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IN THE SUPREME COURT OF THE UNITED STATES

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BOROUGH OF DURYEA, PENNSYLVANIA, :

ET AL., :

Petitioners : No. 09-1476

v. :

CHARLES J. GUARNIERI :

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Washington, D.C.

Tuesday, March 22, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:11 a.m.

APPEARANCES:

DANIEL R. ORTIZ, ESQ., Charlottesville, Virginia; on behalf of Petitioners.

JOSEPH R. PALMORE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioners.

ERIC SCHNAPPER, ESQ., Seattle, Washington; on behalf of Respondent.

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P R O C E E D I N G S

(10:11 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 09-1476, The Borough of Duryea v. Guarnieri.

Mr. Ortiz.

ORAL ARGUMENT OF DANIEL R. ORTIZ

ON BEHALF OF THE PETITIONERS

MR. ORTIZ: Mr. Chief Justice, and may it please the Court:

In asking this Court to cabin Connick v. Myers' public concern requirement, Respondent would constitutionalize, under the Petition Clause, large parts of the law of public employee discipline, and thereby grant to public employees a broad constitutional employment right that private employees do not enjoy. Two independent reasons, however, argue strongly for applying the public concern requirement to discipline claims brought both under the Free Speech and the Petition Clauses.

First, the constitutional framework principles this Court has repeatedly identified in its public employment cases argue strongly for requiring it. And second, McDonald v. Smith's principle of parity argues strongly for creating no hierarchy between the

1 Free Speech and Petition Clauses.

2 When --

3 JUSTICE SCALIA: You agree that the Petition
4 Clause is -- is different and does have a separate
5 content?

6 MR. ORTIZ: Your Honor, we agree that the
7 Petition Clause -- that when the Petition Clause and the
8 Free Speech Clause cover the same activity, they
9 apply -- they cover it under McDonald in the same way.

10 JUSTICE SCALIA: But the Speech Clause, in
11 the employment context, has been interpreted to cover
12 the content. Whether it -- whether it applies or not
13 depends upon the content, right?

14 MR. ORTIZ: One part of that inquiry turns
15 on the content.

16 JUSTICE SCALIA: And you want the Petition
17 Clause also to turn on the content?

18 MR. ORTIZ: Part of the inquiry, yes, Your
19 Honor, should turn on the content.

20 JUSTICE SCALIA: But it seems to me you're
21 either petitioning the government or you're not
22 petitioning the government. Why -- why shouldn't the
23 line be, if you're petitioning the government as
24 employer is different from petitioning the government as
25 ruler? Why shouldn't that be the line that we draw?

1 MR. ORTIZ: Well, the --

2 JUSTICE SCALIA: Which wouldn't necessarily
3 break out the same way as whether it's a matter of
4 private concern versus a matter of public concern.

5 MR. ORTIZ: Your Honor, this -- under the
6 constitutional background principles this Court has
7 developed, this Court should look at -- looks at how
8 close to the core a particular example of employee
9 activity is, and then talks about how much of a burden
10 that kind of activity poses to the efficient operation
11 of the workplace.

12 JUSTICE SCALIA: But the core -- the core of
13 the Petition Clause is petitioning. The core of the
14 Free Speech Clause is political speech, of course --
15 speech in public interest -- but the core of the
16 Petition Clause is quite different. It's simply whether
17 you're petitioning. Surely you -- you could petition
18 the -- most of the petitions in the early years were
19 regarding private matters; isn't that right?

20 MR. ORTIZ: That is right, Your Honor, just
21 as most examples of speech concern private matters, too.
22 Yet that does not define the core of the Free Speech
23 Clause. There's not an empirical inquiry. That depends
24 upon the purpose of the clause. And as this Court
25 stated very definitely in McDonald, the core of the

1 Petition Clause, like the Free Speech Clause, was -- was
2 aimed at promoting democratic self-government.

3 Petitioning is a particular form of speech.
4 It is speech directed to a particular audience, the
5 government, some arm of government, some individual in
6 government, and it is speech that has a particular
7 purpose: Asking for a change of some sort in government
8 policy.

9 JUSTICE SCALIA: That's true, and it seems
10 to me the -- the core is involved whenever you're asking
11 for a change. And it seems to me that the key
12 distinction, if there is one, is whether you're asking
13 for a change in -- by your employer in your employment
14 conditions or a change by the government in some matters
15 over which the government has control as -- as
16 sovereign.

17 MR. ORTIZ: Well, Your Honor, in practice,
18 that inquiry would not align much differently than the
19 Connick inquiry.

20 JUSTICE SCALIA: It may well be, may well
21 be.

22 MR. ORTIZ: And in this particular case,
23 designing a kind of threshold inquiry along those lines
24 would actually advantage Petitioners.

25 One difficulty in application, though, is

1 that this Court has always identified the purpose of the
2 Connick threshold test as categorizing in a way the
3 Pickering balancing inquiry. And if you had a threshold
4 test that basically did not match, was a little oblique
5 to the Pickering balancing inquiry, it would create much
6 more work for the lower courts along the way. Or
7 perhaps this Court would want to change the Pickering
8 balancing inquiry.

9 JUSTICE SCALIA: Would they have to do both?
10 Would they have to do both?

11 MR. ORTIZ: They might well, Your Honor. If
12 the Pickering balancing inquiry still aligns with the
13 traditional framework that this Court has described in
14 its employment cases, what I describe, and this other
15 inquiry, which you're suggesting, Justice Scalia, was
16 somewhat oblique to it, then it might conceivably be
17 necessary to do both. One --

18 JUSTICE SCALIA: If you're proceeding with a
19 claim under two separate provisions of the Constitution,
20 it should not be surprising that you might have two
21 different tests.

22 MR. ORTIZ: Well, Your Honor, then that
23 might argue for more reengineering of the rest of the --
24 the enterprise as well, a step that this Court has not
25 identified as appropriate under --

1 JUSTICE GINSBURG: Why would it make -- why
2 would it make a difference at what you call the
3 balancing stage whether it is -- whether the distinction
4 is between public speech and private speech on the one
5 hand or government as employer and government as
6 sovereign on the other? Why would there be any
7 difference?

8 MR. ORTIZ: Well, Your Honor, if at the
9 first stage the Court is running an inquiry that is
10 something different from Connick, that is not going to
11 map onto traditional Pickering balancing, at least as
12 this Court has described it, at the second stage.

13 JUSTICE GINSBURG: Why not?

14 MR. ORTIZ: Because, Your Honor, Pickering
15 balancing has gone to things like how -- how -- how
16 important that particular example of speech is, how
17 close it is to the core of what the First Amendment
18 protects, and then that is weighed against the kind of
19 burden it would place on the government to have that
20 activity protected in a very strong way.

21 JUSTICE SCALIA: I think all you're saying
22 is that one of the elements of Pickering balancing is
23 the element of Petition Clause jurisprudence, as I
24 suggested it -- it might be applied; that is, in
25 Pickering balancing, certainly you have to ask, was what

1 the individual was asking for a change in employment
2 conditions? That would be one of the questions. If so,
3 it was a private matter, and then you go on to the rest
4 of the balancing.

5 But it seems to me you have to make that
6 determination under Pickering balancing anyway, and once
7 you make it, you've answered the -- the Petition Clause
8 question.

9 MR. ORTIZ: Well, Your Honor, if this -- if
10 this Court were to proceed down that road, Petitioners,
11 I believe, would still end up victorious. This is a
12 case, as I understand your -- your approach, where the
13 petition does concern purely employment matters. It is
14 not a petition aimed at or directed at the government in
15 its capacity as sovereign, so under that kind of
16 analysis, that is where the initial trigger, this case,
17 would have not been constitutionalized.

18 JUSTICE SOTOMAYOR: What kind of case,
19 hypothetically, would qualify under your theory as a
20 petitioning case to the sovereign? Would a claim of
21 retaliation because of a termination based on race
22 qualify?

23 MR. ORTIZ: It would depend upon the
24 particular claims involved, or statements in the
25 petition. If it were a statement that there was a

1 policy, involved a petition against a policy in a
2 government department involving race, that would
3 certainly qualify. That would be like the Gibbons case
4 under the Free Speech Clause, Your Honor.

5 If, however, it were a one-off allegation
6 that a particular, say, low-level governmental
7 supervisor had engaged in a form of discriminatory
8 activity --

9 JUSTICE SOTOMAYOR: Doesn't that get to
10 the -- to the merits of the case? You have to from --
11 you can't invite a question as to whether the sovereign
12 is responsible until you litigate the issue.

13 So what is the -- addressing Justice
14 Scalia's question to you, what would qualify as a
15 petition to the employer as opposed to a petition to the
16 sovereign and why?

17 MR. ORTIZ: Your Honor, a petition to the
18 employer about changing the hours of employment --

19 JUSTICE SOTOMAYOR: Those are clear cases.

20 MR. ORTIZ: -- for overtime --

21 JUSTICE SOTOMAYOR: I was asking the flip.

22 MR. ORTIZ: The flip. A petition, a
23 complaint to an employer about the employer's pervasive
24 or apparently pervasive policies in violation of the
25 law, would certainly qualify as something to -- a

1 petition to the sovereign.

2 JUSTICE SCALIA: Of course, you have to
3 wrestle with the same problem if you apply the other
4 test that you -- you were proposing.

5 MR. ORTIZ: For sure.

6 JUSTICE SCALIA: Namely, whether it's a
7 private matter or a matter of public concern. You
8 confront the same difficulty, don't you?

9 MR. ORTIZ: You certainly do, Your Honor,
10 and presumably this Court would look at some of the same
11 factors involved there: The form, the content, and the
12 context of the communication. All of those things are
13 relevant. This Court has admitted that that inquiry is
14 sometimes messy, that there are some -- many cases where
15 the line of distinction is not clear. But it is -- this
16 Court has not hesitated to apply that test because of
17 its importance to the public employment environment.

18 JUSTICE GINSBURG: Mr. Ortiz, you're not
19 drawing any line depending on the branch of government,
20 in other words, executive, legislature. Those are
21 certainly branches of government to which one can
22 petition. But access to court you agree comes within
23 the Petition Clause?

24 MR. ORTIZ: A lawsuit, pursuing a lawsuit,
25 is definitely a form of petitioning activity, Your

1 Honor. Petitioners do not contest that.

2 JUSTICE GINSBURG: What about the -- this as
3 I understand it, came up originally as arbitration under
4 the -- wasn't it under the collective bargaining
5 contract?

6 MR. ORTIZ: Yes, Your Honor, that is the
7 case.

8 JUSTICE GINSBURG: Would that count also,
9 because it is a mechanism set up by a government
10 employer?

11 MR. ORTIZ: It would qualify under the
12 original conception of what a petition is all about that
13 was in this case. It is Petitioner's view that it would
14 not qualify under the access to courts definition or
15 conception of petition that Respondent has developed
16 since the case was first before the district court.

17 JUSTICE SCALIA: If -- if lawsuits are
18 covered by the Petition Clause, why is it that in the
19 innumerable cases this Court has had concerning what due
20 process of law consists of, we've never mentioned what
21 the Petition Clause requires. I mean, if the Petition
22 Clause guarantees access to the courts, certainly there
23 are some minimum requirements that it imposes as well,
24 and I don't recall any of our cases dealing with
25 lawsuits that mention the Petition Clause. That's

1 rather extraordinary if indeed it governs all lawsuits.

2 MR. ORTIZ: Well, Your Honor, that might be
3 explained by the fact that the Due Process Clause has
4 been interpreted more robustly and supplies a certain
5 floor of constitutional protection for lawsuits. And
6 the Petition Clause, since it is directed at petitions
7 generally and in particular the framers, the evidence
8 is, had in mind not petitions to the courts, but
9 petitions to the legislature, if lawsuits --

10 JUSTICE SCALIA: Maybe that's all they had
11 in mind, or petitions to the executive as well. What --
12 what evidence do you have that it applied to lawsuits?

13 MR. ORTIZ: The evidence is that developed
14 by Professor Andrews, and the argument is a somewhat
15 slender one that goes as follows: At the time of
16 founding, Congress was the central sort of clearinghouse
17 for petitions and handled both what we think of as the
18 stereotypical paradigmatic petitions, pleas to Congress
19 to sort of change the law, and also handled a lot of
20 private bills. Over time, Congress handed over much of
21 the responsibility for handling the things that came
22 through private bills to the courts, and so to the
23 extent -- this is Respondent's argument -- that the
24 courts handled, took over those things, the lawsuits are
25 protected.

1 JUSTICE SCALIA: I agree with you that
2 that's slender.

3 MR. ORTIZ: Thank you, Your Honor.

4 JUSTICE GINSBURG: But you are not
5 challenging that, as I understand.

6 MR. ORTIZ: No, Your Honor. In the district
7 court it was conceded that the grievance activity would
8 be -- was protected. However, Petitioners do contest
9 quite sharply that under Respondent's new view of the
10 Petition Clause that the things of central importance
11 are lawsuits and other communications that would be
12 protected, perhaps be protected, otherwise under the
13 access to courts doctrine, that arbitration, the
14 arbitration involved in this case, does not count and
15 should not receive any kind of heightened protection.
16 The problem, much of the problem here, is the theory of
17 what is a petition from Respondent's side has changed
18 from the district court to this Court.

19 JUSTICE KAGAN: Mr. Ortiz, can I try a
20 hypothetical on you? Suppose that there is a city
21 employee and unrelated to the fact that he is a city
22 employee the government takes some part of his property
23 without just compensation. And he sues the government,
24 and the government says, somebody says, his employer,
25 that his supervisor said: Do you know what he's just

1 done? He's just sued the city; I think we should fire
2 him. And he brings a retaliation claim. Is that
3 protected under the Petition Clause?

4 MR. ORTIZ: Yes, Your Honor, it would be
5 protected for two different reasons. First, that would
6 -- similar activity would be protected under the Free
7 Speech Clause, so that would preserve the principle of
8 parity.

9 Second --

10 JUSTICE KAGAN: Really? What has he done
11 that's protected under the Free Speech Clause? He has
12 brought a suit saying: I'm entitled to just
13 compensation. It seems to me -- the reason I ask is
14 because this seems to me a purely private matter which
15 would not get protection under your test.

16 MR. ORTIZ: It's not employment-related or
17 related to his particular job, and this Court has always
18 drawn the distinction there. For example, in National
19 Treasury Employees Union this Court applied that kind of
20 analysis.

21 JUSTICE KAGAN: I see, so that goes back to
22 Justice Scalia's difference test, which is it's not a
23 matter of public concern versus private concern, but
24 it's a matter of employment-related versus not
25 employment-related, correct? Is that correct?

1 MR. ORTIZ: Well, that shows how closely
2 those two things have been related in this Court's
3 approach. In -- but certainly something that is
4 privately-related, a public employee is complaining
5 about tax assessment or something like that and tries to
6 sue for retaliation under, under that theory, not for
7 anything related to his or her job, this Court -- under
8 this Court's and the lower court's application of the
9 Connick principles, there would be no problem there
10 treating it as speech or as a petition.

11 So it is only when the lawsuit or the
12 petition involves something related to the person's
13 employment that these particular -- this particular test
14 would kick in. And that's consistent, Your Honor, with
15 this Court's twin background constitutional framework
16 principles, one that you look at how much disruption
17 something is likely to pose to the workforce and how
18 central it is to the particular constitutional provision
19 involved.

20 In this case, if in general it's not
21 employment-related the government has much less interest
22 in worrying over it this way and applying the Connick
23 threshold test is much less justified. You would have
24 to do Pickering balancing, proceed directly to Pickering
25 balancing in that case.

1 Now, Your Honor, Respondent's view presents
2 several problems of sort of practical application, or
3 would, to this Court. First, it would allow for the
4 easy circumvention of Connick, which is a test that on
5 the free speech side this Court has long held is very
6 important for the public employment field to work
7 efficiently. It would be very easy for a particular
8 employee to take activity that Connick would not allow
9 to proceed, to turn into a lawsuit on the free speech
10 clause, and just by rephrasing it, respinning it,
11 whatever, to turn it into a petition where under
12 Respondent's rule the result would be very different.

13 It also would require the Court to create a
14 hierarchy between speech claims and petition claims,
15 and, more importantly, if the Court were to go down the
16 particular road that Respondent describes and see the
17 center of the Petition Clause as defined by the access
18 to courts doctrine it would create a hierarchy among
19 different forms of petition. All of a sudden, petitions
20 that at the founding were thought to be at the
21 periphery, if there, of the Petition Clause would define
22 its center, and a paradigmatic petition of a letter to
23 Congress asking it to change its position on something
24 would not be covered at all.

25 If there are no further questions, I would

1 like to retain my remaining time for rebuttal.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Ortiz.

4 Mr. Palmore.

5 ORAL ARGUMENT OF JOSEPH R. PALMORE,
6 ON BEHALF OF THE UNITED STATES,
7 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

8 MR. PALMORE: Mr. Chief Justice, and may it
9 please the Court:

10 The Third Circuit rule here at issue is
11 flawed for two fundamental reasons. First, contrary to
12 this Court's admonitions, it quite literally
13 constitutionalizes the employee grievance process by
14 supplanting carefully calibrated nonconstitutional
15 safeguards and by providing a potential First Amendment
16 claim in Federal court to any employee who has filed a
17 grievance on a matter of only private interest. And
18 second --

19 JUSTICE SOTOMAYOR: How much of your
20 argument is premised on the fact that there was an
21 alternative mechanism to the court system available.

22 MR. PALMORE: That certainly --

23 JUSTICE SOTOMAYOR: Meaning let's assume
24 there wasn't a collective bargaining agreement, let's
25 assume there wasn't a State law protection, all of the

1 items that you mention in your brief as existing to
2 resolve disputes, that the only avenue for redress were
3 the courts. So where would that put your argument?

4 MR. PALMORE: Well, it's a hard hypothetical
5 to answer, of course, because the grievance was filed
6 pursuant to the collective bargaining agreement.

7 JUSTICE SOTOMAYOR: Putting it aside.
8 You -- you were talking about constitutionalizing a
9 grievance process. I'm going more broadly and saying
10 how much of your argument depends on that fact?

11 MR. PALMORE: Well, I think that's an
12 important part --

13 JUSTICE SOTOMAYOR: What was the meaning
14 would -- it is harder if all they have access to is a
15 court proceeding.

16 MR. PALMORE: I think that's an important
17 part of the argument, for this reason: If you look at
18 the Third Circuit's case in San Filippo, the court had a
19 kind of a doctrinal basis for its ruling, but it also
20 had a practical concern that not affording protection
21 for this kind of petitioning activity would be a trap to
22 the unwary. But there was really no basis for that
23 concern, because the issue here is when a sovereign
24 provides a remedial mechanism or enters into a
25 collective bargaining agreement that provides a remedial

1 mechanism --

2 JUSTICE SOTOMAYOR: How about if they don't?

3 MR. PALMORE: It typically -- well --

4 JUSTICE SOTOMAYOR: How about if they don't?

5 That's my point. Then what happens to the Third
6 Circuit's definition?

7 MR. PALMORE: Well, then I think the -- the
8 result is the same, and -- and our position is you --
9 you still apply Connick, just as speech on matters of
10 private concern is protected by the First Amendment, yet
11 under Connick, an employee who engages in speech on a
12 matter of private concern is not going to be protected
13 in the employment context in all respects.

14 And that reflects a very important balance
15 that this Court has struck between its view of how the
16 Constitution applies to the government as sovereign
17 regulator of the general public and how it applies to
18 the government and its proprietary status as an
19 employer. And in that latter situation, Connick has
20 been critical in providing a bulwark against allowing
21 run-of-the-mill employment disputes from becoming
22 constitutional cases in Federal Court.

23 And the second main problem with the Third
24 Circuit's approach, and it's one that Mr. Ortiz
25 highlighted, is that it privileges petition activity

1 over speech activity, contrary to this Court's numerous
2 statements that there is no such hierarchy in the First
3 Amendment. So going back to Thomas v. Collins in 1945,
4 the Court called the two rights inseparable.

5 In the United Mine Workers case, which is a
6 case relied on by the other side, it's an access to
7 courts case, the Court interchangeably applied the
8 speech right, the petition right, and the assembly
9 right, and it said they were intimately connected in
10 origin and purpose. And, of course --

11 JUSTICE KAGAN: Mr. Palmore -- I'm sorry.

12 MR. PALMORE: No, please.

13 JUSTICE KAGAN: Suppose a State legislature
14 passes a law depriving all State employees of collective
15 bargaining rights, and a State employee files a lawsuit
16 saying that this law violates the State constitution,
17 and the State employee is thereupon fired. Is that a
18 matter of public concern or not?

19 MR. PALMORE: It -- it likely would be, and
20 I think this -- this goes to some of the questions
21 Justice Scalia was asking. But as this Court said in
22 Connick that the question about -- of whether speech is
23 a matter of public concern is assessed not only by the
24 content, but by the form and the context.

25 So in the case that Your Honor is positing,

1 the content of the -- of the speech, which was that an
2 act of the legislature was illegal, would suggest that
3 it was a matter of public concern, the form, the form of
4 a lawsuit is relevant to the consideration, and the
5 context that it came in part of a larger political
6 debate would likely be relevant, too.

7 The problem with the Third Circuit approach
8 is that it never engages in that kind of inquiry.

9 JUSTICE KAGAN: And suppose -- now going
10 back to Justice Sotomayor's example, suppose that there
11 were a -- a class action alleging systemic
12 discrimination in some governmental workplace. Would
13 that be a matter of public concern?

14 MR. PALMORE: It very well might be. That's
15 similar to this Court's decision in the *GiVon* case. So
16 that was a case where a teacher went to complain to her
17 principal about the school's general policy of
18 discrimination, and this Court held that that was speech
19 on a matter of public concern, that it affected more
20 than just that individual employee's employment status.

21 So many of these hypotheticals and many
22 submissions and petitions to the government as sovereign
23 will, in fact, satisfy the public concern test, and then
24 you'll get into *Pickering* balancing.

25 JUSTICE KENNEDY: Do you -- can you think of

1 any instance where speech by the employee would not be
2 protected under the Pickering-Connick free speech
3 calculus but would be protected under the Petition
4 Clause?

5 MR. PALMORE: I think that, no, if you put
6 it in that way; this Court has never separately analyzed
7 the two. But I think it is important to note that I
8 think the Connick test already takes into account the
9 distinction between what might be deemed petitioning
10 conduct and non-petitioning conduct because of its use
11 of the term "form." So, again, the Connick test calls
12 on courts to look on the content, the context and the
13 form. So if the form of an employee complaint takes the
14 form of a lawsuit filed in Federal court, that's
15 something that -- that should be taken into account.

16 JUSTICE SCALIA: What -- wouldn't a -- a
17 written letter to -- to the employer, the government
18 employer, similarly be a petition? Is a lawsuit any
19 more of a petition, if indeed it is a petition at all,
20 which I doubt? Surely filing a statement with the
21 employer is a petition as well. So how does the form
22 make any difference?

23 MR. PALMORE: I -- it's -- I think it's a
24 serious question about whether a letter submitted to an
25 employer as an employer, not as a sovereign, is a

1 petition. But that's the kind of line-drawing that the
2 Third Circuit approach requires.

3 This Court has had a very broad conception
4 of what counts as petitioning activity, so in *Edwards v.*
5 *South Carolina* the Court said that a march to the
6 grounds of the State capitol in South Carolina to
7 protest segregation was an example of petitioning
8 conduct in its most classic and pristine form.

9 The Third Circuit doesn't -- doesn't
10 count -- wouldn't count that as a petition for this
11 purpose. It has kind of a gerrymandered view of what
12 will count as a petition, basically a lawsuit and an
13 employee grievance.

14 Now, the -- the approach followed by the
15 majority of the circuits and the approach we advocate
16 today doesn't require that kind of line-drawing, because
17 whether, for example, the grievance filed in this case
18 is a petition or not, it's certainly speech, and so we
19 would agree that it's susceptible to analysis under the
20 normal *Connick v. Myers* framework.

21 JUSTICE GINSBURG: Mr. Palmore, what about
22 the distinction that the other side brings up that
23 *Connick* is about what happens inside the workplace --
24 you don't want to disrupt the routine by the kind of
25 activity in which *Myers* was involved -- but the Petition

1 Clause, they're talking about conduct outside the
2 workplace, that is a complaint filed in court, nothing
3 that's happening in the workplace.

4 MR. PALMORE: Well, I think it's workplace-
5 related and I think that's the test. So I don't think
6 it -- you know, where an employee physically was when he
7 or she filed the petition isn't really relevant. The
8 question is the connection to the workplace and the
9 connection to the employer-employee relationship.

10 So as Mr. Ortiz answered before, the NTEU
11 case provides a separate set of protections under the
12 First Amendment, under the speech protection for
13 employees who engage in speech conduct that has no
14 connection to the workplace, and it would limit the
15 ability of a government employer to take action against
16 such an employee.

17 But the conduct here is the -- the
18 grievances that were filed here were obviously
19 intimately connected to the workplace relationship
20 between Chief Guarnieri and the Borough Council. This
21 was not a case like NTEU, where someone wanted to go out
22 and give a speech on something that had no connection to
23 their job or go out and file a lawsuit or some kind of
24 petitioning activity on something that had no connection
25 to the workplace.

1 JUSTICE KAGAN: Mr. Palmore, on that matter,
2 one last hypothetical. Suppose the New York City
3 council passed a resolution that said a precinct house
4 would be closed all night long from 7 p.m. to 7 a.m.,
5 and the chief of -- of that precinct filed suit saying
6 that this was micromanagement and it was going to affect
7 the public safety of the citizenry, and then that chief
8 of police was fired.

9 Is that a matter of public concern?

10 MR. PALMORE: It very well might be. It's
11 hard to answer in the abstract, because what this Court
12 has said is that the question has to be analyzed in
13 light of the whole record and in light of the context --
14 content, the context, and the form.

15 It's not necessary for this Court in this
16 case to decide whether the petitioning and speech
17 activity here was on a matter of public or private
18 concern. The question presented says that it was on a
19 matter of private concern. So all the Court needs to
20 decide is -- is whether that makes a difference or not
21 in terms of the constitutional analysis. And then the
22 Third Circuit on remand could -- could decide, assuming
23 the arguments were preserved, could look at the whole
24 record and decide whether the speech activity here was
25 on a matter of public or private concern.

1 If there are no further questions, we ask
2 the judgment be reversed.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Schnapper.

5 ORAL ARGUMENT OF ERIC SCHNAPPER

6 ON BEHALF OF THE RESPONDENT

7 MR. SCHNAPPER: Mr. Chief Justice, and may
8 it please the Court:

9 Neither the text, history, or purpose of the
10 Petition Clause nor the interest of a government
11 employer in an efficient workplace provide a basis for
12 distinguishing and giving less protection to a petition
13 because it didn't involve a matter of public concern.

14 The text of the Petition Clause certainly
15 draws no such distinction. The subject of the petition
16 must be a grievance and a grievance I think is measured
17 by whether the matter is of concern to the petitioner.
18 If it's a problem of concern to the petitioner, that
19 satisfies that constitutional element. It does not
20 matter whether the public cares a lot, it doesn't
21 care --

22 CHIEF JUSTICE ROBERTS: But all of our cases
23 have equated the Petition Clause reach with that of the
24 First Amendment, and our cases under the First Amendment
25 have made clear that we don't want to constitutionalize

1 the -- the employee grievance procedures.

2 MR. SCHNAPPER: Well, with all respect, Mr.
3 Chief Justice, I don't think this Court is committed to
4 the view that the Petition Clause and the Free Speech
5 Clause cover exactly the same things. In fact,
6 emphatically they -- obviously they don't because the
7 Free Speech Clause covers many things that the Petition
8 Clause would not. It covered, for example, the
9 remark --

10 CHIEF JUSTICE ROBERTS: Does the Petition
11 Clause cover anything that the First Amendment does not?

12 MR. SCHNAPPER: I believe so, Your Honor.
13 This Court's decisions in the antitrust area and under
14 the National Labor Relations Act with regard to -- an --
15 access to the government or -- or the courts, they've
16 always been framed solely in terms of the Petition
17 Clause, not the Free Speech Clause. It would be at
18 least very awkward to characterize those -- those
19 problems as free speech cases, particularly where, as is
20 typically the case, the -- the underlying activity was
21 on the part of, say, a lawyer rather than an individual
22 who -- who is asserting the petition right.

23 CHIEF JUSTICE ROBERTS: Well, getting back
24 to the second part of my question --

25 MR. SCHNAPPER: Yes.

1 CHIEF JUSTICE ROBERTS: -- in the First
2 Amendment cases we were concerned about, as I said,
3 constitutionalizing employee grievances. If you
4 constitutionalize it under the Petition Clause, how is
5 that any less a problem of constitutionalizing it under
6 the First Amendment?

7 MR. SCHNAPPER: Well, it -- it's our view,
8 Mr. Chief Justice, that -- and in this respect to some
9 extent I think we agree with a statement made by
10 Petitioners -- that every gripe that an individual
11 employee might have, indeed most of them, wouldn't be
12 covered by the Petition Clause. In the petition reply
13 brief, the Petitioners state, and we agree with this,
14 that the ordinary, routine e-mails, give and take within
15 the office, that's not covered by the Petition Clause.
16 We would agree with that.

17 CHIEF JUSTICE ROBERTS: All you have to do
18 then is add a sentence to your complaint saying: This
19 is an example of how the government employer mistreats
20 its employees?

21 MR. SCHNAPPER: No.

22 CHIEF JUSTICE ROBERTS: And then it becomes
23 more generalized?

24 MR. SCHNAPPER: No, no, Your Honor. That --
25 that -- that's their view, that -- that it becomes a

1 matter of public concern if you say it affects a lot of
2 people. Our view is that that's not relevant. It --

3 JUSTICE GINSBURG: What if added to that is
4 "and I'm going to sue" or "I'm going to file a
5 grievance"?

6 MR. SCHNAPPER: No, Your Honor, saying that
7 wouldn't have that effect. The case to which they refer
8 is one in which an employee indicated, as indeed
9 occurred, that he was going to file a lawsuit, and the
10 employer retaliated in a peremptory fashion because of
11 that. That -- that's been the rule in the Third
12 Circuit, it has only come up twice, but if I might point
13 out, that's the rule under any -- any number of Federal
14 statutes which protect filing a charge with the EEOC or
15 filing a lawsuit. The lower courts have agreed --

16 JUSTICE KENNEDY: Well, under -- under the
17 First Amendment speech clause --

18 MR. SCHNAPPER: Yes.

19 JUSTICE KENNEDY: We have said that an
20 employee's, public employee's, right to speech can be
21 regulated, can be confined, can be restricted beyond
22 what the State could do for a nonemployee. Are you
23 saying that if -- if the Petition Clause is involved
24 there is no right to restrict what the -- employer does?

25 MR. SCHNAPPER: No, Your Honor. No, Your

1 Honor. The government --

2 JUSTICE KENNEDY: Then you have to offer a
3 test and you don't want the public concern test, so
4 what's your test?

5 MR. SCHNAPPER: The, the -- that it, the
6 government's interest as an employer is part of the
7 calculus if -- if this issue arose under the Petition
8 Clause, and under ordinary balancing one would look at
9 the nature of the government's interest and the degree
10 of burden that's imposed, and that's the way the Court
11 has administered the Petition Clause.

12 JUSTICE KENNEDY: And you would be content
13 to apply that analytic, broad analytic framework to the
14 Petition Clause?

15 MR. SCHNAPPER: Yes, that's what the Court
16 has done. Now, that said, I think there are
17 circumstances where the government would be hard pressed
18 to argue that it had a generalized interest in stopping
19 a particular form of petition. For example, the
20 Petitioners express a considerable unhappiness that
21 they're subject to suit under section 1983. It's
22 expensive, it requires lawyers, they could have to pay
23 counsel fees. Those are judgments that the Congress of
24 the United States made in 1871 when it adopted section
25 1983. It knew the government was -- local governments

1 would be subject to it. When the Congress strikes that
2 balance, and -- and of course, section 1983 is a very
3 complicated piece of machinery -- the balance Congress
4 struck is -- is ordinarily going to be controlling --

5 JUSTICE SCALIA: Well, let's talk about it.
6 I find it difficult to believe that lawsuits are covered
7 by the Petition Clause when it is very clear that the
8 Congress can prevent all lawsuits against the Federal
9 Government by simply refusing to waive sovereign
10 immunity. Now, you know, how can you have a
11 constitutional guarantee of the right to petition the
12 government, which you say includes the -- the right to
13 -- to be in law court, and yet the Federal Government
14 can exempt itself from suits in law courts?

15 MR. SCHNAPPER: Your Honor, the -- the
16 Federal Government is not obligated to provide a -- a
17 lower court system for -- authorized to hear suits
18 against it.

19 JUSTICE SCALIA: I'm not talking about just
20 a lower court system. I'm talking about all suits,
21 right up to the Supreme Court. The Federal Government
22 can say: You can't sue us.

23 MR. SCHNAPPER: It can. But it cannot set
24 up a court system and then punish government employees
25 for using it. They are not -- historic -- if I might

1 step back a couple hundred years here, the --

2 JUSTICE SCALIA: You're saying that the
3 Petition Clause only covers those petitions that the
4 government chooses to allow; is -- is that what the
5 constitutional guarantee is? If you choose to allow a
6 certain kind of petition, it is constitutionally
7 guaranteed. That's not much of a guarantee.

8 MR. SCHNAPPER: No, I think -- I think
9 historically that -- that's a fairly accurate
10 description of what has happened with the emergence of
11 the Petition Clause over the last 6 or 700 years of
12 Anglo-American history. There were no courts to which
13 people could seek redress against the crown at the time
14 of Magna Carta. Over time the courts became available
15 to do that. Insofar as they did, on our view, the
16 Petition Clause would now apply.

17 And if I might turn to a question you asked
18 earlier. You expressed some skepticism about whether
19 the Petition Clause applies to lawsuits. I note that in
20 at least half a dozen decisions that this Court has held
21 that, and I think that was the premise of your
22 concurring opinion in the BE & K Construction case a few
23 years ago.

24 And we don't in this regard have to get
25 deeply into history in the debate about whether courts

1 are covered. The text of the First -- of the Petition
2 Clause is sufficient on its face. It doesn't say
3 petitions to the legislature. It says petitions to the
4 government, and that was clearly a deliberate choice,
5 because the States --

6 JUSTICE GINSBURG: Mr. Schnapper, you can
7 write a letter to the president, you can write a letter
8 to your congressional representative, but getting to a
9 court, you have to pay a filing fee. And since this
10 would be a civil case, this Court has held if you
11 haven't got whatever is the filing fee amount, too bad,
12 you don't have access to the Court.

13 MR. SCHNAPPER: Yes, Your Honor, and I think
14 those cases are clearly distinguishable. The -- the
15 core historical purpose of concern of the Petition
16 Clause was reprisals by the government against people
17 for -- for petitioning the government. There's a
18 fundamental difference here between what's at stake
19 here, where the Borough is asserting a right to punish
20 people for going to court, and the question about
21 whether the government has an affirmative obligation to
22 remove the incidental barriers that may exist to
23 bringing lawsuits.

24 JUSTICE ALITO: Do you -- do you think --

25 MR. SCHNAPPER: And so, we think those

1 cases are distinguishable.

2 JUSTICE GINSBURG: Are you suggesting that
3 in one of these suits you wouldn't have to pay the
4 filing fee?

5 MR. SCHNAPPER: No, no, precisely to the
6 contrary. We are asserting only that the government
7 cannot punish Mr. Guarneri for filing a lawsuit. We
8 are not suggesting the government has to pay his filing
9 fee, any more than if -- if the -- if Mr. Guarneri
10 wants to go to Harrisburg and meet with his or her
11 representative, the government, our view, Duryea, can't
12 punish him for doing it, but they don't have to give him
13 gas money, and if he doesn't have enough money for gas
14 that's just too bad.

15 JUSTICE ALITO: Suppose the Borough here
16 bought something from a company under a contract that
17 included an arbitration clause. Would that, would the
18 right of the company to engage in arbitration be
19 protected by the Petition Clause?

20 MR. SCHNAPPER: Yes. The -- we believe the
21 Petition Clause applies to government-created mechanisms
22 for redressing grievances; and if the government sets up
23 an arbitration procedure like that, we think that that's
24 covered. An arbitration agreement between two private
25 parties would not be, be covered by the Petition Clause,

1 because the government wouldn't have been involved in
2 standing that up. And that distinction really has its
3 roots in history. The petition started out; back at the
4 time of Magna Carta petitions only went to the king.
5 Over time the British government and ultimately the
6 American government developed other mechanisms that were
7 simply more efficient.

8 So that, for example, at the time the
9 Petition Clause was written, Congress received a large
10 number of petitions from wounded veterans, and after
11 several years of dealing with that it adopted the
12 Invalid Pension Act and turned that over to a somewhat
13 unusual combination of administrative and judicial
14 officials. So I think the creation of --

15 JUSTICE SCALIA: What's the earliest English
16 or American case you have that refers to a lawsuit as
17 protected by the Petition Clause?

18 MR. SCHNAPPER: I'm not familiar with
19 English law in that respect. With regard to the
20 decisions of this Court, I think it's California Motor
21 Transport, which I think is about 40 years ago.

22 JUSTICE SCALIA: How many?

23 MR. SCHNAPPER: About 40.

24 JUSTICE SCALIA: 40 years ago.

25 MR. SCHNAPPER: There's precious little --

1 JUSTICE SCALIA: So for a couple hundred
2 years, nobody -- nobody connected the two?

3 MR. SCHNAPPER: Many of the constitutional
4 issues this Court deals with were not raised for -- for
5 a very long period of time.

6 JUSTICE KENNEDY: In the Garcetti case, the
7 district attorney was disciplined for sending a memo
8 because he disagreed with how the trial strategy was
9 supposed to unfold, and then he actually made that
10 argument in court and was disciplined for that.

11 Would he have been protected if he had just
12 gone to court to sue the office of the district attorney
13 on some sort of a prospective injunction saying, with
14 reference to all search warrants you should follow the
15 following procedures? Would that have been protected,
16 even though the memo was not?

17 MR. SCHNAPPER: Well, it would have been a
18 petition. It would not necessarily have been protected.
19 The government has an interest in such matters as an
20 employer, and that might indeed outweigh --

21 JUSTICE KENNEDY: Would you have objected if
22 the same analysis were used in the Petition Clause case
23 as in the actual case? Just take the --

24 MR. SCHNAPPER: Right, right. The question
25 is, was the --

1 JUSTICE KENNEDY: Just white out "Speech
2 Clause" and put in "Petition Clause" and file the same
3 opinion?

4 MR. SCHNAPPER: The question I take it
5 you're asking is -- is whether the Garcetti principle
6 would apply to a Petition Clause case where the
7 government -- it was part of the official --

8 JUSTICE KENNEDY: I want to know how the
9 analytic framework differs.

10 MR. SCHNAPPER: I don't -- I don't think --
11 the specific question is whether the Garcetti rule
12 should apply in a Petition Clause case. I don't think
13 we have a position on that. It's not raised in this
14 case.

15 JUSTICE KAGAN: Well, Mr. Schnapper, can I
16 ask Justice Kennedy's question in maybe a little bit of
17 a different way?

18 In -- in the Connick inquiry, you have a
19 threshold inquiry and then you have a balancing test.
20 Now, you're suggesting that the threshold inquiry, the
21 public concern inquiry, is kind of apples and oranges
22 here; it's just not appropriate for the Petition Clause.

23 But the question that then follows is,
24 should there be a replacement threshold inquiry before
25 you get to the balancing that Connick suggests is the

1 second stage of the process?

2 MR. SCHNAPPER: Probably not in the sense
3 that you're asking. There would be a threshold inquiry
4 as to whether what had happened was petitioning. If it
5 were, this Court's decisions indicate that the Court
6 might impose a threshold inquiry consistent with, say,
7 the line of cases, most recently BE&K Construction, as
8 to whether the underlying petition had a -- a reasonable
9 basis or was -- had been pursued in good faith. But I
10 think if you got past that, then there would be no
11 further threshold.

12 JUSTICE ALITO: What if a number of
13 municipal employees prepare a formal document called
14 "Petition," and they say: We have a grievance, and our
15 grievance is that the quality of the food in the
16 cafeteria is poor? Now, is that protected by the
17 Petition Clause?

18 MR. SCHNAPPER: As you describe it, on our
19 view, not so, because our view is that, putting aside
20 the historical and somewhat unusual but less common
21 instance of a petition directed to, let's say at the
22 Federal level the Congress or the president, the
23 Petition Clause ordinarily applies only where the
24 government has created a specific remedial mechanism for
25 addressing a particular kind of grievance. It's

1 something that's just outside the ordinary give-and-take
2 of the office, something like, you know, a separate
3 agency or an arbitrator or a court, something like that.
4 And that -- there's an historical --

5 JUSTICE ALITO: Where does that rule come
6 from? It's drawn out of thin air?

7 MR. SCHNAPPER: No. No, it isn't. That's
8 the -- historically, that's the kind of distinction that
9 was there. If you had a problem in England, if the
10 undersheriff took your cow, you could go to the sheriff,
11 but historically, that wasn't called a petition. If you
12 went to the king, that was a petition. It was not going
13 to the local.

14 So we -- we do have a great deal of
15 historical material, as Justice Scalia points out, about
16 individuals, including Federal Government officials,
17 petitioning Congress. And I -- we think the framers
18 would have regarded those as petitions. I don't think
19 they would regard a beef with the Secretary of the
20 Treasury as -- as -- so we would -- there's no --

21 JUSTICE GINSBURG: Mr. Schnapper, this is
22 not -- if you're -- if you're talking about the
23 practical significance, Myers in Connick was going
24 around the office, collecting signatures. She was
25 taking a poll. She was taking a poll and the poll was

1 going to be presented to the employer. That sounds much
2 more petition-like than filing a grievance pursuant to a
3 collective bargaining agreement.

4 So the -- the distinction between Connick,
5 who was taking a poll -- why wasn't that a petition?
6 Maybe -- did she just put the wrong label on it? If she
7 called her case a petition case, it would have been all
8 right?

9 MR. SCHNAPPER: No. No, Your Honor. Our
10 view, as I indicated to Justice Alito, is that a gripe
11 within the office, whether you label it a petition or
12 not, would not, except in maybe some extraordinary
13 circumstance, constitute a petition.

14 But if I might respond, I think your
15 question raises a second important linguistic point,
16 which is the word "petition" today has acquired a
17 somewhat different meaning than it would have probably
18 had in the 18th century. We think of petitions as the
19 things you see out on tables, along the street; people
20 say, come on, sign my petition to do this, that, or the
21 other thing.

22 That was not a common phenomena in the 18th
23 century. Petitions were ordinarily things from one
24 individual or a couple of people. There were some
25 exceptions, but that was -- that was not the normal --

1 the normal practice. In fact, the very idea that you
2 could have large numbers of people signing something
3 called a petition was much controverted at that time.

4 JUSTICE KENNEDY: Well, you're the expert in
5 this area, but that -- that surprises me. I thought it
6 was quite common in the early 1800s for you to go to all
7 your neighbors -- and the book "Quarreling About
8 Slavery" explains this, where there were petitions
9 signed by many of the constituents in the congressman's
10 district.

11 MR. SCHNAPPER: There -- there were. It
12 came to be used that way as -- that is largely a --

13 JUSTICE KENNEDY: And there were scores,
14 scores of -- of signatures on these petitions. So
15 that's like your card table.

16 MR. SCHNAPPER: It is, but what I'm
17 suggesting is that is a 19th and 20th-century
18 phenomenon. You see very little of that in the 18th
19 century or earlier. And I'd note, although -- I mean,
20 I, I think that if that's done by private individuals
21 and directed to the government, it would be protected by
22 the Petition Clause.

23 I note, just to give you a sense of the
24 history, that at the time that happened, its legitimacy
25 was challenged, and the argument was made by the

1 proponents of slavery in support of a gag order adopted
2 by Congress that this was not really a legitimate
3 petition. The legitimate petition ought to be something
4 about your personal problems; an abolitionist really had
5 no business signing these things; it wasn't a personal
6 grievance.

7 Now, I think that's wrong. I think it's
8 certainly not consistent with current case law. But it
9 illustrates how the position advanced by Petitioners
10 stands on its head the historical evolution of the
11 Petition Clause, which starts as about private matters,
12 and only over time and after a good deal of struggle is
13 it extended to things of broader concern and possibly a
14 petition signed by people who don't have a personal
15 stake in --

16 JUSTICE KENNEDY: That was the Calhoun
17 position, not the John Q. Adams position.

18 MR. SCHNAPPER: Right. Right. That's
19 right.

20 JUSTICE GINSBURG: Mr. Schnapper, let's come
21 to the century in which we are now living. We have
22 Title VII. Title VII has this provision, an explicit
23 provision against retaliation. But suppose it didn't.
24 Suppose it just prohibited discrimination and it didn't
25 have a retaliation clause. It's the thrust of your

1 arguments that the government employee would have a
2 claim for retaliation, although someone in the private
3 sector would not?

4 MR. SCHNAPPER: Exactly. Exactly. And here
5 we part company with -- I think the government expressed
6 the concern in its brief and perhaps at oral argument --
7 I guess it was Petitioner that made this point -- that
8 there was something amiss about government employees
9 having rights that private employees don't. That
10 distinction exists because the Bill of Rights and the --
11 and the other constitutional guarantees, with the
12 exception of the Thirteenth Amendment and the right to
13 travel in interstate commerce, those rights don't apply
14 to private -- to people dealing with private employers.
15 That's just --

16 CHIEF JUSTICE ROBERTS: But -- but that's
17 the basis of our law in this area is that when the
18 government is actually the employer the rights of the
19 individuals are somewhat different, and they're closer
20 to the rights that private employees have. So simply
21 saying that these constitutional provisions apply
22 against the government and therefore, you don't have to
23 worry about the distinction between private employers
24 and government employers doesn't seem to be -- me to be
25 completely responsive to our precedent.

1 MR. SCHNAPPER: And -- and we're not taking
2 issue with the assertion of the government that the
3 government as an employer has interests which are
4 different than it -- it -- those it has just as a
5 sovereign. But that distinction has nothing to do with
6 the distinction they propose in this case between
7 matters of public concern and matters of only private
8 concern.

9 Indeed, to the contrary. To the extent that
10 the government's -- the government's interests might be
11 greater, surely a petition that deals with a matter of
12 public importance is going to cause the government a lot
13 more trouble than a purely private matter. A lawsuit
14 alleging systemic employment discrimination on the basis
15 of religion or even an individual, if -- if
16 Mr. Guarnieri had alleged and a court had found that he
17 had been fired because he was Catholic, the
18 ramifications politically and in terms of just -- the
19 ramifications in terms of the workplace would have been
20 far more serious than the --

21 JUSTICE KAGAN: Mr. Schnapper, isn't the
22 real question in these cases whether the employee is
23 acting as a citizen or instead whether the employee is
24 acting as an employee? And in the speech cases, that
25 distinction suggests a public concern threshold inquiry.

1 Maybe in the petition cases it suggests something else,
2 but that that's really the question we should be asking
3 is, is this employee acting as an employee or as a
4 citizen?

5 MR. SCHNAPPER: With all due respect, our
6 view is it depends whether or not the -- the employee is
7 acting as a petitioner within the meaning of the
8 Petition Clause. The petition Clause was not adopted,
9 like the Free Speech Clause, to foster a vigorous public
10 debate. The purpose of the Petition Clause, as the
11 Court said in Christopher v. Harbury, is to enable an
12 individual to seek relief for a wrong. And that has --
13 that's not the same as the -- the free speech interests
14 that -- that might exist to engage as a citizen in a
15 robust public debate.

16 Mr. Guarnieri didn't file his complaint in
17 Federal court, for example, looking to the second
18 petition, in the hopes of a robust debate between
19 himself and Judge Caputo. He -- he filed that complaint
20 to get redress for an alleged violation of his
21 constitutional rights.

22 So -- so the citizen versus employee
23 distinction in -- in Connick is inapt here. It's --
24 it's -- it's rooted in the purpose of the -- of the Free
25 Speech Clause, which is protecting vigorous public

1 debate on matters of public concern. The Petition
2 Clause is not about matters of public concern. It's
3 about -- about people's ability to seek redress. It
4 doesn't guarantee redress, but it protects the ability
5 to ask for it.

6 The --

7 JUSTICE GINSBURG: You do, I think,
8 recognize that it would be possible then to circumvent
9 Connick if you could turn around and file a pleading and
10 say: Now I have a petition, not just a grievance.

11 MR. SCHNAPPER: Your Honor, we don't think
12 that that is a serious problem for three reasons. First
13 of all, the Petitioners have in -- in highly expressive
14 language described the decision in Filippo as one which
15 would lead to an avalanche, tsunami, an overwhelming
16 number of new lawsuits.

17 We pointed out in our reply brief that they
18 had not adduced any evidence that any such thing had
19 happened in the 17 years since San Filippo. Their reply
20 brief does not purport to have any information to -- to
21 support that.

22 CHIEF JUSTICE ROBERTS: Well, but things
23 will be a lot different if we give the sanction to your
24 theory. I think the idea that it hasn't happened in 17
25 years in the wake of San Filippo is a little bit -- it's

1 not very compelling.

2 MR. SCHNAPPER: Well, I think your -- I
3 think there are two -- two other reasons why this is not
4 a -- a major concern. The first one is it simply isn't
5 the case that you could take any beef, write "Federal
6 complaint" at the top of it and file it in Federal court
7 and be protected. Most internal gripes don't raise a
8 colorable claim under Federal or State law, and this
9 Court's Petition Clause cases make it clear that a
10 petition, particularly a lawsuit, that doesn't have a
11 reasonable basis simply isn't going to be protected.

12 It's also, to be frank, based on my contact
13 with private petitioners, it's highly unrealistic to
14 suggest that if an employee, government employee, took
15 some gripe and went to a lawyer and said, let's file
16 this in Federal court, I want to get it off my chest, to
17 find a lawyer on a contingent fee basis that is going to
18 do that. If a chance case has no chance of success,
19 you're not going to find a lawyer who will do it; and on
20 a police officer's salary, you're certainly not going to
21 be able to hire one.

22 Third --

23 CHIEF JUSTICE ROBERTS: Well, but the most
24 likely solution when you have an employee grievance
25 along with it is that some umbrella settlement -- I

1 mean, the employer doesn't want to spend -- I mean,
2 that's part of the reason our doctrine developed under
3 the First Amendment. The employer doesn't want to have
4 to worry about spending time and money in court to
5 resolve what is essentially an employee grievance.

6 MR. SCHNAPPER: Few -- few private lawyers
7 who aren't independently wealthy are going to take a
8 baseless case on the theory that they're going to get
9 some umbrella settlement. It's just -- it simply
10 doesn't happen. It -- it -- and realistically, we don't
11 really have a plausible account of why an employee would
12 do this. I mean, you're an employee, you're unhappy
13 with the way you're being treated at work, you --

14 JUSTICE SOTOMAYOR: Counselor, your client
15 won everything in his collective bargaining grievance.
16 He got his pay back, he got them to stop doing what they
17 did, and he found a lawyer to file a constitutional
18 claim. So your suggestion that lawyers won't fight
19 semi-chaotic adventures is realistic as well.

20 MR. SCHNAPPER: Your Honor, this --

21 JUSTICE SOTOMAYOR: People get upset about
22 how they're treated all of the time, and they find
23 lawyers to file suits about that treatment.

24 MR. SCHNAPPER: Your Honor, I can certainly
25 tell you that people who are upset all the time call me

1 ostensibly unable to find lawyers. I mean, remember,
2 the -- the fact that Mr. Guarnieri was able to find a
3 lawyer to take this case doesn't prove that people can
4 find lawyers to take baseless cases. Mr. Guarnieri
5 found a lawyer, she brought this case, she got past
6 summary judgment, she took it to trial and she won.
7 This is a case that not only had a substantial basis,
8 but on the facts, and this issue is no longer before us,
9 she prevailed.

10 If the Court has no --

11 JUSTICE ALITO: Your submission is there are
12 not very many -- throughout the whole country there are
13 very few frivolous 1983 cases or employment cases,
14 that's your point?

15 MR. SCHNAPPER: No, they -- they --
16 certainly they happen, but the notion that this is going
17 to unleash a flood of them seems to me unrealistic.

18 A particular institution like this where the
19 theory of this is that the private -- the government
20 employee reads Connick, realizes they can't write a
21 letter to the boss with -- with their gripe, and
22 undissatisfied with their ability to talk about it with
23 friends and family and gripe with pals at the bar,
24 decides that the only way they can get it off their
25 chest is to have it be in a complaint in some Federal

1 courthouse, where it would then probably be dismissed.
2 I think in the real world that's something that would
3 make very little sense to an employee.

4 If the Court has no further questions --
5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Mr. Ortiz, you have a minute left.

7 REBUTTAL ARGUMENT OF DANIEL R. ORTIZ
8 ON BEHALF OF THE PETITIONERS

9 MR. ORTIZ: Your Honor, it defies the
10 imagination that the radical Republicans and the framers
11 understood that the Petition Clause would
12 constitutionalize public employee grievance, and as
13 academic commentary that Respondent cites suggests,
14 their -- Respondents long-centered view of the Petition
15 Clause would call into question, sovereign immunity
16 doctrine, parts of Rule 11, suggest a right to appeal
17 and a right to judicial review whenever anyone has
18 agreed to government action.

19 There is also a danger that it would
20 constitutionalize the arbitration process whenever the
21 government is a party.

22 If I can just answer one question. Connick
23 is focused not on where speech happens, as Respondent
24 insists, but rather where its effects occur. As this
25 Court held in the City of San Diego v. Roe, employee

1 speech completely outside of the workplace raises the
2 same kind of concerns.

3 If there are no further questions,
4 Petitioners will rest on their submissions.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 The case is submitted.

7 (Whereupon, at 11:09 a.m., the case in the
8 above-entitled matter was submitted.)

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