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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the right of access of the courts embodied in the Petition Clause protect

(a) an individual who while not a public employee prevailed in an arbitration proceeding against a city, who later becomes a city employee and is retaliated against, or

(b) a public employee who is retaliated against by a city for having filed an action in federal court under section 1983,

without regard to whether the subject matter of that arbitration and lawsuit was a matter of public concern?

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STATEMENT

This litigation concerns respondent Guarnieri's service as Police Chief of the Borough of Duryea, Pennsylvania. Duryea is a small town with only two full time police officers; the Police Chief spends a substantial portion of his time doing regular police work, rather than administration. Under the applicable borough ordinance the seven member Borough Council has the authority to hire and fire the Police Chief; supervision of the Chief, on the other hand, is the responsibility of the Borough's Mayor. The relationship between the Borough and the Police Chief is governed in part by a collective bargaining agreement between the Borough and Duryea Police Association, which is represented by the Fraternal Order of Police. That agreement provides, in certain circumstances, for a grievance process that can lead to binding arbitration.

Guarnieri was initially hired in September 2000. In February 2003 the Borough Council voted to dismiss Guarnieri, an action precipitated in part when Guarnieri rejected a request from the Council Chair that he lobby the mayor to sign a proposed ordinance that was unrelated to the Police Department.[1] Two weeks after his dismissal Guarnieri filed

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[1] D.Ex. 29 (Arbitration Decision of Dec. 28, 2004), at 11:

> [C]ouncil's attempt to reorganize the Sewer Authority may have been a critical turning point. Ms. Dommes [the Council Chair] and Mr. Guarnieri concurred that she had asked him to intervene with the Mayor in an

(Continued on following page)

a grievance challenging his termination. The Mayor, who had no power to overturn that dismissal, nonetheless indicated his support for Guarnieri.[2] The dispute ultimately was referred for binding arbitration under the terms of the applicable collective bargaining agreement.

The arbitral process, conducted under the auspices of the American Arbitration Association, had many of the facets of a trial. The dispute was heard by the arbitrator over several days of hearings in August and September 2004, with a number of witnesses being examined and cross-examined, and a range of documents being presented. Both sides were represented by counsel; Guarnieri was represented by counsel for the union. Each side submitted post-hearing briefs. In December 2004 the arbitrator issued a detailed 23 page opinion which concluded that the dismissal was improper. The arbitrator ordered that Guarnieri be reinstated with back pay. Guarnieri returned to work on January 21, 2005.

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effort to prevent a veto of Council's bill. Mr. Guarnieri refused the request, and the Mayor vetoed the bill. Although Mr. Guarnieri had wanted to keep himself and the Police Department out of politics, it did prove impossible. Mr. Guarnieri and the Mayor were now seen as allies, and Mr. Guarnieri made no effort to dispel that view. As relations between the Mayor and Council deteriorated, so, too, did relations between Mr. Guarnieri and Council.

[2] *Id.* at 17 ("Mayor Moss replied ... 'I wish to advise you that I agree with you in this matter. At this time I am advising you to proceed to the next step of the grievance procedure'.").

The Retaliatory Directives

Guarnieri alleged, and a jury ultimately found, that when Guarnieri returned to work the Borough Council immediately retaliated against him for having filed the grievance and pursued the successful arbitration. The Council retaliated by adopting an unprecedented set of "directives" controlling the actions of the Police Chief. Some of the directives had the effect of limiting how much the Chief could earn; for example, it forbade Guarnieri to work or earn overtime. Others constrained the Chief's ability to do his job; the Chief was ordered, for example, to leave work and "go home" at 3 p.m. each day, an order that applied regardless of whether at that point in time the Chief might be dealing with an emergency, conducting an investigation, or making an arrest.[3]

Guarnieri initiated two separate challenges to these directives. On January 29, 2005, Guarnieri filed a new grievance under the collective bargaining agreement, this one challenging the disputed directives. That grievance ultimately led to binding arbitration at the request of the Police Union. In July 2005, Guarnieri commenced the instant action in federal court, alleging inter alia that the directives were the result of an unconstitutional purpose to

[3] In a number of instances a directive was disputed because it provided that the Police Chief would be personally responsible for any violation of a rule by one of his subordinates, a form of strict liability which Guarnieri claimed was not imposed on other department heads. D.Ex. 18 (P.Ex. F), at 19, 23.

retaliate against him for pursuing the earlier grievance and arbitration, retaliation which Guarnieri asserted violated the Petition Clause of the First Amendment.

In a decision in February 2006 regarding this second grievance, the arbitrator sustained many of the challenges raised by Guarnieri and the Union to the disputed directives. The arbitrator concluded that a number of the directives were invalid to the extent that the Borough Council had usurped the role of the Mayor in attempting to supervise the work of the Police Chief.[4] A subsequent arbitration decision

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[4] D.Ex. 18 (P.Ex. F) (Arbitration Decision of Feb. 15, 2006), at 18-24:

> [T]he Mayor may determine that the Chief is needed to perform duties [for more than eight hours in a day, or 40 hours in a week] when an additional officer is required and cannot be procured.... [I]t is clearly beyond the authority of Borough Council, as its attorney acknowledged, and the Borough President agrees, to require that any employee must "go home" at the end of his or her shift.
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> * * *
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> [T]o the extent that the Chief of Police might be required to attend a Council meeting(s), ... he must be compensated.
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> * * *
>
> The absolute requirement [that a particular officer be present at a specified school at certain hours] may interfere with other duties required of the ... officer or the Mayor's direction of the manner in which the persons assigned to the various ... ranks ... shall perform their duties.

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regarding this grievance, in July 2006, resolved a number of issues that were not fully addressed in the February 2006 decision. The combined effect of these arbitration decisions was to resolve the dispute between the Borough Council and Guarnieri regarding the conditions governing the work of the Police Chief, and thus mooted any request in the section 1983 action for injunctive relief regarding the directives. The section 1983 action challenging the original directives proceeded to discovery and trial with regard to Guarnieri's claims for monetary relief arising out of the retaliatory directives. A jury found that the Borough Council had imposed the disputed directives for the purpose of retaliating against Guarnieri for having pursued the earlier grievance and arbitration regarding his 2003 dismissal. The jury awarded Guarnieri $45,000 in compensatory damages and $24,000 in punitive damages.

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* * *

> [T]o require the Chief to be out of his office 4-5 hours per day, on patrol, may not allow him time to perform other critical police duties without incurring overtime.

* * *

> [I]f the Mayor determines there is an operational necessity to work a different shift [than the day shift mandated by a Directive]... the Chief may be so assigned....

Retaliatory Denial of Overtime

In December 2006 the Borough Council refused to pay Guarnieri overtime for fourteen and one-half hours he had worked. Guarnieri alleged, and a jury later found, that the Borough did so to retaliate against him for having filed the instant section 1983 action.

Guarnieri challenged this denial of overtime pay in two ways. First, Guarnieri amended his pending section 1983 complaint, adding a new claim which alleged that the retaliatory denial of overtime pay violated his rights under the Petition Clause of the First Amendment. Second, Guarnieri complained about the denial to the Wage and Hour Division of the United States Department of Labor, asserting that the denial of overtime violated the federal Fair Labor Standards Act. The Department of Labor investigated Guarnieri's complaint, and concluded that the denial of overtime pay violated the FLSA. The Borough entered into a written agreement with the Department of Labor in which it promised to pay Guarnieri $338.53 for the overtime he had worked.

The Borough, however, failed to pay Guarnieri that $338.53. The section 1983 claim therefore proceeded to trial on this claim. The jury found that the Council's original denial of overtime was the result of a retaliatory purpose. The jury awarded Guarnieri on this claim $358 in damages; the jury also awarded punitive damages on this claim.

The Appeal

On appeal the Borough argued that none of the proven retaliatory conduct violated the Petition Clause. The Borough contended that the Petition Clause does not forbid reprisals against public employees for petitioning activity unless that activity involves a matter of public concern. The Borough argued specifically that the protections accorded to public employees by the Petition Clause are the same as the protections accorded by the Free Speech Clause of the First Amendment, and are thus subject to the limitation in *Connick v. Myers*, 461 U.S. 138 (1983), which requires a plaintiff to show that the assertedly protected activity involved a matter of public concern.

The Third Circuit rejected this contention. The court of appeals applied that circuit's earlier decision in *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir.1994). *San Filippo* had concluded that when a public employee files a lawsuit, or invokes some analogous formal remedial mechanism, the employee is protected by the right of access to courts embodied in the Petition Clause. 30 F.3d at 433-43. This Court's decisions regarding the right of access to courts has never been limited to lawsuits (or other similar proceedings) regarding matters of public concern. Under *San Filippo* the *Connick* public concern requirement remains applicable in the Third Circuit to all public employee Petition Clause claims

that do not involve access to courts or other similar formal remedial mechanisms.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED DOES NOT WARRANT REVIEW BY THIS COURT

The narrow issue raised by the decision in *San Filippo* does not warrant review by this Court. Because of the limited scope of that decision, the overwhelming majority of First Amendment claims by public employees in the Third Circuit continue to be governed by the public concern requirement of *Connick*. Even where *San Filippo* applies, that rule regarding the right of public employees to access to courts often is not outcome determinative; frequently cases to which this standard has been applied would in any event have satisfied the public concern requirement, or involved retaliatory acts that were already illegal under some other provision of law. The question presented is thus of insufficient practical importance to warrant expenditure of this Court's scarce resources.

(a) Under *San Filippo* First Amendment claims of public employees remain subject to the *Connick* public concern standard except where the employee's protected activity was filing a lawsuit or invoking some similar "formal mechanism of redress." *Foraker v. Chaffinch*, 501 F.3d 231, 236 (3d Cir.2007).

This narrow rule is expressly rooted in this Court's repeated decisions that the Petition Clause guarantees access to the courts. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972), the Third Circuit noted, this Court held that "[t]he right of access to the courts is ... one aspect of the right to petition." *San Filippo*, 30 F.3d at 436. The Third Circuit relied as well on *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731, 741 (1983), which also held that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." See *San Filippo*, 30 F.3d at 437 (quoting *Bill Johnson's*). Neither *California Motor Transport* nor *Bill Johnson's Restaurants* suggested that the lawsuits at issue in those cases did (or needed to) involve matters of public concern. This Court's decisions in those cases held in light of the Petition Clause that all lawsuits – not merely lawsuits regarding issues of public concern – could not give rise to a claim under the federal anti-trust law or under the National Labor Relations Act, at least absent a showing that that lawsuit was a mere sham. The Third Circuit correctly concluded that the right of access to the courts is not limited to plaintiffs who want to use litigation to express their views on some public debate. 30 F.3d at 441.

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," *San Filippo*, 30 F.3d at 440 n.18, such as a lawsuit or a formal grievance and arbitration

process under a collective bargaining agreement. This Court's decisions make clear that the Petition Clause applies to a far wider range of activities, such as demonstrations or other public protests,[5] that would fall outside the narrow rule in *San Filippo*. *San Filippo* made clear, for example, that a simple letter from a worker invoking no such mechanism would continue to be governed by *Connick*.

> [I]f the "petition" at issue w[ere] simply a letter imposing on the government no obligation to respond, it w[ould] properly [be] analyzable under the conventional *Connick* rubric applicable to speech.

30 F.3d at 439.

Most complaints and statements by government workers simply do not fall within this narrow rule regarding access to the courts and similar formal remedial processes. Of the four Third Circuit cases cited by petitioners, half actually rejected a plaintiff's claim precisely because it did not involve such a formal mechanism. *Foraker*, 501 F.3d at 237 ("the plaintiffs' complaints up the chain of command did not constitute petitioning activity. [The plaintiffs] complained internally; they did not petition a state agency qua agency. They appealed to their employer, which also happened to be a state agency, through informal channels."); *Hill v. Borough of Kutztown*,

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[5] E.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

455 F.3d 225, 242 n.24 (3d Cir.2006) ("Hill appears to allege that his report to the Borough Council could be protected ... as 'petitioning activity.' ... We have never held, however, that a report of a supervisor's misconduct to a legislative body when the legislative body is also the reporter's employer constitutes 'petitioning activity.'") The Petition points to the denial of rehearing en banc in *Foraker* as an indication that the Third Circuit is implacably committed to an overboard interpretation of the Petition Clause. (Pet. 28). In fact, however, rehearing was sought in *Foraker*, not by the defendants, but by the unsuccessful plaintiffs, who objected that the panel had applied the Petition Clause in an unduly narrow manner.[6]

District courts in the Third Circuit have repeatedly rejected Petition Clause claims by public employees because their actions did not involve invocation of some formal remedial mechanism.

> [T]he Petition Clause does not protect informal grievances such as memoranda, letters, and verbal complaints.... Plaintiff['s] ... grievances consisted of verbal complaints and internal memoranda, which are not protected by the Petition Clause.

Perna v. Township of Montclair, 2006 WL 2806276 at *6 (D.N.J.).

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[6] Appellants' Petition for Rehearing En Banc or By The Panel, No. 06-4086 (3d Cir.), at 11-14.

> Plaintiff's speech at issue does not implicate the Right to Petition ... because his meeting with union representatives and [an agency official] is not in the nature of a formal grievance procedure.... Plaintiff expressed his speech in many informal settings, including letters, phone calls, and meetings....

Cooper v. Cape May County Bd. of Social Services, 175 F.Supp.2d 732, 746 (D.N.J.2001); see *Price v. MacLeish*, 2006 WL 2346430 at *9 (D.Del.) ("Plaintiffs' 'petitions' up the chain of command were not through a formally-adopted mechanism.... Clearly, the plaintiffs' petitioning activities do not fall under the safe harbor provided by *San Filippo*"); *Bradshaw v. Township of Middletown*, 296 F.Supp.2d 526, 546 (D.N.J.2003) ("[i]nformal conduct such as letters, phone calls, memoranda and meetings" are not protected); *Karchnak v. Swatara Township*, 2009 WL 2139280 at *9 n.11 (M.D.Pa.) (actions not protected because plaintiff did not personally file or participate in lawsuit); *Baranowski v. Waters*, 2008 WL 728366 at *25 (W.D.Pa.) ("Baranowski's statement ... did not constitute petitioning activity. Baranowski complained internally, speaking only with his superiors.... A public employee's informal complaints are not transformed into petitioning activity merely because he or she happens to be employed by the government"); *Livingston v. Borough of Edgewood*, 2008 WL 5101478 at *3 (W.D.Pa.) (soliciting union to file a grievance insufficient); *Miller v. Weinstein*, 2008 WL 4279817 at *21 (W.D.Pa.) (email appeal to employer insufficient).

(b) The petition repeatedly[7] describes the Third Circuit rule in a manner that omits that rule's narrow limitation to petitions invoking some formal remedial mechanism. The Question Presented, for example, describes the Third Circuit as

> 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....

(Pet. i). "[T]he Third Circuit refused to extend the public concern requirement that this Court applied to free speech retaliation claims in *Connick* to similar petition claims." (Pet. 4). In fact, as noted above, *San Filippo* expressly does apply the *Connick* public concern requirement to petitions that do not involve a formal remedial mechanism. Petitioners object that anomalous results would ensue if the Petition Clause interpreted "to protect *all* public employee petitions from retaliation regardless of their purely private nature" (Pet. 11) (emphasis added). But *San Filippo* clearly does not exempt all such cases from the public concern requirement.

The petition at times edits quotations from Third Circuit decisions in ways that obscure their meaning. For example, the petition describes one passage in *San Filippo* in the following manner:

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[7] But not invariably. See Pet. 7.

> 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."

(Pet. 4-5). This suggests that the Third Circuit comment was about all petitions, and that that Circuit thought (oddly) that failing to protect petitions on non-public concerns would somehow be uniquely unfair. In fact, however, the quoted twelve words from *San Filippo* are in a discussion about the "formal governmental adoption of a mechanism for redress of grievances." 30 F.3d at 442.

> If the government could ... freely discharge an employee for the reason that the employee ... invoked such a mechanism, the petition clause of the first amendment would, for public employees seeking to vindicate their employee interests, be a trap for the unwary a – and a dead letter.

Id. The "trap" described in the opinion consists of inviting workers to invoke some formal government-created mechanism, and then firing them for having done so.

> Another passage in the petition asserts that
>
> the *San Filippo* majority distinguished petition claims from free speech claims. "When one files a 'petition,'" the majority argued, "one is not appealing over the 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."

(Pet. 4) (quoting *San Filippo*, 30 F.3d at 442). This suggests that the Third Circuit held that *all* Petition Clause claims should be exempt from the *Connick* public concern rule. In fact, however, the term "petition" appears in quotation marks in this passage because the Third Circuit was referring only to petitions that invoke formal remedial mechanisms. The quoted passage is preceded by a sentence that draws precisely that distinction, using quotation marks around the word "petition" for that very purpose.

> [W]hen government ... formally adopts a mechanism for redress of those grievances for which government is allegedly accountable, it would seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguably meritorious "petition" invoking that mechanism may be disciplined for such invocation by the very government that in compliance with the petition clause has given the particular mechanism its constitutional imprimatur.

30 F.3d at 442.

The petition describes the Third Circuit decision in *Foraker* in the following manner:

> 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.

(Pet. 12). But *Foraker* does not call for or defend providing broader protection to all "those who petition"; the fifteen words quoted from *Foraker* were offered only as a justification for broader treatment for public employees who file lawsuits or invoke other formal remedial mechanism.

> Formal petitions are defined by their invocation of a formal mechanism of redress.... [W]hen a formal petition is made, the employee need not show that the subject matter of the petition involved a matter of public concern. [*San Filippo*, 30 F.3d] at 442. This distinction is legitimate because the Petition Clause is not merely duplicative of the Free Speech Clause.

Foraker, 501 F.3d at 236.

(c) The petition repeatedly predicts that by according protection under the Petition Clause to lawsuits and other formal mechanisms not involving matters of public concern the Third Circuit will eviscerate the rule in *Connick*. "[T]he Third Circuit rule creates an easy end run around *Connick's* public concern requirement." (Pet. 24).[8] Under *San Filippo*,

[8] "[The Third Circuit] 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." (Pet. 11).

petitioners contend, public employees can evade that requirement "simply by couching their expression in the form of a petition" (Pet. 11), or "through the commonplace step of filing a grievance" (Pet. 15).

> 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 [v. Hurst*, 734 F.2d 1240,] 1244 [(7th Cir.1984)].

(Pet. 21) (bracketed material in petition).

The fatal problem with these dire predictions is that *San Filippo* was decided sixteen years ago. Petitioners do not contend that any of these predicted consequences have in fact occurred. Petitioners do not assert that there has been an avalanche of sham lawsuits or grievances used to concoct Petition Clause protections for otherwise unprotected statements. Indeed, the Third Circuit standard expressly does not apply to sham proceedings,[9] and petitioners do not contend that the courts in that circuit have identified any such problems. Petitioners do not, of course, contend that Guarnieri's 2003 grievance was merely a contrivance to obtain protection for statements criticizing the Borough Council; to the contrary, there is no dispute that the grievance and subsequent arbitration were a bona fide (and ultimately successful) effort to win back Guarnieri's job as Police Chief.

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[9] *San Filippo*, 30 F.3d at 436-37.

The petition identifies three appellate decisions in the sixteen years since *San Filippo* that have applied the standard in that case (including *Foraker*, which held the plaintiffs' actions in there were not protected by the Petition Clause). (Pet. 2). During the same period, however, appellate decisions in the Third Circuit applied the *Connick* public concern standard in 32 cases.[10] The petition identifies four district court decisions in the Third Circuit which have applied the standard in *San Filippo* during the years since that case was decided in 1994. (Pet. 26). During the same sixteen year period, however, district court decisions in the Third Circuit applied the *Connick* public concern standard in 158 cases.[11] Despite petitioners' predictions that *San Filippo* would largely supplant *Connick* as the controlling criterion in public employee First Amendment cases, nothing of the sort has occurred. To the contrary, *Connick's* public concern standard continues to govern the overwhelming majority of public employee First Amendment cases in the Third Circuit. The comparative handful of cases to which *San Filippo* has been applied are not important enough to warrant investment of this Court's scarce time and resources.

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[10] We set forth a list of those cases in an appendix to this brief.

[11] We set forth a list of those cases in an appendix to this brief.

That *San Filippo* has had only a marginal impact is not difficult to understand. Most of the gripes of public (or private) employees do not result in litigation because the underlying complaints simply do not involve any arguable violation of federal or state law. Petitioners hypothesize that state and local employees might file lawsuits solely for the purpose of voicing in an assertedly protected civil complaint some disagreement that they might have with their employers. But public employees generally lack the tens of thousand of dollars that would be needed to hire an attorney to litigate such a lawsuit, and no sensible lawyer would take such a case on a contingent fee basis. Similarly, most dissatisfactions on the part of employees would not support a colorable formal grievance and request for arbitration under a collective bargaining agreement (if any such agreement even existed), and ordinarily only a union – not an individual member – can press a grievance to the point of arbitration.

Petitioners assert that "the plaintiff in *Connick* could simply have filed her questionnaire in a grievance in order to have received First amendment protection." (Pet. 24). This comment illustrates precisely why *San Filippo* has had so little impact. Including that questionnaire in a grievance would have been utterly pointless. What the plaintiff in *Connick* wanted was for her fellow employees actually to read and fill out the questionnaire; there is no possibility that the plaintiff's co-workers would have gone to the arbitrator, obtained a copy of that questionnaire, and filled it out. And there is nothing in

Connick suggesting that the employer in that case even had some sort of formal grievance and arbitration mechanism that the plaintiff could have invoked.

(d) Even when it is applied, *San Filippo* often is not outcome determinative. In some instances courts holding that a plaintiff's statements were protected by the Petition Clause have noted that the statements, in any event, involved matters of public concern and would have been protected under *Connick*.[12] For example, petitioners point to *Marrero v. Camden County Bd. of Soc. Services*, 164 F.Supp.2d 455 (D.N.J.2001), as an example of a "run-of-the-mill employment dispute[ ]" that did not belong in federal court. (Pet. 26). *Marrero* concerned the dismissal of a county worker because she had filed an administrative complaint and lawsuit alleging sexual harassment and other gender based discrimination.[13] The district court noted that a complaint of sexual harassment constituted "speech on a 'matter of public

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[12] E.g., *Pollock v. City of Ocean City*, 968 F.Supp. 187, 192 (D.N.J.1997) ("*San Filippo* remains the law of this Circuit.... In any case, ... plaintiff's allegations – regarding personal favoritism, nepotism, and ultra vires acts on the part of City officials – probably suffice to implicate public concerns").

[13] 164 F.Supp.2d at 460-61. The petition refers to this case as merely involving "a tort claim notice involving alleged dress code violations." (Pet. 26). The dress code at issue was relevant only because it was part of the context in which the alleged gender-based discrimination and harassment occurred. The plaintiff alleged she was retaliated against for filing suit in federal court (which the Petition does not mention) and filing the tort claims notice; that notice was "a required precursor to her lawsuit." 164 F.Supp.2d at 468.

concern' that was protected by the First Amendment regardless of whether a formal petition was ever filed." 164 F.Supp.2d at 468 n.10.

Even where a plaintiff establishes that his or her conduct was indeed protected (only) by the Petition Clause, that often has no impact on the outcome of the litigation. Decisions recognizing that a plaintiff engaged in such protected activity routinely grant summary judgement to the defendant, either on the ground that there is insufficient evidence of an unconstitutional motive,[14] or because the defendants have immunity,[15] or because the asserted retaliation was too insignificant to be actionable.[16]

The core justification asserted by petitioners for denying constitutional protection to lawsuits and other formal proceedings regarding matters not of public concern is to accord state and local governments the latitude to punish or prohibit such actions if they are deemed inconsistent with the efficient operation of government. "The decision below ... critically undermines the ability of state and local

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[14] *Olsen v. Ammons*, 2009 WL 2426060 at *4 (M.D.Pa.); *Snavely v. Arnold*, 2009 WL 1743737 at *4 (M.D.Pa.); *Howard v. Bureau of Prisons*, 2008 WL 318387 at *16 (M.D.Pa.); *Walsifoer v. Borough of Belmar*, 2006 WL 2990364 at *9-*11 (D.N.J.); *Barnes Foundation v. Township of Lower Merion*, 982 F.Supp. 970, 1002-03 (E.D.Pa.1997).

[15] *Dewees v. Haste*, 620 F.Supp.2d 625, 636 (M.D.Pa.2009).

[16] *Snavely v. Arnold*, 2009 WL 1743737 at *4 (M.D.Pa.).; *Howard v. Bureau of Prisons*, 2008 WL 318387 at *15 (M.D.Pa.).

governments to manage their work forces" (Pet. 3), and impairs "the ability of state and local governments to manage their employees efficiently." (Pet. 14; see *id.* at 10 (according protection under the Petition Clause would obstruct "necessary flexibility as employers"), 27 (according protection under the Petition Clause would impair "the efficient functioning of state and local governments")).

But precisely because *San Filippo* is limited to invocation of formal remedial mechanisms, the retaliatory practices at issue in these cases – far from being an ordinary tool of efficient management – are often forbidden by state or federal law in order to safeguard those very mechanisms, and thus are already unavailable to the state and local employers at issue. *Marrero v. Camden County Bd. of Soc. Services*, on which petitioners rely, involved retaliation against a county worker for filing an administrative complaint and lawsuit under the New Jersey Law Against Discrimination. 164 F.Supp.2d at 468-69. The terms of that very statute forbade the use of such reprisals. N.J.S.A. 10:5-12(d); see *Marrero*, 164 F.Supp.2d at 472-73. In *Moore v. Darlington Township*, 690 F.Supp.2d 378 (W.D.Pa.2010), also relied on by petitioners, the plaintiff had been fired because he sought and obtained an award under the state workers' compensation statute. Under Pennsylvania law such retaliatory dismissals, far from being an accepted method of reducing employer costs, were illegal. *Shick v. Shirey*, 552 Pa. 590, 716 A.2d 1231 (Pa.1998).

The instant case illustrates with particular clarity why *San Filippo* often has little if any impact on the ability of state and local officials to oversee their employees. Although petitioners insist that the Borough Council should have been permitted, without federal intervention, to implement the disputed directives (Pet. 26), those very directives had been largely invalidated by an arbitrator long before this case went to trial; the decision below did not limit "the Borough's right" to issue such directives, because the arbitrator had already effectively resolved the disputes about those directives. Petitioners do not refer to or defend the retaliatory denial of overtime that occurred in 2006. Again, however, the Borough clearly had no "right" to deny that overtime pay; the Department of Labor concluded that the Borough's actions had violated the Fair Labor Standards Act, a determination which the Borough does not contest.

II. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The particular circumstances of this case make it a poor vehicle for resolving the question presented.

First and foremost, Guarnieri was not a public employee at the point in time when he engaged in the assertedly protected activity. Guarnieri was fired on February 7, 2003, filed the grievance on February 20, 2003, participated in the arbitration hearings in August and September 2004, and was not rehired

until January 21, 2005. Petitioner asserts that the 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," that speech is not protected by the free speech clause. (Pet. 2).[17] But when Guarnieri filed the grievance and pursued the arbitration that are at the heart of this case, he simply was not "a public employee speak[ing] ... as an employee." The decision in *Connick* deals with statements made by individuals while in the employ of a government entity. 461 U.S. at 146 ("employee expression"), 147 ("an employee's speech"; "[w]hen a public employee speaks"), 149 ("criticism by [public] employees"), 152 "the employee's speech").

Nothing in *Connick* purports to establish a standard for cases such as this in which an individual acted or spoke only as a private individual, and later suffered retaliation when he or she became a public employee. *Connick* makes clear that even speech about matters not of public concern ordinarily enjoys constitutional protection. 461 U.S. at 147. An individual may to some degree prospectively waive the right to exercise some of those rights as a condition of public employment, but assuredly individuals do not by taking a government job tacitly agree to being punished for speech or other actions that were

[17] See Pet. 4 ("when a public employee speaks"), 19 ("public employee expression").

completely protected at the time it occurred. None of the opinions which petitioners claim conflict with the decision below involved the highly atypical circumstances of the instant case.

If certiorari were granted in this case, there is a substantial likelihood that Guarnieri would prevail on this ground alone. Were this Court to conclude that the public concern requirement of *Connick* does not apply to statements made by individuals at a point in time when they were not public employees, the decision below would be affirmed without ever reaching the question presented.

Second, in the particular circumstances of this case the asserted rationale for denying protection to petitions involving formal remedial mechanisms – the asserted importance of not interfering with retaliatory action as a method of assuring efficient governance – simply does not apply. The actions challenged in this case had already been invalidated on other grounds well before this case ever came to trial. Providing a remedy for the asserted Petition Clause violation in no way limited to the ability of the Borough to engage in the underlying practices, which it had long before been compelled to abandon by the actions of the arbitrator (in the second arbitration) and by the United States Department of Labor.

Finally, the second proven retaliatory act (the denial of overtime compensation) was taken as a reprisal for Guarnieri's filing of a section 1983 civil rights action in a federal district court. Petitioner

argues that according protection under the Petition Clause to actions not involving matters of public concern would be "inconsistent with sound principles of federalism and the separation of powers." (Pet. 22) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006)). Whatever force that argument might have in ordinary contexts, it makes absolutely no sense when state or local officials seek to punish employees who have sought redress in a federal court for a violation of federal rights. To the contrary, sound principles of federalism weigh heavily against an interpretation of the Constitution which would permit – indeed, immunize – actions by state or local officials to obstruct or punish access to the federal courts. Similarly, the principles of separation of powers are assuredly trampled, not vindicated, when executive or legislative officials interfere with or retaliate against employees who in good faith seek redress from Article III courts.

III. THE DECISION BELOW IS NOT INCONSISTENT WITH THIS COURT'S DECISIONS IN *McDONALD* AND *CONNICK*

Petitioners correctly acknowledge that the question presented is an issue which this Court has not resolved.

> 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.

(Pet. 13). The petition never discusses, or even mentions, either the reasoning in *San Filippo* that the Petition Clause protects access to the courts, or the decisions of this Court – relied on in *San Filippo* – regarding that right of access.

The petition nonetheless asserts that the decision below (and in *San Filippo*) "flouts" the decisions of this Court. (Pet. 11). While there may be a colorable argument that the Petition Clause should be interpreted in the narrow fashion proposed by petitioners, that assuredly is not a question which this Court has already definitively determined.

(a) The petition asserts that "the Third Circuit's rule violates this Court's holding in *McDonald v. Smith* [, 472 U.S. 479 (1985)] that the Petition Clause protects expression no more than does the Free Speech Clause." (Pet. 14) (capitalization omitted); see Pet. 16 (*McDonald* "held ... that speech and petition should be treated alike"). This contention substantially overstates the holding in *McDonald*. The actual issue in *McDonald* was far narrower – whether the protections accorded to statements about matters of public concern by the Petition Clause, like the protections of the Free Speech Clause, are unavailable where a defendant sued for libel acted with knowledge that his statements were false or with reckless disregard of their veracity. 472 U.S. at 485. In holding that the Petition Clause and the Free Speech Clause are in this particular respect the same, *McDonald* relied on the specific history of libel claims. 472 U.S. at 483-84. That historical analysis is

obviously irrelevant in the instant case, which challenges, not the constitutionality of a libel action, but the constitutionality of a retaliatory dismissal.

Petitioner relies primarily on this Court's observation in *McDonald* that the purposes and historical origins of the Petition Clause and Free Speech Clause overlap. (Pet. 3, 14). But the Court's observation is far from a holding that the two clauses are identical. Clearly they are not. The Free Speech Clause protects many things – such as music, dance, speech unrelated to any possible action by the government – that would fall outside of the Petition Clause; there is no logical reason which the Petition Clause could not also apply to some actions not protected (or not protected to the same degree) by the Free Speech Clause. This Court has repeatedly held that the Petition Clause and Free Speech Clause are "not identical." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967); *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Most importantly, *McDonald* reiterated the very premise of the Third Circuit decision in *San Filippo*, holding that the "filing of a complaint in court is a form of petitioning activity," citing the same cases – *California Motor Transport* and *Bill Johnson's Restaurant* – relied on by *San Filippo* itself. Nothing in *McDonald* suggested that the right of access to the courts recognized in *California Motor Transport* and *Bill Johnson's Restaurant* is limited to lawsuits regarding matters of public concern.

The petition describes *McDonald* as holding that "there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." (Pet. 4-5, quoting *Mcdonald* 472 U.S. at 485). Edited in this way that passage from *McDonald* appears to announce a general rule that the protections accorded to petitions can be no broader than the protections accorded to speech. But the missing words in the ellipsis – "to the President" – gives the quoted passage a significantly narrower meaning. That passage states only that there was no reason to accord to that particular petition in *McDonald* itself greater protection under the Petition Clause than would be accorded to the same statement by the Free Speech Clause. Read without this key deletion, the passage in *Mcdonald* clearly does not reach all other situations to which the Petition Clause might apply, or hold (as petitioners contend) that the Petition Clause would never accord more protection to an individual filing a lawsuit than the Free Speech Clause would accord to that individual if, while a public employee, he made statements on the same subject to his supervisor or colleagues.

(b) Petitioners also argue that the issue in the instant case is controlled by this Court's decision in *Connick*. *Connick*, however, did not concern or even mention the Petition Clause.

The petition argues that

> The First Amendment Free Speech and Petition clauses ... 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) ...).

(Pet. 17). But the actual quotation in *Connick* does not mention the Petition Clause; it refers, rather, that "the First Amendment." 461 U.S. at 145. In this context "the First Amendment" clearly referred to the Free Speech Clause. Obviously the listed purposes were not the reason for the adoption of every provision in the First Amendment; they were not, for example, the purposes for the adoption of Establishment Clause. The full quote from *Roth* (quoted in turn in *Connick*) states that the identified purpose is the reason for "the protection given speech and press," not the rationale for everyone of the provisions in the First Amendment. The sentence in *Connick* following the quoted passage refers specifically (and only) to "speech." 461 U.S. at 145.

Petitioners object that the filing of a lawsuit or a formal grievance by a government employee can be disruptive because it will "engag[e] the government in a time-consuming formal dispute." (Pet. 19). Petitioners also object that lawsuits can be expensive to defend. (Pet. 23). Certainly a city could save itself time and money if it forbade all its employees to sue the city (even in federal court), and if it could dismiss

any worker who did so. But this is a very different governmental interest than was relied on by the Court in *Connick*. Nothing in *Connick* suggested that government employers are entitled to use threats of reprisal to immunize themselves from lawsuits in federal court by plaintiffs seeking to enforce the Constitution and laws of the United States. And where, as here, a municipal government has made the considered judgment that its interests as an employer would best be served by adopting a collective bargaining agreement that includes a right to arbitration, nothing in *Connick* suggests it would be important to construe the First Amendment in a manner that would permit individual city officials to punish or obstruct employees who seek to resort to the very remedial mechanisms established by the city's own agreement.

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CONCLUSION

For the above reasons certiorari should be denied.

Respectfully submitted,

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