* v. *School Bd.*, 497 F.3d 1203, 1211 (11th Cir. 2007); *Pratt* v. *Ottum*, 761 A.2d 313, 321 (Me. 2000); *Harris* v. *Mississippi Valley State Univ.*, 873 So. 2d 970, 984 (Miss. 2004); *McDowell* v. *Napolitano*, 895 P.2d 218, 225-226 (N.M. 1995); *Smith* v. *Bates Technical Coll.*, 991 P.2d 1135, 1145-1147 (Wash. 2000). The decision below stands contrary to the great weight of precedent and critically undermines the ability of state and local governments to manage their work forces. The Third Circuit has repeatedly refused to bring its law into accord with the uniform view of the other courts of appeals and this case represents an ideal vehicle for resolving this important and frequently recurring question.

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 (1983), this Court held that the First Amendment's Free Speech Clause does not protect a public employee from retaliation for speech on a matter of no 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 [should not] review the wisdom of a personnel decision taken by [the employer] in reaction to the employee's behavior," *id.* at 147. The decision below disregards this Court's holdings in both *McDonald* and *Connick*.

In *San Filippo* v. *Bongiovanni*, the Third Circuit refused to extend the public concern requirement that this Court applied to free speech retaliation claims in *Connick* to similar petition claims. 30 F.3d at 443. Rejecting the uniform view of all circuits that had considered the issue at the time, the *San Filippo* majority distinguished petition claims from free speech claims. "When one files a 'petition,'" the majority argued, "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 retaliation claim because 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 would have held "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 believed, (1) defied "the inexorable logic of *McDonald* v. *Smith*," *ibid.*, (2) 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 (3)] would undermine the government's special role as an employer," *ibid.*

B. District Court Proceedings

After being dismissed as the chief of police for Duryea Borough, respondent Charles J. Guarnieri filed a grievance, which ultimately led to his full reinstatement after arbitration. App., *infra*, 4a. On his first day back, the Duryea Borough Council issued eleven directives to Guarnieri, instructing him how to perform certain aspects of his job.[1] *Ibid.* He filed another grievance, which led to another

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[1] The directives instructed him, among other things, (1) not to work more than eight hours a day or more than forty hours per week, (2) to follow Duryea's purchase order system, (3) to patrol four to five hours during every eight-hour shift, (4) to submit a weekly written report, (5) to use the police car only for official business, and (6) to keep the police department offices smoke-free. App., *infra*, 57a-59a.

arbitration, which directed the Borough to modify or withdraw some of the directives. *Ibid.* Other disputes arose, as a result of which Guarnieri filed this lawsuit, claiming that the directives and other acts constituted retaliation in violation of the Petition Clause for his having filed and won his initial grievance. App., *infra*, 5a. Later the Borough denied an overtime claim by Guarnieri on the ground that he had not explained why the overtime was necessary. *Ibid.* After an investigation, however, the Pennsylvania Department of Labor directed the Borough to pay the claim, *ibid.*, and Guarnieri amended his complaint to add the denial of overtime as a retaliatory act, *ibid.*, for his having filed his grievances and this lawsuit, Am. Compl. at 9.

Petitioners, Duryea Borough and various of its officials (collectively "Duryea"), sought summary judgment on Guarnieri's retaliation claim for filing his grievance and this lawsuit. App., *infra*, 55a-56a. Duryea argued, among other things, that Guarnieri's grievances and lawsuit did not represent protected activity because they concerned purely private matters. The district court, relying on *San Filippo*, denied Duryea summary judgment on the claim. "The filing of a formal petition," it held, "is protected without regard to whether the petition addresses a matter of public concern." App., *infra*, 79a (citing 30 F.3d 424, 442 (1995)). After trial, the jury found that issuing the directives and withholding overtime constituted retaliation and awarded Guarnieri damages. App., *infra*, 5a-6a.

Duryea then moved for judgment as a matter of law on the petition claim. It renewed its argument that only petitions addressing matters of public concern could give rise to retaliation claims. The district court, however, again relying on *San Filippo*, rejected it again: "The filing of * * * a petition is protected without regard to whether the petition addresses a matter of public concern." App., *infra*, 27a. The district court noted, however, "that the holding of *San Filippo* contravenes the law of numerous other circuit courts [and that] the Supreme Court has yet to decide the split in authority between the Third Circuit and other Courts of Appeals." *Ibid.*

C. Court of Appeals Proceedings

On appeal, the Third Circuit rejected Duryea's argument that it should adopt the uniform position of the other courts of appeals. Like the district court, it followed its holding in *San Filippo*:

> This court [has] held that "a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity, even if the petition concerns a matter of purely private concern." Defendants urge us to overrule that holding because other courts of appeals disagree, *see San Filippo* v. *Bongiovanni*, 30 F.3d at 440 n. 19 (collecting cases); *Martin* v. *City of Del City*, 179 F.3d

> 882, 889 (10th Cir. 1999), but we are bound by our prior holding.

App., *infra*, 8a (quoting *Foraker* v. *Chaffinch*, 501 F.3d 231, 236 (3d Cir. 2007) (citing *San Filippo* v. *Bongiovanni*, 30 F.3d 424 (3d Cir. 1994))). The Third Circuit later denied Duryea's request for it to revisit this circuit precedent by denying its petition for rehearing and rehearing en banc. App., *infra*, 97a-98a.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's Decision Entrenches A Split Among The Circuits Over Whether The Petition Clause Protects Public Employees From Retaliation When They Petition On Matters Of Purely Private Concern

The First Amendment protects the right "to petition the Government for a redress of grievances." U.S. Const. Amend. I, cl. 1. The courts of appeals are split, however, over whether the First Amendment protects a public employee from retaliation for petitioning the government about a matter of purely private concern. Ten courts of appeals have applied the standard that this Court developed in *Connick* v. *Myers* for free speech-based retaliation claims and have held expressly that in the retaliation context "a public employee's petition, like his speech, is constitutionally protected only when it addresses a matter of public concern." *Kirby* v. *City of Elizabeth City*, 388 F.3d 440, 448 (4th

Cir. 2004); accord *Jenkins* v. *Rock Hill Local Sch. Dist.*, 513 F.3d 580, 587 (6th Cir. 2008); *Martin* v. *City of Del City*, 179 F.3d 882, 887-889 (10th Cir. 1999); *Grigley* v. *City of Atlanta*, 136 F.3d 752, 755-756 (11th Cir. 1998); *Tang* v. *Department of Elderly Affairs*, 163 F.3d 7, 11-12 (1st Cir. 1998); *Rendish* v. *City of Tacoma*, 123 F.3d 1216, 1220-1223 (9th Cir. 1997); *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993); *Hoffmann* v. *Mayor of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990); *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1261-1262 (7th Cir. 1988); *Day* v. *South Park Indep. Sch. Dist.*, 768 F.2d 696, 701-703 (5th Cir. 1985). All state courts of last resort that have addressed this question also agree that "in order for a public employee to have a viable § 1983 claim [under the Petition Clause], the petition must address a matter of public concern." *Pratt* v. *Ottum*, 761 A.2d 313, 320-321 (Me. 2000); accord *Harris* v. *Mississippi Valley State Univ.*, 873 So. 2d 970, 984 (Miss. 2004); *McDowell* v. *Napolitano*, 895 P.2d 218, 225-226 (N.M. 1995); *Smith* v. *Bates Technical Coll.*, 991 P.2d 1135, 1145-1147 (Wash. 2000).

These courts thus adhere to this Court's holding that "First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *Kirby*, 388 F.3d at 488 (citing *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985)); accord *Grigley* v. *City of Atlanta*, 136 F.3d 752, 755-756 (11th Cir. 1998); *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993). These

courts have reasoned that to recognize retaliation claims lacking any public concern under the Petition Clause, when such claims are not recognized under the Free Speech Clause, would "elevate the Petition Clause to special First Amendment status." *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1261 (7th Cir. 1988) (quoting *McDonald*, 472 U.S. at 485). As this Court has instructed, however, "[t]he Petition Clause * * * was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *Ibid.* As ten courts of appeals have recognized, "[w]ere we to adopt [the public employee's] position that the right to petition is absolute, we would be guilty of implementing precisely the sort of hierarchy of first amendment rights forbidden by *McDonald*." *Ibid.*; accord *Rendish*, 123 F.3d at 1222.

Fidelity to the principles explained in *McDonald* serves other important interests. Consistent with federalism principles, for example, the majority rule affords state and local governments necessary flexibility as employers rather than turning literally every minor employment decision into "a federal case." As the First and Second Circuits explained, "absent the most unusual circumstances, 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." *Tang* v. *Department of Elderly Affairs*, 163 F.3d 7, 12 (1st Cir. 1998); *White Plains Towing Corp.*, 991 F.2d at 1058 (citing *Connick*, 461 U.S. at 147). These courts have reasoned that "government officials should enjoy wide latitude in

managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *White Plains Towing Corp.*, 991 F.2d at 1058 (citing *Connick*, 461 U.S. at 146).

Many of these courts also have recognized that a contrary rule would permit public employees to make an end run around the public concern requirement for free speech retaliation claims simply by couching their expression in the form of a petition. Interpreting the Petition Clause to protect all public employee petitions from retaliation regardless of their purely private nature "would allow the anomalous result that a private employment dispute could be 'constitutionalized merely by filing a legal action.'" *Kirby*, 388 F.3d at 448 (citing *Altman* v. *Hurst*, 734 F.2d 1240, 1244 n.10 (7th Cir. 1984)); accord *Rendish*, 123 F.3d 1216, 1221 (9th Cir. 1997). These courts understand that "special treatment of the right to petition would unjustly favor those who through foresight or mere fortuity present their speech as a grievance rather than in some other form." *Belk*, 858 F.2d at 1262; accord *Hoffmann* v. *Mayor of Liberty*, 905 F.2d 229, 234 (8th Cir. 1990); *Day* v. *South Park Indep. Sch. Dist.*, 768 F.2d. 696, 703 (5th Cir. 1985).

The Third Circuit has repeatedly rejected the approach and reasoning of the majority and flouted this Court's precedents. It has held that "a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity, even if the

petition concerns a matter of solely private concern." App., *infra*, 8a (citing *Foraker* v. *Chaffinch*, 501 F.3d 231, 236 (3d Cir. 2007); *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 435-442 (3d Cir. 1994)). The Third Circuit has justified its rule by pointing to the "distinct origin of the Petition Clause" and has criticized this Court for "ignoring the varied histories of the right to petition and the freedoms of speech, religion, and the press." *Foraker*, 501 F.3d at 236 (citing *McDonald*, 472 U.S. at 485). While acknowledging *McDonald*, the Third Circuit rejects the essential logic of that decision and instead argues that "the right to petition has a pedigree independent of—and substantially more ancient—than the freedoms of speech and press." *San Filippo*, 30 F.3d. at 443. The Third Circuit contends that providing those who petition broader protection from retaliation than those who speak "is legitimate because the Petition Clause is not merely duplicative of the Free Speech Clause." *Foraker*, 501 F.3d at 236. According to the Third Circuit, "there is an independent reason—a reason of constitutional dimension—to protect an employee lawsuit or grievance if it is of the sort that constitutes a 'petition' within the meaning of the first amendment." *San Filippo*, 30 F.3d at 441-442.

The Third Circuit maintains that these differences in origin, pedigree, and purpose "correlate[] to * * * separate analysis for each clause." *Foraker*, 501 F.3d at 237. In the Third Circuit's view, "[w]hereas the Free Speech Clause protects the right to 'wide-open' debate, the Petition Clause encompasses only activity directed to a

government audience." *Ibid.* Thus, "[w]hen one files a 'petition' one is not appealing over government's head to the general citizenry * * * one is addressing the government and asking government to fix what, allegedly, government has broken or has failed in its duty to repair." *Id.* at 236 (quoting *San Filippo*, 30 F.3d at 442). In this view, the "[P]etition [C]lause imposes on the [government] an *obligation* to have at least some channel open for those who seek redress for perceived grievances" and imposing a public concern requirement for retaliation in public employment cases would close those channels of communication to such an extent that it would render the Petition Clause a "dead letter." *Id.* at 247, 249 (Greenberg, J., concurring) (emphasis added).

The Third Circuit has repeatedly rejected requests to bring its view into line with the majority's. See, *e.g.*, App., *infra*, 8a; *Foraker*, 501 F.3d at 236; *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). By denying the petition for rehearing en banc in this case, it has confirmed that it will not revisit the issue on its own. See App., *infra*, 99a. Any review must come from this Court.

The long-standing split on this important issue warrants this Court's review. As the Third Circuit observed, this Court "has not discussed the scope of the constitutional right to petition in the context of an allegedly retaliatory discharge of a public employee." *San Filippo*, 30 F.3d at 435. It is,

moreover, a recurring question of great importance. As discussed in greater detail below, *infra*, Parts III(B) and IV, it affects the rights of a large segment of the population—all state and local employees—as well as the ability of state and local governments to manage their employees efficiently and without intrusive supervision from the federal courts.

II. The Third Circuit's Rule Violates This Court's Holding In *McDonald* v. *Smith* That The Petition Clause Protects Expression No More Than Does The Free Speech Clause

The Third Circuit's rule contravenes fundamental First Amendment principles this Court set forth in *McDonald* v. *Smith*, 472 U.S. 479 (1985). As this Court recognized there, neither the rights of petition nor speech should be given priority over the other; rather, they "are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *Id.* at 485 (citing *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945)).

The Court spoke unanimously on this point. As Justice Brennan elaborated in his concurring opinion, the "essential unity" of the First Amendment rights counsels against interpreting the Petition Clause as conferring an absolute privilege in a context in which the Free Speech Clause does not. *McDonald*, 472 U.S. at 489 (Brennan, J., concurring). "[T]here is no persuasive reason," he ex-

plained, "for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a letter to the President of the United States." *Id.* at 490 (Brennan, J., concurring).

The Third Circuit's rule disrupts this fundamental parity. So long as a public employee formalizes in a petition a workplace complaint of no interest to the public, which he can do through the commonplace step of filing a grievance, the First Amendment protects him from retaliation. If he makes the same complaint through less formal speech, to which this Court's *Connick* standard applies, it does not.

Standing alone, *McDonald*'s logic reveals the error in the Third Circuit's approach and leaves no doubt that *Connick's* public concern requirement must apply to petitions, as every other court of appeals addressing the issue has held. See pp. 8-9, *supra*.

III. The Third Circuit's Rule Violates The Principles Of *Connick* v. *Myers*

A. The Rationales This Court Identified In *Connick* For Protecting Public Employee Speech From Retaliation Only When It Implicates A Matter Of Public Concern Apply Equally To Petitions

Even if this Court had not held in *McDonald* that speech and petitions should be treated alike, the particular First Amendment principles that compel applying *Connick's* public-concern requirement to free speech apply equally to petitions. In *Engquist* v. *Oregon Dep't of Agric.*, 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.

128 S. Ct. 2146, 2152 (2008). In *Engquist*, these principles required rejecting "class-of-one" equal

protection claims in public employment. *Id.* at 2148-2149. Here, they require that public employee petitions address a matter of public concern before receiving protection from retaliation.

Starting with the second principle, the public concern requirement is indispensible if the retaliation claim is actually to implicate concerns at the heart of the First Amendment. In protecting from retaliation petitions addressing matters of purely private concern, the Third Circuit has mistakenly distinguished between the purposes of the Free Speech and Petition Clauses. See, *e.g.*, *Foraker*, 501 F.3d 231, 237 (3d Cir. 2007) ("Whereas the Free Speech Clause protects the right to 'wide-open' debate, the Petition Clause encompasses only activity directed to a government audience. This distinction correlates to the separate analysis for each clause."). The First Amendment Free Speech and Petition Clauses, however, share a singular purpose: to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Connick*, 461 U.S. at 145 (quoting *Roth* v. *United States*, 354 U.S. 476, 484 (1957); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964)); see also *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey* v. *Brown*, 447 U.S. 455, 467 (1980) ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'")). It follows that expression that most facilitates this aim—expression on matters of public concern—"is entitled to special protection" under the First

Amendment. *Connick*, 461 U.S. at 145. The same cannot be said of expression on purely private matters. See *Rendish*, 123 F.3d 1216, 1223 (9th Cir. 1997) ("[The Third Circuit's approach] diverges from the Supreme Court's teachings that the primary function of the First Amendment is to facilitate participation in a free political process and that the First Amendment extends its guarantees to public employees in order to encourage such participation.").

This Court has long recognized that the government's special interests as employer warrant limiting protection of public employee speech to matters of public concern. In particular, this Court has held that, when a public employer has retaliated for employee speech, "[t]he problem * * * is to arrive at a balance between 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* v. *Board of Educ.*, 391 U.S. 563, 568 (1968) (emphasis added).

In *Connick*, this Court further held that when speech does not address a matter of public concern courts should not even engage in *Pickering* balancing. 461 U.S. at 146 ("[I]f [the employee speech in question] cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for [retaliation]."). This type of speech thus enjoys no First Amendment protection from retaliation. When

speech addresses purely private concerns, "government officials should enjoy wide latitude in managing their offices." *Ibid.* As *Connick* reasoned,

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

Id. at 151 (quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

The particular rationales that justified the public concern requirement in *Connick* apply equally when public employee expression takes the form of a petition. First, to the extent that a government employee's speech is disruptive, formalizing it by filing a written grievance or lawsuit—and thus engaging the government in a time-consuming formal dispute—would make it only more so. Second, speech and petitions should receive equal protection from public employer retaliation because the nature of the employer-employee relationship is the same, whatever the form of expression. Indeed, a public employer acts no less as an *employer* when it responds to expression in the form of a petition.

The same reasons *Connick* applied the public concern requirement to speech apply to petitions. When two types of expression, protected by the same constitutional amendment, give rise to similar consequences, no reason supports protecting one more than the other. Petitions should receive the same level of First Amendment protection from government employer retaliation as speech—no more, no less.

B. The Dangers Of Constitutionalizing Public Employment Law And Creating An End Run Around *Connick* Strongly Support Recognizing Only Those Retaliation Claims Involving Petitions On Matters Of Public Concern

Recognizing a cause of action for *every* public employee's claim of retaliation for filing employment grievances and making other formal employment complaints would constitutionalize many garden-variety employment disputes that rightfully belong in state court (if in any judicial forum). As this Court acknowledged in *Connick*, "it would indeed be a Pyrrhic victory for the great principles of free expression if the [First] Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance." 461 U.S. at 154. "[W]hile the First Amendment invests public employees with certain rights," this Court stated in *Garcetti* v. *Ceballos*, "it does not empower them to

'constitutionalize the employee grievance.'" 547 U.S. 410, 420 (2006) (quoting *Connick*, 461 U.S. at 154); see also *Engquist*, 128 S. Ct. 2146, 2156 (2008).

There are limits to what the First Amendment protects, and a public employee's interest in preserving his personal vision of his job deservedly rests outside the scope of protection. See *Board of Regents* v. *Roth*, 408 U.S. 564, 575 n.14 (1972) ("Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest."). Just as this Court has declined to convert the Fourteenth Amendment into a "font of tort law," *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 768 (2005) (citing *Parratt* v. *Taylor*, 451 U.S. 527, 544 (1981) (quoting *Paul* v. *Davis*, 424 U.S. 693, 701 (1976))), the Petition Clause must likewise not become a font of public employment law. Rather, personal grievances and petitions "are best left to internal procedures established by employers and employees or * * * where such procedures are inadequate, through state court adjudication." *Altman* v. *Hurst*, 734 F.2d 1240, 1244 (7th Cir. 1984).

By confounding petitioners' actions with violation of a constitutional right, the decision below permits federal litigation on all sorts of petitions and grievances. As other courts of appeals have recognized, "permitting [retaliation claims that lack a matter of public concern] would open the federal floodgates to all manner of petty personal disputes." *Altman*, 734 F.2d at 1244. This Court has already

rejected protecting speech exercised as part of a public employee's official duties because it "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business." *Garcetti*, 547 U.S. at 423. "This displacement of managerial discretion by judicial supervision finds no support in [this Court's] precedents." *Ibid.* Simply put, a "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).

Just as with speech, special protection for petitions of purely private concern would involve federal courts in everyday office management. It would "demand 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. As this Court explained in *Connick*, "[p]erhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for dismissal are alleged to be mistaken or unreasonable." 461 U.S. at 146-147 (citing *Board of Regents* v. *Roth*, 408 U.S. 564; *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Bishop*, 426 U.S. at 349-350). When, as here, the alleged retaliation amounts to far less than dismissal—and, indeed, involves *ongoing supervision* of an

employee—federal judicial involvement is even less warranted.

Institutional and state remedies efficiently resolve workplace disputes without requiring government employers to waste valuable time and resources defending constitutional claims in federal court. Abandoning the public concern requirement displaces these remedies and allows many ultimately fruitless claims to survive a motion to dismiss in federal court. "[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*, 128 S. Ct. at 2157. When a petition actually touches upon a matter of public concern, the federal courts' and public employers' time and attention might be warranted; when it does not, however, federal courts will waste valuable public resources, and plaintiffs will be able to assert "largely groundless claim[s] to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the * * * process will reveal relevant evidence." *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975)). When the party facing liability in a retaliation case is a government employer, time-consuming litigation carries great costs to the efficient operation of local government offices—to the detriment of the offices' provision of services to citizens.

Relaxing *Connick's* public concern requirement in petition cases would, moreover, undermine *Connick* itself. By favoring petitions over speech, the Third Circuit's rule creates an easy end run around *Connick*'s public concern requirement. In *Connick*, for example, this Court held that most items in a questionnaire distributed by a government employee to her colleagues did not involve any matter of public concern and were thus unprotected. 461 U.S. at 148. If petitions need not involve matters of public concern to receive protection, then *Connick* loses much of its force. Had she not been terminated immediately, the plaintiff in *Connick* could simply have filed her questionnaire in a grievance in order to have received First Amendment protection. In other words, abolishing the public concern requirement for petitions gives public employees a perverse incentive to formalize any expression of complaint in a grievance, lawsuit, or other means of petition in order to escape *Connick's* strictures.

As recognized by numerous courts that have rejected the Third Circuit's reasoning, it makes no sense "to elevate * * * an employee's complaint [on a personal matter] to the level of constitutional protection merely because she has asserted it in the form of a grievance." *Day* v. *South Park Indep. Sch. Dist.*, 768 F.2d 696, 703 (5th Cir. 1985); accord *Kirby* v. *City of Elizabeth City*, 388 F.3d 440, 448 (4th Cir. 2004); *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1262 (7th Cir. 1988); see also *San Filippo*, 30 F.3d at 449 (Becker, J., concurring and dissenting) (warning that recognition of Petition Clause claims on matters

of purely private concern would represent "an invitation to the wary to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined" and also would "undermine the government's special role as an employer"). The mere form an employment complaint takes should not determine the scope of First Amendment protection.

IV. This Case Presents An Ideal Vehicle For Resolving A Recurring And Important Issue Of Constitutional Law

This Court has long recognized that government's overall effectiveness rests in large part on its ability to manage its employees efficiently. See, *e.g.*, *Ex parte Curtis*, 106 U.S. 371, 373 (1882) (noting "[t]he evident purpose of congress * * * to promote efficiency and integrity in the discharge of official duties and to maintain proper discipline in the public service[, which] is within the just scope of legislative power"); *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part and concurring in the result in part) (noting "the public's interest [in] the maintenance of employee efficiency and discipline[, which] are essential if the Government is to perform its responsibilities effectively and economically."); *Connick*, 461 U.S. at 150-151. Most recently, in *Engquist*, this Court noted "the common-sense realization that government offices could not function if every employment decision became a constitutional matter." 128 S. Ct. at 2156 (quoting *Connick*, 461 U.S. at 143).

The Third Circuit's rule, however, does exactly that. By constitutionalizing many everyday disputes between public employers and employees, it turns the First Amendment into "a font of [employment law]." *Parratt* v. *Taylor*, 451 U.S. 527, 544 (1981). The rule below allows public employees to take state and local governments to federal court over run-of-the-mill employment disputes. This is far from a theoretical concern. District courts within the Third Circuit have routinely allowed public employees to "make a federal case" out of claims of alleged retaliation arising from filings relating to garden-variety disputes, such as the filing of (1) a municipal court criminal complaint for assault growing out of a fight outside a bar, *McGovern* v. *City of Jersey City*, No. 98-5186 (JLL), 2007 WL 2893323 (D.N.J. Sept. 28, 2007); (2) 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); (3) a workman's compensation claim for an injured shoulder, *Moore* v. *Darlington Twp.*, No. 08-1012, 2010 WL 597989 (W.D. Pa. Feb. 17, 2010); and (4) a tort claim notice involving alleged dress code violations, *Marrero* v. *Camden County Bd. Of Soc. Services*, 164 F. Supp. 2d 455 (D.N.J. 2001). Indeed, in the present case, the Third Circuit made a federal case out of retaliation for the filing of a grievance concerning, among other things, the Borough's right to designate a building smoke-free, set an employee's work hours, and demand that the Borough's only

full-time police officer manage traffic at the only school in town at the beginning and end of the school day, App., *infra*, 57a-59a.

The sheer number of state and local employees worsens the burden such claims impose on both public employers and federal courts. The Third Circuit alone contains an estimated 1,050,316 full-time state and local employees, who are free to bring suits alleging retaliation for the filing of an employment grievance implicating no public concern. United State Census Bureau, 2008 Annual Survey of State and Local Government Employment and Payroll, http://www.census.gov/govs/apes/ (last accessed April 29, 2010) (noting Delaware has 43,913, New Jersey 465,049, and Pennsylvania 529,454 public employees, respectively); U.S. Dep't of Labor, Bureau of Labor Statistics, Database on the Virgin Islands, http://www.bls.gov/data (noting Virgin Islands have 12,900). More broadly, the question presented affects the rights of all 14,857,827 state and local employees across the country, United States Census Bureau, 2008 Annual Survey of State and Local Government Employment and Payroll, and the efficient functioning of state and local governments everywhere.

This case, moreover, represents an ideal vehicle for resolving the circuit split. The parties fully argued the issue at every stage below and both the court of appeals and the district court expressly addressed it. See App., *infra*, 8a, 27a, 78a-79a. The issue involves a pure question of law and is squarely presented by the petition.

The Third Circuit, moreover, has shown it has no intention of resolving this split on its own. It has repeatedly acknowledged that its rule conflicts with other circuits, see, *e.g.*, *San Filippo*, 30 F.3d at 439-440; App., *infra*, 8a, and it has consistently denied requests for rehearing en banc of cases concerning this question, see *San Filippo*, 30 F.3d 424, *petition for rehearing en banc denied* Aug. 18, 1994; *Foraker*, 501 F.3d 231, *petition for rehearing en banc denied* Oct. 10, 2007; App., *infra*, 97a. Worse still, the Third Circuit's clear and deeply entrenched position discourages public employers from litigating the issue and seeking appeal. Under the Third Circuit's rule, state and local governments know retaliation claims will survive a motion to dismiss, likely require discovery, and entail possible trial. Faced with that prospect, they will not only fail to press for the rule to be reconsidered, but also will face overwhelming pressure to settle claims in order to avoid the expense and disruption of fighting them on other grounds. Because of such perverse litigation incentives, a better vehicle to resolve the split and bring Third Circuit law into conformity with *McDonald* and *Connick* is highly unlikely to come before this Court.

In light of the conflict of the decision below with *McDonald*, *Connick*, and other decisions of this Court and with the decisions of all the ten other federal courts of appeals and of the four state supreme courts that have addressed the issue, this Court should consider disposing of the case summarily. Vacating the decision below and

remanding the case to the Third Circuit for proceedings consistent with a per curiam opinion holding that state and local employees cannot sue their employers for retaliation under the First Amendment's Petition Clause unless the petitions involved matters of public concern would be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for oral argument or, in the alternative, the petition for a writ of certiorari should be granted, the decision below vacated, and the case remanded for proceedings consistent with a per curiam opinion holding that state and local employees cannot sue their employers under the Petition Clause unless their petitions involved matters of public concern.

Respectfully submitted.

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