No. 09-1476

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

**BRIEF OF THE STATE AND LOCAL LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## INTEREST OF AMICUS CURIAE

*Amici* are organizations whose members include municipal, county, and state governments and officials throughout the United States.[1] These organizations regularly file *amicus* briefs in cases that, like this one, raise issues of vital concern to the nation's cities, counties, and states.

In *Connick v. Myers*, 461 U.S. 138 (1985), this Court held that public employees' speech is protected under the First Amendment only when it involves a matter of public concern.

In the present case, the Court is asked to decide whether the Third Circuit—in disagreement with every other circuit court and every state court of last resort that has considered the question—correctly held that the First Amendment's Petition Clause nonetheless protects a private workplace grievance that does not implicate a matter of public concern merely because the grievance is aired through some formal dispute resolution mechanism.

If this Court adopts the Third Circuit's view, it will open the door for state and local government employees to make "a federal case" out of every garden variety employment dispute, seriously undermining the purpose and effect of the rule the Court recognized in *Connick*.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

The resolution of this question will impact every state and local government because of its potential to unleash a torrent of federal lawsuits by public employees against their government employers based on purely private employment matters. For this reason, the amici have a substantial interest in this case and a unique perspective on its proper resolution.

The individual amici organizations are as follows:

The National Conference of State Legislatures (NCSL) is a bipartisan organization that represents state legislatures throughout the United States. One of NCSL's core missions is to improve the quality and effectiveness of those bodies.

The National Governors Association (NGA) is the bipartisan organization of the Nation's governors. Founded in 1908, NGA is the governors' collective voice. Its members are the governors of the 48 States, two commonwealths, and three territories.

The Council of State Governments (CSG) is a non-partisan, non-profit organization that was formed in 1933 to serve the executive, judicial, and legislative branches of state government through leadership education, research, and information services. Its members include every elected and appointed state and territorial official in the United States. CSG's mission is to provide a region-based forum for fostering the exchange of insights and ideas to help state officials shape public policy.

The National League of Cities (NLC) was established in 1924 by and for reform-minded state municipal leagues. Today it represents more than 19,000 cities, villages, and towns across the country. NLC's mission is to strengthen and promote cities as centers of opportunity, leadership, and governance; to pro-

vide programs and services that enable local leaders to better serve their communities; and to function as a national resource and advocate for the municipal governments it represents.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's counties. It advances county-related issues with a unified voice before the federal government and assists counties in finding and sharing solutions.

The International City/County Management Association is a non-profit professional and educational organization for chief appointed managers, administrators, and assistants in cities, towns, counties, and regional entities. Its mission is to create excellence in local governance by advocating and developing the professional management of local governments worldwide.

The United States Conference of Mayors (USCM) is the official non-partisan organization of cities with populations of 30,000 or more. Among UCSM's primary roles are promoting the development of effective national urban/suburban policy, strengthening federal-city relationships, and ensuring that federal policy meets urban needs.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court held that when a government employer disciplines an employee for speech that is not a "matter of public concern," such discipline is not considered an

abridgement of the employee's First Amendment rights because the employee's speech is not protected by the First Amendment (the "*Connick* rule"). The *Connick* rule was crafted to protect government officials from the fear that their routine employment decisions would subject them to constitutional torts. *Id.* at 143. The *Connick* rule therefore keeps those officials on the same plane as nongovernmental employers, who are free to discipline employers without any such fear. *Id.* at 147.

The Third Circuit has held, contrary to settled law in the vast majority of the country, that the *Connick* rule does not apply when an employee is disciplined for "petitioning" activity rather than "speech." Respondent asks that this Court affirm the Third Circuit, thereby carving out petition claims from the ambit of the *Connick* rule. As Petitioners' brief demonstrates, such a carve-out is untenable because **[ADD based on what Petitioners say in their brief]**.

The Third Circuit's carve-out becomes even more unsupportable in light of the fact that the *Connick* rule is only one part of a larger body of law from this Court aimed at safeguarding the ability of government officials to perform their duties in an effective manner. This Court's jurisprudence governing the qualified immunity of government officials is motivated by the same concern. And this Court has applied qualified immunity to all constitutional torts, regardless of the source of the allegedly infringed constitutional right, based on considerations that argue just as strongly for consistent application of the *Connick* rule to all First Amendment claims, irres-

pective of whether they arise from the Free Speech Clause or The Petition Clause.

By forcing public officials to make employment decisions based on a guess as to whether a disgruntled employee is "petitioning" or just "speaking," the Third Circuit has exposed such officials to the very legal uncertainty that this Court consistently has sought to minimize, including through its qualified immunity decisions. There is no sense in undercutting this Court's demonstrated commitment to allowing public employers to perform their jobs free from deterrence by litigious plaintiffs based on the Third Circuit's arbitrary distinction between petition-based and speech-based First Amendment claims. The Third Circuit's decision should be reversed.

## ARGUMENT

### I. THE THIRD CIRCUIT'S DECISION UNDERMINES THIS COURT'S BROAD JURISPRUDENCE PROTECTING PUBLIC OFFICIALS FROM LITIGATION THAT WOULD INTERFERE WITH THE PERFORMANCE OF THEIR DUTIES.

#### A. *Connick* And Its Progeny Are Based On The Recognition That Public Employers Could Not Function If All Of Their Decisions On Personnel Matters Were Subject To Federal Judicial Review.

Until the mid-20th century, "a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick*, 461 U.S. at 143. This Court departed from that

position in a series of decisions culminating in *Pickering v. Board of Education of Township High School District 205, Will County, Ill.*, in which the Court held that the First Amendment protects a public employee's right to speak on issues of public importance. 391 U.S. 563, 574 (1968). At the same time, this Court recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those that it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568. Accordingly, this Court emphasized that even where a public employee is "commenting upon matters of public concern," the employee's right to do so must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

Over the next fifteen years, this Court repeatedly stressed the importance of safeguarding the interests of public employers for the reasons stated in *Pickering*. *See, e.g.*, *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 564 (1973) (upholding constitutionality of Hatch Act's prohibition against active political campaigning by federal employees); *Kelley v. Johnson*, 425 U.S. 238, 244-245 (1976) (upholding police department's personal appearance standards).

It was "the common sense realization that government offices could not function if every employment decision became a constitutional matter" that led this Court to establish the *Connick* rule, limiting public employees' First Amendment rights under *Pickering* to speech on matters of public concern. *Connick*, 461 U.S. at 143; *accord, e.g.*, *Rutan v. Re-*

*publican Party of Ill.*, 497 U.S. 62, 99 (1990); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989). As this Court explained in *Connick*, "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." 461 U.S. at 147. Like their private counterparts, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146-147 (First Amendment "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state"); *accord, e.g.*, *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 600 (2008). In the Court's eyes, importantly, this "wide latitude" required "a wide degree of deference to the employer's judgment," pursuant to which government employers can discipline employees for speech acts based simply on the risk of a possible disruption, without having established that a disruption will actually take place. *Connick*, 461 U.S. at 152 ("we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action").

This Court echoed *Connick*'s concern with protecting public officials in subsequent cases. In *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, for example, this Court recognized that "[t]he federal workplace, like any place of employment, exists to accomplish the business of the employer." 473 U.S. 788, 805 (1985) (upholding government's limitations on employees' participation in charity drive because "[t]he Government, as an employer, must have wide

discretion and control over the management of its personnel and internal affairs") (internal quotations omitted). Two years later, in *Rankin v. McPherson*, this Court recognized that "public employers are employers, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." 483 U.S. 378, 384 (1987).

Despite the Court's longstanding support of public employers' ability to manage their personnel, it was not until *Waters v. Churchill* that the Court squarely answered the question: "What is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?" 511 U.S. 661, 671 (plurality opinion of O'Connor, J.). The *Waters* court held that the *Connick* rule bars a public employee's free speech claims as long as the employer reasonably *believed* that the speech was not about a matter of public concern, *even if that belief was mistaken*.[2] In an extended review of

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[2] The four-Justice plurality, joined by two dissenting Justices, held that an employer's mistaken belief that an employee's speech was not of public concern would only trigger the *Connick* rule if that belief was reasonable. *Id.* at 677-79 (plurality opinion), 685 (Souter, J., concurring) (noting that the two dissenting Justices shared this position), 697 n.4 (Stevens, J., dissenting). The three remaining Justices—Justices Scalia, Kennedy and Thomas—joined the plurality in holding that the *Connick* rule applies to an employer's "mistaken belief," but would have applied the *Connick* rule to *any* instance of an employer's mistaken belief, whether the mistake was reasonable or not. *Id.* at 686-694.

this Court's jurisprudence governing the First Amendment rights of public employees, the four-Justice *Waters* plurality noted that even when employee speech is "nondisruptive" or "of value to the speakers and the listeners," this Court has "declined to question government employers' decisions on such matters." *Id.* at 674. "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Id.* at 674-675.

In the Court's view, a contrary conclusion could surround a public official with an atmosphere of doubt, in which she "would have to ask not what conclusions she, as an experienced professional, can draw from the circumstances, but rather what conclusions a jury would later draw." *Id.* at 676.

Over the last fifteen years, this Court has not swerved from the principles animating the rules set forth in *Connick* and *Waters*. In *City of San Diego, Cal. v. Roe*, for example, this Court observed that the absence of the *Connick* rule "could compromise the proper functioning of government offices" and upheld a police department's imposition of discipline on an officer for posting an online masturbation video. 543 U.S. 77, 82-83 (2004) (per curiam). Even more recently, in *Garcetti v. Ceballos*, this Court noted the "emphasis of our precedents on affording government employers sufficient discretion to manage their operations," and echoed the *Connick* court's warnings against empowering public employees to "'constitutionalize the employee grievance.'" 547 U.S. 410, 417-423 (2006) (quoting *Connick*, 461 U.S. at 154)

(holding that a deputy district attorney could be disciplined under the *Connick* rule for speech in an office memorandum made pursuant to his professional duties). In sum, the creation and evolution of the *Connick* rule has consistently been guided by the Court's recognition that public officials cannot function effectively if they are constantly threatened by the specter of constitutional litigation over their employment decisions.

### B. Like the *Connick* Rule, The Doctrine Of Qualified Immunity Was Established To Ensure That Public Officials Can Function Effectively.

This Court first articulated the doctrine of "qualified immunity" in *Scheuer v. Rhodes*, 416 U.S. 232, 247-248 (1974) (abrogated in part by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). As initially conceived, an official enjoyed qualified immunity when she committed a constitutional violation based on a "good-faith belief" that her conduct was legal, as long as there were "reasonable grounds for the belief formed at the time and in light of all the circumstances." *Id.* at 247-248.[3]

In *Scheuer*, this Court recognized "two mutually dependent rationales" for the historical existence of official immunity: "(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his

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[3] The *Scheuer* court distinguished qualified immunity from "absolute" immunity, under which no inquiry was made into the official's belief or its basis. *Id.* at 242-243.

position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.* at 240. Implicit in the second of these rationales "is a recognition that [public officials] may err," and "that it is better to risk some error and possible injury from such error than not to decide or act at all." *Id.* at 242; *see also id.* at 245 ("a policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does") (internal quotations omitted).

In *Wood v. Strickland*, 420 U.S. 308 (1975), this Court explained that denying qualified immunity to public officials would "unfairly impose upon [them] the burden of mistakes made in good faith in the course of exercising [their] discretion within the scope of [their] official duties," and "undoubtedly deter even the most conscientious [official] from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the [public]." *Id.* at 319-320. Indeed, the "most capable candidates . . . might be deterred" altogether "from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure." *Id.* at 320. *Wood* nevertheless held, in line with *Scheuer*, that a qualified immunity defense could be overcome in one of two ways: *either* (a) objectively, by showing that the defendant should have known of the illegality of her act based on clearly established law at the time; *or* (b) subjectively, by showing that the defendant had "the malicious intention to cause a deprivation of constitutional rights." *Id.* at 321-322.

In 1982, the Court expanded the qualified immunity doctrine to better serve the goal of protecting public officials from the risk of liability for decisions made in the performance of their duties by eliminating the subjective option for defeating a qualified immunity defense. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-819 (1982). The *Harlow* Court observed that a meritless suit against public officials would cause harm "not only to the defendant officials, but to society as a whole," including "the expenses of litigation, the diversion of official energy from pressing public issues, . . . the deterrence of able citizens from acceptance of public office," and "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties." *Id.* at 814 (internal quotations omitted). Because subjective good faith is often an issue of fact for a jury, allowing qualified immunity to be defeated by an inquiry into a defendant's subjective motives would increase the risk that a meritless suit could continue all the way through trial. *Id.* at 815-816. This Court reasoned that removing this risk "should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.* at 818; *accord Saucier v. Katz*, 533 U.S. 194, 202 (2001) (abrogated in part on other grounds in *Pearson v. Callahan*, 129 S. Ct. 808 (2009)).

Accordingly, *Harlow* reformulated the qualified immunity inquiry so that the only relevant factor is whether a public official's conduct was objectively reasonable in that it did not violate "clearly established law" at the time of her decision. 457 U.S. at 818; *see also Mitchell v. Forsyth*, 472 U.S. 511, 525-

526 (1985) ("The conception animating the qualified immunity doctrine as set forth in *Harlow* . . . is that 'where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences'") (quoting *Harlow*, 457 U.S. at 819 (internal quotations omitted)).

After *Harlow*, the Court's qualified immunity jurisprudence has increasingly focused on the fact that public officials can be chilled not only by the fear of meritless suits, but also by the concern that they might unknowingly commit constitutional violations when the governing legal rules are uncertain. In *Davis v. Scherer*, for example, the Court "recognized that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." 468 U.S. 183, 195 (1984); *accord Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (qualified immunity doctrine's "accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued") (internal quotations omitted); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (question of whether applicable law was clearly established at time of alleged constitutional violation must be evaluated based on a specific conception of the violated right, as liability based on a generalized conception would "mak[e] it impossible for officials reasonably to anticipate when their conduct may give rise to liability for damages") (internal quotations omitted).

Even this Court's decisions limiting qualified immunity demonstrate the Court's concern with protecting government officials from the disruption and deterrence caused by litigation based on their decisions made in the performance of their duties. Twice, the Court has refused to extend qualified immunity to private actors, reasoning both that "extending *Harlow* qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service," and "the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes." *Wyatt v. Cole*, 504 U.S. 158, 167-168 (1992)); *see also Richardson v. McKnight*, 521 U.S. 399, 408-409 (1997) (fear of suit will not deter private prison guards from doing their jobs aggressively because of countervailing market pressures). Other defendants have been equally unsuccessful in invoking qualified immunity in cases where the underlying rationales were inapposite. *See, e.g.*, *Ryder v. United States*, 515 U.S. 177, 185 (1995) (refusing to deny injunctive remedy based on qualified immunity principles because "[q]ualified immunity specially protects public officials from the specter of damages liability for judgment calls made in a legally uncertain environment"); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478-479 (2003) (defendant's alleged status as instrumentality of foreign state did not allow it to avoid tort liability because foreign sovereign immunity is not based on the same concerns about chilling official behavior that undergird qualified immunity).

A comparison of the *Connick* rule and the qualified immunity doctrine demonstrates that both care-

fully balance the rights of individuals to vindicate legitimate constitutional claims against the public's need for assertive and efficient government action. Both seek to give government officials wide latitude in performing their duties in order to minimize costly disruption from courts, even to the extent of shielding such officials when their conduct is not demonstrably justified. *Compare, e.g.*, *Connick*, 461 U.S. at 146-147, 152 ("we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action"), *with Hunter*, 502 U.S. at 229 (qualified immunity doctrine's "accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued") (internal quotations omitted). And both highlight the damage caused when officials do not have certainty about what they can and cannot do in the performance of their duties. *Compare, e.g.*, *Waters*, 511 U.S. at 676, *with Anderson*, 483 U.S. at 639.[4]

[4] Amici recognize that qualified immunity does not apply to local governments, as opposed to the officials who work for such entities. *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980). Amici are not suggesting that qualified immunity applies to the Borough of Duryea. Their point is rather to put *Connick* into a larger context by examining the principles that underlie both the *Connick* rule and the qualified immunity doctrine.

### C. The Third Circuit's Arbitrary Distinction Between Public Employees' Speech And Petition-Based First Amendment Claims Exposes Public Officials To The Very Impediments To The Performance Of Their Duties From Which This Court Consistently Has Sought To Protect Them.

That the *Connick* rule is part of a larger body of law that shields public officers from litigation is not simply a point of academic interest. It shows that the Third Circuit erred in refusing to apply the *Connick* rule to petition-based retaliation claims for several reasons in addition to those described by Petitioners.

***First***, in *San Filippo v. Bongiovanni*—the opinion in which the Third Circuit first refused to apply *Connick* to petition claims—the Third Circuit primarily justified its conclusion by distinguishing the First Amendment's Free Speech and Petition Clauses. 30 F.3d 424, 439-443 (3d Cir. 1994). But, even if the Third Circuit's proffered distinctions were valid—and we agree with Petitioners that they are not, *see infra*—they do not explain why petition claims are different from the wide variety of other types of claims against which public officials are protected by qualified immunity.

***Second***, this Court's caselaw governing qualified immunity makes clear that legal standards for government officials should be applied "'across the board,'" rather than in a differentiated fashion depending on the employee interests in dispute. *Anderson*, 483 U.S. at 642 (quoting *Harlow*, 457 U.S. at 821 (Brennan, J., concurring)); *accord Saucier*, 533 U.S.

at 203. The plaintiffs in *Anderson* argued that qualified immunity should not apply to Fourth Amendment-based claims because such claims already implicate "unreasonable" conduct by defendants, or alternatively that certain subsets of such claims should be excepted from immunity based on common-law principles. 483 U.S. at 642-645. The Court rejected this argument, noting that it had "been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated." *Id.* at 642. "An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide." *Id.* Finding that the *Anderson* plaintiffs could not carry the "heavy burden" of justifying why Fourth Amendment claims should be exempted from the qualified immunity doctrine, the Court refused those exceptions. *Id.* at 642-645; *accord Saucier*, 533 U.S. at 203 (refusing to except excessive force claims from qualified immunity).

The same concerns underpinning the need for "across-the-board" application of qualified immunity—namely, a desire to give public officers consistent and straightforward legal guidelines for their actions—argue just as strongly for "across-the-board" application of the *Connick* rule. Government employers should not be forced to fine-tune their management of personnel based on "the precise character of the particular rights alleged to have been violated," *Anderson*, 483 U.S. at 642, whether those rights spring from the Speech or Petition Clause.

***Third***, especially in light of the "heavy burden" described above, the Third Circuit in *San Filippo* contended that petition claims are different from speech claims because "when one files a 'petition' 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." 30 F.3d at 441-442. This argument suffers from at least three fatal flaws, however. As an initial matter, the Third Circuit's starting premise—that an employee would necessarily be petitioning the *same* government that is employing her—is false: often, for example, a *state* or *local* government employee will be petitioning a *federal* agency such as the EEOC, in which case the employee *is* in fact going over her employer's head. *See, e.g.*, *Hill v. Borough of Kutztown*, 455 F.3d 225, 242 n.24 (3d Cir. 2006) (noting that borough manager's complaint to EEOC would have qualified as petitioning activity). A second problem with the *San Filippo* court's argument is that it sweeps too broadly; it is undisputed that employee *speech* directed toward an employer is covered by the *Connick* rule. *See, e.g.*, *Garcetti*, 547 U.S. at 414 (employee disciplined for memorandum directed to supervisors). This undercuts the assertion that *petitions* should be exempt from the *Connick* rule merely because they are sometimes also directed toward the employer. Finally, and perhaps most importantly, the Third Circuit's carve-out of petition claims from *Connick*'s ambit "is 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," an end-run around *Connick* that "would undermine the government's special role

as an employer." *San Filippo*, 30 F.3d at 449 (Becker, J., dissenting).[5]

***Fourth***, the end-run decried by Judge Becker is especially illogical and pernicious given this Court's decades-old admonition that petition and free speech rights "are inseparable." *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances"); *accord United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) (right to petition is "intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press"); *Nat'l Ass'n for Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982); *see also McDonald v. Smith*, 472 U.S. 479, 482 (1985) ("The right to petition is cut from the same cloth as the other guarantees of that Amendment").

Because of their inseparable nature, claims under the Petition and Speech Clauses "are related and generally subject to the same constitutional analysis." *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985) (citing *Claiborne Hardware*, 458 U.S. at 911-915); *see also Bill Johnson's Restaurants, Inc. v. Nat'l Labor Relations Bd.*, 461 U.S. 731, 743 (1983) ("Just

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[5] It is not hard to imagine that the threat of such an end-run would create perverse incentives for government employers to *minimize* their employees' abilities to petition (i.e., by reducing the availability of grievance processes) so that employers are not susceptible to the very constitutionalization of employee grievances from which *Connick* was designed to protect them.

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") (internal citations omitted); *accord BE & K Constr. Co. v. Nat'l Labor Relations Bd.*, 536 U.S. 516, 530-531 (2002). Following this precedent, this Court has unequivocally rejected the argument that the Petition Clause has "special First Amendment status." *McDonald*, 472 U.S. at 485. Noting that "[t]he Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble," the *McDonald* court held that the right to petition under the First Amendment carries no greater immunity from defamation suits than does the right to free speech. *Id.*

The argument advanced by Respondent here is essentially identical to the one that *McDonald* denied, in that he asks for his petition rights to be recognized in a context in which his free speech rights unquestionably would not apply.[6] Respondent's con-

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[6] The *San Filippo* court tried to confine *McDonald* to its facts in a footnote, 30 F.3d at 442 n.21, but *McDonald*'s sweeping language belies any such cramped interpretation of its holding. The Third Circuit also expressed concern that application of the *Connick* rule to petition claims would render the Petition Clause redundant of the Speech Clause, *id.* at 442-443, but the consistent application of *Connick*'s limiting rule across First Amendment claims does not render them "redundant" any more than the consistent application of qualified immunity to *all* constitutional claims renders all of the provisions of the Constitution redundant of one another. *See id.* at 450 (Becker, J., dissenting) ("*Inter alia*, the clause would still have use when there is a 'petition,' in lieu of more conventional speech"). Moreover,

tention should therefore be no more successful here than was its predecessor in *McDonald*.

The intertwined nature of speech and petition rights renders the Third Circuit's position not only illogical, but also destructive to the principle of legal certainty considered so important by this Court to the ability of government officials to perform their duties. *See* Section I, *supra*. The line between petitioning and speaking is a blurry one, creating a confusion that is apparent in the inconsistent treatment given to petition claims in Third Circuit decisions citing *San Filippo*. *See, e.g.*, *Hill*, 455 F.3d at 242 n.24 (stating without explanation that "reporting a superior's misconduct to a legislative body when the legislative body is also the reporter's employer" is not petitioning activity); *Foraker v. Chaffinch*, 501 F.3d 231, 237-238 (3d Cir. 2007) (stating that strength of petition rights depend on formality of petitioning channels, and holding that internal grievances did not constitute petitions). In fact, the *Foraker* court held that an informal grievance appeal by employees "to their employer, which also happened to be a state agency" was not petitioning activity even though the premise that petitions are directed to one's employer formed the very basis for the *San Filippo* rule to begin with. *Id.*

Under *San Filippo*, it is unclear what a public employer should do if an employee submits a com-

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any overlap between the Speech and Petition Clauses is not a product of the Petition Clause being whittled away, but rather the fact that the definition of speech has been *expanded* over the years to cover most if not all petitioning conduct. *Id.*

plaint about a matter of personal rather than public concern: should the employer consider the complaint to be "speech" or "petitioning"? What if the employee threatens to file a formal grievance in a letter to the employing agency? In these and other such ambiguous situations, the employer's safest course would be to consider itself prohibited from disciplining the employee because there is a chance that the employee's behavior would be considered "petitioning" rather than speech. But this is the exact kind of decision-making through intimidation that rules such as qualified immunity and the *Connick* rule were meant to prevent. *See Hunter*, 502 U.S. at 229 (qualified immunity doctrine's "accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued") (internal quotations omitted). In short, the Third Circuit's refusal to apply the *Connick* rule to petition claims undermines the settled interests of government officials long protected by this Court, and should therefore be overturned.

## CONCLUSION

For the reasons stated in this brief and in the Petitioners' brief, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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