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COMMENTS

MARTIN v. CITY OF DEL CITY:
A LOST OPPORTUNITY TO RESTORE THE FIRST AMENDMENT RIGHT TO PETITION

REBECCA A. CLAR*

INTRODUCTION

The First Amendment of the Constitution1 protects the fundamental right of individuals to petition the government for redress of grievances.2 In accordance with this constitutional protection, the government may not condition public employment upon the surrendering of the right to petition.3 The United States Supreme Court has declared that in the context of a retaliation claim alleging a First Amendment violation of freedom of speech, government employees cannot challenge adverse job actions unless the speech that prompted that action involved a matter of public concern.4 A majority of the federal

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1 See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”) (emphasis added).


3 See Connick v. Myers, 461 U.S. 138, 142 (1983) (stating that “[f]or at least [fifteen] years, it has been settled that a State cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression”); Keyishian v. Board of Regents, 385 U.S. 589, 605–06 (1967) (stating same).

4 See Connick, 461 U.S. at 147 (“We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.”).
circuit courts, however, have severely limited a government employee's protection under the right to petition by holding that this distinct right is also subject to the "public concern" requirement, effectively nullifying any separate protection that it may provide.\(^5\) Although a majority of the circuit courts have analyzed the right to petition under the same standard as freedom of speech in this context, the preceding issue continues to be raised by plaintiffs and discussed by the circuit courts.\(^6\) In recent years, dissenting opinions in the circuit courts, legal commentary,\(^8\) and the comments of courts that have sided with

\(^5\) See, e.g., Martin v. City of Del City, 179 F.3d 882 (10th Cir. 1999); Grigley v. City of Atlanta, 136 F.3d 752 (11th Cir. 1998), cert. denied, 525 U.S. 819 (1998); Valot v. Southeast Local Sch. Dist. Bd. of Educ., 107 F.3d 1220 (6th Cir. 1997); Rendish v. City of Tacoma, 123 F.3d 1216 (9th Cir. 1997), cert. denied, 524 U.S. 952 (1998); Zorzi v. County of Putnam, 30 F.3d 885 (7th Cir. 1994); White Plains Towing Corp. v. Patterson, 991 F.2d 1049 (2d Cir. 1993); Rice v. Ohio Dep't of Transp., 887 F.2d 716 (6th Cir. 1989); Rathjen v. Litchfield, 878 F.2d 836 (5th Cir. 1989); Belk v. Town of Minoqua, 858 F.2d 1258 (7th Cir. 1988); Day v. South Park Indep. Sch. Dist., 768 F.2d 696 (5th Cir. 1985); Gearhart v. Thorne, 768 F.2d 1072 (9th Cir. 1985); Altman v. Hurst, 734 F.2d 1240 (7th Cir. 1984). But see San Filippo v. Bongiovanni, 30 F.3d 424, 441–443 (3d Cir. 1994) (holding that retaliation claims by public employees alleging a violation of the First Amendment right to petition are not subject to a "public concern" requirement).

The circuit courts improperly relied upon dicta in the Supreme Court decision, McDonald v. Smith, 472 U.S. 479 (1985), in concluding that the right to petition, as well as the freedom of speech, was subject to the "public concern" requirement. See infra Part II.A.

\(^6\) In recent years, the circuit courts continued to decide the issue. See generally Martin v. City of Del City, 179 F.3d 882 (10th Cir. 1999); Grigley v. City of Atlanta, 136 F.3d 752 (11th Cir. 1998); Valot v. Southeast Local Sch. Dist. Bd. of Educ., 107 F.3d 1220 (6th Cir. 1997); Rendish v. City of Tacoma, 123 F.3d 1216 (9th Cir. 1997).

\(^7\) In Valot, the Sixth Circuit adhered to the "public concern" requirement in the context of a retaliation claim by a government employee under the right to petition. See Valot, 107 F.3d at 1226. Yet, Circuit Judge Merritt asserted, in his concurring and dissenting opinion, that he would follow the reasoning of San Filippo, 30 F.3d at 442—holding that the retaliation claim under the right to petition was not subject to a "public concern" requirement—because the right to petition is a separate concept from the freedom of speech. See Valot, 107 F.3d at 1234 (Merritt, J., concurring in part and dissenting in part).

In Rendish, the Ninth Circuit reaffirmed the public concern requirement; yet, Judge Reinhardt and Judge Tashima dissented from the denial of a rehearing en banc. See Rendish, 134 F.3d at 1389. In the dissenting opinion, Judge Reinhardt harshly criticized the court for relying on the dicta in McDonald as a basis for their decision. See id. at 1392 ("McDonald, however, had absolutely nothing to do with the use of the courts by public employees or others."). He stated that San Filippo was correct in holding that a public employee discharge may not be based on the filing of a "non-sham" petition, so long as the petition takes the form of a lawsuit. See id. at 1389.

\(^8\) In recent years, this issue has raised a stir among authors who suggest that
the majority of other circuits illustrate a current surge toward recognizing a “modern” right to petition that deserves a separate standard of analysis. Despite the reoccurrence of this issue, the Supreme Court has refused to decide whether the “public concern” requirement applies to the right to petition and has denied petition for writ of certiorari six times in the last three years. In Martin v. City of Del City, the United States Court of Appeals for the Tenth Circuit failed to follow this growing trend toward recognizing an independent petition right and reluctantly joined the majority of other circuit courts holding that a public employee’s claim of retaliation in violation of the First Amendment right to petition is subject to a public concern requirement.

John Martin was an employee of Del City (“City”) from 1990 until his termination on June 6, 1996. On August 14, 1995, Stan Greil, a City manager, ordered Martin transferred from his position as supervisor of fleet maintenance to the position of planning technician—a lower grade, and thus a demotion. Greil ordered the transfer because he received reports that Martin sexually harassed a female City employee and a female employee of one of the City’s suppliers. After the transfer, the public concern requirement is inapplicable to the right to petition in this context. See, e.g., Margo Pave, Public Employees and the First Amendment Petition Clause: Protecting the Rights of Citizen-Employees Who File Legitimate Grievances and Lawsuits Against Their Government Employers, 90 NW. U. L. REV. 304, 306-07 (1995) (arguing that courts should not automatically apply the standard governing a public employee’s freedom of speech to the right to petition); Kara Elizabeth Shea, Recent Development, San Filippo v. Bongiovanni: The Public Concern Criteria and the Scope of the Modern Petition Right, 48 VAND. L. REV. 1697, 1730-34 (1995) (pointing out that the Framers explicitly established the right to petition in the Constitution and suggesting that it is distinct from the freedom of speech).

See, e.g., Martin, 179 F.3d at 886 (finding the question intriguing, but refusing to adopt the minority position); see also infra notes 28-45 and accompanying text.

10 See U.S.L.W. Sept. 15, 1998. At that time, the United States Supreme Court was being asked for the fifth time in three years to consider the issue. See id. After this article was published, the Supreme Court denied certiorari in the case of Grigley v. Atlanta, 136 F.3d 752 (11th Cir.), cert. denied, 525 U.S. 819 (1998).

11 179 F.3d 882 (10th Cir. 1999).

12 See id. at 889 (holding that First Amendment claims must meet the “public concern” test).

13 See id. at 883.

14 See id. at 884.

15 See id. at 884. Greil ordered the transfer to remove Martin from the work area where the alleged sexual harassment had occurred. See id. Greil provided Martin with a written statement of the alleged reasons for his transfer:
Martin filed an appeal of the transfer order with the Del City Civil Service Commission ("Commission"), pursuant to Section 38 of the Del City Charter. On March 6, 1996, Martin and his attorney met with City officials to negotiate his separation from employment. The parties initially agreed to a settlement that would pay Martin a lump sum to cover six pay periods in addition to various other payments. At this time, the City placed Martin on administrative leave with pay. The settlement, however, was not finalized. For the next two months, the City submitted drafts of the separation agreement to Martin, one of which reduced the number of pay periods from six to four. Martin eventually rejected the settlement offer and returned to work on May 8, 1996. The City notified Martin that he had abused the grievance process and that if he did not execute the separation document as prepared, he would be terminated. On June 6, 1996, Greil terminated Martin.

In Martin, the Tenth Circuit failed to recognize a distinct right to petition by commencing its discussion of Martin's right

(1) Martin had made sexually offensive remarks to a female employee which resulted in a complaint against the city to the E.E.O.C.; (2) Martin had made sexually offensive remarks, displayed sexually offensive behavior, and made unwanted sexual advances to a female supplier representative, as well as having made sexual remarks to female subordinates, including solicitations for sexual favors in exchange for pay checks and benefits; (3) Martin created and fostered unsatisfactory working relationships with other departments and divisions; (4) he improperly used city equipment; and (5) he engaged in insubordination by failing to serve on a policy review committee after being appointed to the committee.

Id.  
16 See id. "Section 38 provides that a city employee may appeal to the Commission any decision that terminates, suspends without pay, demotes or removes the employee." Id. This section "also entitles the appealing employee to a public hearing." Id.

17 See id.

18 See id. These other payments included "pay for any unused vacation and compensatory time, pay for unused accrued sick leave, and pay for the March premium for Martin's medical plan plus a sum equal to five times the monthly cost of the premium." Id.

19 See id.

20 See id.

21 See id. The City claimed a credit for the sums paid to Martin while he was on administrative leave. See id. at 885.

22 See id. at 884.

23 See id. at 885.

24 See id.
to petition claim with the “multi-tiered” test used to determine whether the government violated a public employee’s First Amendment freedom of speech.\textsuperscript{25} The court analyzed whether the “public concern” requirement necessary to establish a violation of the freedom of speech is also applicable to the right to petition.\textsuperscript{26} Admittedly, the Tenth Circuit devoted much more attention to this issue than the majority of other circuit courts that have decided the matter.\textsuperscript{27} The court considered in detail the case of \textit{San Filippo v. Bongiovanni},\textsuperscript{28} the only circuit court decision that did not subject the right to petition to a “public concern” requirement.\textsuperscript{29} The Tenth Circuit referred to the decision in \textit{San Filippo} as a “scholarly opinion,” providing a “thoughtful analysis [which] demonstrates the difficulty of the question before us.”\textsuperscript{30} The court, however, still refused to accept the logical reasoning in \textit{San Filippo} and reverted to the same analysis employed by the majority of circuit courts.\textsuperscript{31} In order to justify the application of the “public concern” requirement to a petition claim, the Tenth Circuit, as most other circuit courts,

\textsuperscript{25} See id. at 886. The court listed the steps for determining whether there was a free speech violation. See id. First, the court must determine “whether the public employee’s speech at issue touches upon matters of public concern.” Id. (citing \textit{Connick v. Myers}, 461 U.S. 138, 146 (1983)). If so, the court “must balance the interest of the public employee in making the statement against the government-employer’s interest ‘in promoting the efficiency of [its services].’” Id. (citing \textit{Pickering v. Board of Educ.}, 391 U.S. 563, 568 (1968)). Then, the plaintiff “must show that the constitutionally protected expression was a motivating factor in the adverse employment decision.” Id. (citing \textit{Mount Healthy City Sch. Dist. v. Doyle}, 429 U.S. 274, 287 (1977)). Finally, if the plaintiff satisfies these elements, “the burden shifts to the employer to show by a preponderance of the evidence that it would have made the same employment decision ‘even in the absence of the protected conduct.’” Id. (citation omitted).

\textsuperscript{26} See Martin, 179 F.3d at 887–89.

\textsuperscript{27} See, e.g., Grigley v. City of Atlanta, 136 F.3d 752, 755 (11th Cir. 1998) (declaring, with little analysis, that the “public concern” requirement is applicable to the right to petition); Gearhart v. Thorne, 768 F.2d 1072, 1073 (9th Cir. 1985) (immediately equating a grievance with freedom of speech and applying the “public concern” requirement).

\textsuperscript{28} 30 F.3d 424 (3d Cir. 1994).

\textsuperscript{29} See id. at 443. In \textit{San Filippo}, the court set forth a separate standard of analysis for retaliation claims under the right to petition, that considers whether the petition is “non-sham” and whether a formal grievance mechanism was used. See id.

\textsuperscript{30} Martin, 179 F.3d at 888–89. The court also recognized that plaintiff Martin’s argument that petitioning does not need to be of a public concern to be protected by the First Amendment “enjoys impressive support from some quarters” and “requires careful consideration.” Id. at 886.

\textsuperscript{31} See id. at 886–89.
relied on dicta from a Supreme Court case, *McDonald v. Smith*, which commented that "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." This dicta, so heavily relied upon by the circuit courts to support the application of a public concern requirement to petition claims, is taken out of the context of the *McDonald* decision, which had "absolutely nothing to do with use of the courts by public employees or others."

The *Martin* court incorrectly asserted that it must follow, as binding precedent, the Tenth Circuit's decision in *Schalk v. Gallemore*, which embraced the public concern requirement for the right to petition. Actually, the *Schalk* case opened the door for the Tenth Circuit to distinguish the form of petition at issue in *Martin* and reject the "public concern" requirement in this context. In *Schalk*, a hospital employee hand-delivered a letter to hospital board members that described her concerns about certain practices at the hospital. Schalk was informed that she would be discharged if she made further complaints. She was eventually terminated because she spoke with a board member about planning a subsequent meeting with the board to discuss her concerns. The *Schalk* court held that the letter and comments to the board member addressed a matter of public concern and stated that "[i]n the instant case, Schalk's right to petition is inseparable from her right to speak. As such, we see

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32 472 U.S. 479 (1985). In *McDonald*, the Court held that the Petition Clause does not provide absolute immunity from damages in a defamation suit arising from the content of petitions. See id. at 482.

33 Id. at 485.

34 Rendish v. City of Tacoma, 134 F.3d 1389, 1392 (9th Cir. 1998) (Reinhardt, J., dissenting), cert. denied, 524 U.S. 952 (1998); see also infra Part II.A.

35 906 F.2d 491 (10th Cir. 1990).

36 See *Martin*, 179 F.3d at 889 ("Of course, this panel must follow Schalk's holding, there being no intervening Supreme Court opinion and no en banc ruling by our court changing Schalk's application of the principles relating to the Petition Clause ....").

37 See *Schalk* v. Gallemore, 906 F.2d 491, 492–93 (10th Cir. 1990) (describing Schalk's letter that expressed her concern regarding benefits she felt were unevenly distributed to employees).

38 See id. at 493 (characterizing her conduct as unacceptable because her allegations did not "directly relate to [her] job or its performance").

39 See id. (stating that Schalk spoke to the board member when she saw him in a local store).
As was noted in the Third Circuit's *San Filippo* decision, the *Schalk* court had difficulty drawing a meaningful distinction between the speech found in the petition and other employee speech in that case. As in the Supreme Court decision in *McDonald v. Smith*, the "petition" at issue was only a letter, and thus "properly analyzable" under the public concern standard applicable to speech. The *Martin* court failed to take this opportunity to properly distinguish the "petition" at issue in *Schalk* from a formal lawsuit or grievance directed at the government employer, as in *Martin*. As opposed to the letter in *Schalk*, the "formal mechanism for the redress of grievances" that Martin employed is within the scope of protection afforded by the Petition Clause. Yet, the *Martin* court failed to distinguish *Schalk* and thus passed up the opportunity to restore the protection provided by the First Amendment right to petition for government employees.

It is submitted that the rationale of the Tenth Circuit is flawed because the court failed to recognize a distinct standard for the right to petition. Although the court admittedly discussed the right to petition in greater detail than many other circuit courts, the final decision to subject the right to petition to a "public concern" requirement in the context of a retaliation claim by a public employee fails to take into account the long-standing, prominent history of the petition right; the Supreme Court decisions concerning the right to petition; recent views of judges and commentators; and the numerous policy issues involved. The court's failure to distinguish the type of "petition"
at issue in this particular case represents a lost opportunity to restore the protection that the First Amendment strives to provide for government employees, and has the destructive effect of permitting the government to discharge a public employee with a legitimate grievance or lawsuit.

This Comment asserts that the right to petition is distinct from the freedom of speech, and thus a public employee's retaliation claim in violation of the right to petition should be subject to a separate analysis that does not include a public concern requirement. Part I of this Comment focuses on the distinction between freedom of speech and the right to petition. Subpart A summarizes the prominent and distinct historical development of the right to petition. Subpart B discusses the intent of the Framers of the Constitution to embody these distinctions within the First Amendment. Subpart C analyzes the Supreme Court decisions that discuss the right to petition. Part II of this Comment discusses the analysis of the public employee's right to petition. Subpart A criticizes the incorrect analysis of the majority of circuit courts considering this issue. Subpart B focuses on the proper standard to analyze a public employee's retaliation claim under the right to petition, including policy reasons for recognizing a separate standard for this right.

I. DISTINCTION BETWEEN THE FREEDOM OF SPEECH AND THE RIGHT TO PETITION

A. Historical Development of the Right to Petition

Historically, the right to petition was recognized as a distinct and superior right compared to other First Amendment rights.46 The petition right was recognized long before the right to free speech.47 "The right to petition first emerged in England with King John's signing of the Magna Carta in 1215," 48 which


48 Pave, supra note 8, at 307. The right granted by the Magna Carta was
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predated any recognition of the rights to speech or press. In 1689, William and Mary were offered the crown on the condition that they accept the Declaration of Rights (later codified as the Bill of Rights) which stated not only that it is "the right of [the] subjects to petition the king," but also that "all [commitments] and prosecutions for such petitioning are illegal." While the Bill of Rights provided explicit protection for the right to petition, the individual rights of speech and press were not even mentioned. The importance of the right to petition was also made apparent when Blackstone, in his Commentaries, stated:

If there should happen any uncommon injury, or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances....

In light of its prominent history, "[t]here is no persuasive reason for the right of petition to mean less today than it was intended to mean in England three centuries ago." The colonists in America also recognized the right to petition before the right to freedom of speech. The early colonial governments recognized petitioning as an independent right, and many colonies provided explicit protection for the right to petition in their charters. In 1774, the Declaration and

limited because only Barons could petition the Crown; there was no method of enforcement; and the petitioner could be subsequently punished for exercising the right. See id. The recognition of this right was significant in and of itself because the Crown did not recognize any right to free speech or press. See id. The right to petition was not a "fully matured, absolute right" in England until 1702. See Smith, supra note 47, at 1153.

49 San Filippo, 30 F.3d at 443 (internal quotation marks omitted) (quoting 1 W. & M., 2d Sess., ch. 2, § 5 (1689) (Eng.)); see also Smith, supra note 47, at 1162 (quoting same).

50 See Spanbauer, supra note 46, at 34; see also Smith, supra note 47, at 1180 ("The state of affairs in Eighteenth Century England manifest that petitioning was [in] practice an absolute right while speech and press were the constant in subjects of seditious libel prosecutions and other restraints.").

51 San Filippo, 30 F.3d at 443 n.23 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *143).

52 San Filippo, 30 F.3d at 443.

53 See McDonald v. Smith, 472 U.S. 479, 482 (1985) ("[T]he historical roots of the Petition Clause long antedate the Constitution."); see also Spanbauer, supra note 46, at 27–28. "As in England, petitioning in America was not originally a meaningful right." Id. at 29.

54 See Spanbauer, supra note 46, at 27–28. "In 1641 the Massachusetts Body of
Resolves of the First Continental Congress proclaimed that the colonists “have a right peaceably to assemble, consider of their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.” Thus, the right to petition was deeply rooted in Anglo-American history long before the Framers incorporated this right into the Constitution.

Even after England and its American colonies recognized freedom of speech rights, they did not afford as much protection to the freedom of speech as they did to the right to petition. The right to petition encompassed freedom from punishment for petitioning; yet, free speech rights had no such protection. While the colonial government had removed prior restraints on speech, this removal of restraints was replaced with the possibility of subsequent punishment for seditious libel. In reality, the freedom of speech meant nothing more than an absence of prior restraints, whereas the right to petition had evolved to the point where the government did not sanction

Liberties became the first colonial charter to provide explicit protection for the right to petition.” Id. at 27. “By the time of the American Revolution, Delaware, New Hampshire, North Carolina, Pennsylvania, and Vermont also provided explicit protection for [this] right . . . .” Id. at 28 (footnotes omitted).

55 Smith, supra note 47, at 1174 (internal quotation marks omitted); see also Spanbauer, supra note 46, at 32 (noting that the Declaration and Resolves were modeled after the English Bill of Rights).

56 See Pave, supra note 8, at 307 (noting that the petition right has been in existence longer than other First Amendment rights).

57 See Smith, supra note 47, at 1180.

58 See Smith, supra note 47, at 1166 (“By the time of the American Revolution, petitioning had become extremely popular in England; it was no longer checked or penalized and was frequently successful.”).

59 See Spanbauer, supra note 46, at 37 (“Seditious libel laws existed in all of the colonies, and punishment for statements critical of the government was an accepted, lawful practice which continued even after the framing and ratification of the First Amendment.”) (footnote omitted).

60 See id. at 36 (“As in England, the colonial government removed these prior restraints on speech only to replace them with the possibility of subsequent punishment for seditious libel.”). “In both England and colonial America, presentation of a petition to government was not a ‘publication’ under the existing libel law.” Id. at 38. If the petition was subsequently published, the petitioner “could be subject to prosecution for seditious libel, but not for the subject matter of the petition . . . .” Id. It has been stated that “[t]hese features distinguished petitioning from the rights of speech and the press and held petitioning in a superior status.” Id.

61 See id. at 36 (noting that both the British citizens and the American colonists knew that their freedom of speech was limited by libel restrictions).
punishment for the subject matter of petitions. Thus, it has been recognized that "[t]he existence of both state seditious libel laws and the Federal Sedition Act coupled with the failure to prosecute petitioners under those laws indicate that there was no original intention to raise freedom of speech and the press to the level of protection given to petitioning." Compared to the subsequent freedoms of speech and the press, "the right to petition was far less restricted and was the only authorized means by which individuals could speak out against governmental action." This history illustrates that the right to petition granted greater protection than other First Amendment rights and was thus more meaningful than the freedom of speech.

B. Intent of the Framers

The Founding Fathers were cognizant of the greater protections afforded to the right to petition than the freedom of speech. As such, the ratification of the First Amendment's Petition Clause codified a right to petition that was historically recognized with the breadth of its protection already established. The history of the right to petition is critical because the United States Supreme Court has declared that the rights included in the Bill of Rights must be preserved as they

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62 See id. at 33.
63 Id. at 39. The Sedition Act of 1798 made it a crime to "write, print, utter or publish... any false, scandalous and malicious writing or writings against the government of the United States, or either House of the Congress... or the President... with intent to defame... or to bring them... into contempt or disrepute...." Law of July 14, 1798, ch. 74, 1 Stat. 596 (1798). Therefore, it became obvious that the adoption of the Constitution had not eliminated restraints on speech and press. See Smith, supra note 47, at 1176.
64 Spanbauer, supra note 46, at 37-38 (explaining that the minimal restriction on petitioning can likely be explained by the fact that petitions do not pose the same type of threats as does published speech); see also Smith, supra note 47, at 1175 ("Evidence of limitations placed upon the right to petition during [post-Revolutionary America] is nonexistent [sic]."). The freedom of the press was limited by press licensing laws that restricted expression to those few printers the government approved. See Spanbauer, supra note 46, at 36.
65 See Pave, supra note 8, at 310 (noting that, prior to the Constitution, the right to petition was treated with greater deference than the right to speak).
66 See id. at 310-11 (stating that, by ratifying the Petition Clause, the colonists essentially codified a recognized right); see also Emily Calhoun, Initiative Petition Reforms and the First Amendment, 66 U. COLO. L. REV. 129, 130 (1994) ("Petitioning was a primary source of bills in pre-constitutional America.").
existed under the English common law in 1791. There is no doubt that the history of the right to petition, which was at that time an absolute right against the government, had a great influence on the intent of the Framers of the First Amendment.

Congress approved the right to petition without much comment, and there are very few recordings of the debates concerning state ratification of this right. It appears that James Madison, draftsman of the First Amendment, supported the view that petitioning is a “preferred and distinct right.” When Madison first introduced his proposed list of amendments, the clause containing the rights of assembly and petition were separate from the clauses containing the freedoms of speech and the press. While the records concerning the right to petition may be sparse, “they evince no intent to change the original British and colonial experiences whereby the right to petition

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68 See Smith, supra note 47, at 1180–81 (discussing the history of the Petition Clause). Furthermore, prior to the American Revolution, the rights of speech, press, and assembly were subject to widespread suppression. See id. at 1181; see also Gary Lawson & Guy Seidman, Downsizing the Right to Petition, 93 NW. U. L. REV. 739, 742 (1999) (“The inclusion of the right to petition in the First Amendment... existed in 1789 and 1790 just as surely as it did in 1791.”); Gregory A. Mark, The Vestigial Constitution: The History and Significance of the Right to Petition, 66 FORDHAM L. REV. 2153, 2157 (1998) (“For the colonists and citizens of the early republic, petitioning embodied important norms of political participation in imperfectly representative political institutions...”).

69 See Spanbauer, supra note 46, at 42 (observing that the records of debates surrounding the right to petition are sparse); see also James E. Pfander, Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government, 91 NW. U. L. REV. 899, 954–55 (1997) (noting that “the Petition Clause was not the subject of illuminating debate[,]” but that “[n]either the senate debates nor the debates in the legislatures of the ratifying states were officially recorded”); Stephen A. Higginson, Note, A Short History of the Right to Petition Government for the Redress of Grievances, 96 YALE L.J. 142, 155–56 (1986) (noting that Congress approved the right to petition as being absolute).

70 See Smith, supra note 47, at 1182. But see Thomas v. Collins, 323 U.S. 516, 530 (1945) (noting that the freedom of speech and freedom to petition “though not identical, are inseparable”).

71 See Higginson, supra note 69, at 155–56; see also Spanbauer, supra note 46, at 39 (noting that, in 1789 when Madison introduced his proposed amendments, the rights of assembly and petition were envisioned as separate amendments). The text of the original clause stated: “The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances.” Spanbauer, supra note 46, at 39.
was subject to few restrictions.”

This construction of the First Amendment also suggests that the Framers did not intend to subsume the right to petition within the protections of the freedom of speech. Although the right to petition and freedom of speech are found within the same Amendment, they are clearly separated into two distinct clauses. The right to petition is “the last in the list of rights granted in the First Amendment; it was a concept separate from free speech in the minds of the authors of the Bill of Rights.”

C. Supreme Court Decisions

It is well settled that the First Amendment protects the right of individuals to “petition the government for redress of grievances.” Furthermore, a state cannot “condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.”

72 Spanbauer, supra note 46, at 42; see also Eric Schnapper, “Libelous” Petitions for Redress of Grievances—Bad Historiography Makes Worse Law, 74 IOWA L. REV. 303, 345 (1989) (“[T]here is absolutely no contemporaneous history suggesting that anyone connected with the framing and approval of the [P]etition [C]lause... intended any limitation on the right to petition as it had existed under English law prior to the Revolution and as it continued in the several states.”).

73 See Valot v. Southeast Local Sch. Dist. Bd. of Educ., 107 F.3d 1220, 1234 (6th Cir. 1997) (Merritt, J., dissenting) (expressing that, in the minds of the Framers of the Bill of Rights, the right to petition the government was a notion separate from the freedom of speech); see also San Filippo v. Bongiovanni, 30 F.3d 424, 442 (3d Cir. 1994) (stating that the Petition Clause was not intended to be “a graceful but redundant appendage of the clauses guaranteeing freedom of speech and press”).

74 See Martin v. City of Del City, 179 F.3d 882, 887 (10th Cir. 1999) (noting that “the First Amendment separates the Petition Clause from the Free Speech Clause”). A cursory analysis of the text of the First Amendment suggests that the petition right and freedom of speech are separate because a semi-colon separates them. See U.S. CONST. amend. I. The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Id. But see Mark, supra note 68, at 2155 (noting that the right to petition “has been almost completely collapsed into the other rights that the First Amendment protects”).

75 Valot, 107 F.3d at 1234 (Merritt, J., dissenting). But see Thomas v. Collins, 323 U.S. 516, 530 (1945) (“It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances.”).


77 Connick v. Myers, 461 U.S. 138, 142 (1983); see also Keyishian v. Board of
Although the Supreme Court clearly stated that public employees are protected by the First Amendment right to petition, the actual degree of protection afforded by this right is a little more uncertain.\(^7\) There are no Supreme Court decisions that specifically address the scope of the First Amendment right to petition in the context of a retaliation claim by a public employee.\(^7\) The leading case regarding a public employee’s rights under the First Amendment, Connick v. Myers,\(^8\) was in the context of a free speech claim. In Connick, the Court held that a public employee who seeks to recover pursuant to a section 1983 claim,\(^8\) on grounds that adverse action has been taken against him or her because of the exercise of First Amendment freedom of speech rights, must establish that the speech “constitute[d] . . . a matter of public concern . . . .”\(^8\) The Court justified the public concern requirement by reasoning that “government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”\(^8\) Although the Supreme Court

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\(^7\) See supra note 5 (noting the division in the circuit courts as to whether there is a “public concern” requirement for a retaliation claim under the right to petition).

\(^7\) See San Filippo v. Bongiovanni, 30 F.3d 424, 442 (3d Cir. 1994).


\(^8\) See 42 U.S.C. § 1983 (1994) (providing a remedy for persons whose constitutional rights have been deprived “under the color of any statute, regulation, custom, or usage”).

\(^8\) Connick, 461 U.S. at 146. The Court held that:

[When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.][1]

Id. at 147.

The standard as to whether a matter is of “public concern” is determined by the “content, form, and context of a given statement, as revealed by the whole record.” Id. at 147–48. This standard has been criticized due to the vague criteria for determining exactly what constitutes a matter of “public concern,” and circuit courts have offered various definitions of this standard. See Shea, supra note 8, at 1714–15 (criticizing the “Connick public concern test” and its application to the Petition Clause). It has been stated that, “arguably[,] all government employee speech which discloses wrongdoing and inefficiency is of relevance to public debate and thus entitled to protection . . . .” Rosalie Berger Levinson, Silencing Government Employee Whistleblowers in the Name of “Efficiency,” 23 OHIO N.U. L. REV. 17, 23 (1996).

\(^8\) Connick, 461 U.S. at 146; see also Waters v. Churchill, 511 U.S. 661, 675
established the public concern requirement for government employees asserting a violation of their freedom of speech, this decision is expressly limited to the First Amendment freedom of speech. Despite the Supreme Court's failure to make any mention of the Petition Clause in the Connick decision, many circuit courts have applied the public concern requirement to retaliation claims under the First Amendment right to petition.

Just as the Supreme Court has never directly ruled on the issue of a public employee's claim of retaliation under the right to petition, there are also relatively few Supreme Court First Amendment decisions which have addressed the right to petition in any context. Yet, the existing decisions suggest that the Supreme Court is committed to providing a basic level of protection for an individual's right to petition and have set forth distinct guidelines for analyzing this right. In the 1960s and 1970s, the Court recognized the Petition Clause as a source of immunity from the penalties of conflicting federal law in cases arising from alleged violations of the Sherman Antitrust Act.

(1994) ("The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.").

See Connick, 461 U.S. at 147. Justice Brennan's vigorous dissent sets forth a different view. See id. at 157 (Brennan, J., dissenting) (arguing that whether a public employee's speech addresses a matter of "public concern" should only be relevant "when the statements at issue ... may have an adverse impact on the government's ability to perform its duties efficiently"); see also Pave, supra note 8, at 314 (noting that many commentators have criticized the public concern requirement as being too narrow to "adequately protect the free speech rights of individuals that work for their government").

See supra note 5 and accompanying text (citing circuit court decisions that have applied the public concern standard to the right to petition).

See Lawson & Seidman, supra note 68, at 739 (referring to the right to petition as "the First Amendment's poor relation"); Spanbauer, supra note 46, at 16 ("Of [the First Amendment's] expressive rights, the right to petition has engendered the least discussion among litigants, judges and scholars."); Note, A Petition Clause Analysis of Suits Against the Government: Implication for Rule 11 Sanctions, 106 HARV. L. REV. 1111, 1111 (1993) ("Courts and scholars alike have virtually ignored the Petition Clause in developing First Amendment jurisprudence.").

See supra note 8, at 317 (noting that the Supreme Court's right to petition jurisprudence is particularly committed to protecting the right of access to the court system).

See Shea, supra note 8, at 1703–05 (analyzing the Supreme Court's right to petition jurisprudence in the context of cases arising from alleged antitrust violations).
In *Eastern Railroad President's Conference v. Noerr Motor Freight*, the Supreme Court held that barring the railroads from joining together to lobby Congress for changes in the law would violate the plaintiff's rights under the Petition Clause. The Court stated that “[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.” Later, in *United Mine Workers v. Pennington*, the Court permitted unions to collectively petition the Secretary of Labor regarding minimum wages, even though the petitioning was intended to eliminate competition and would violate the Sherman Antitrust Act.

After acknowledging a level of protection under the petition right, the Supreme Court declared that this protection is not absolute. As recognized in *California Motor Transp. Co. v. Trucking Unlimited*, the petition right is limited by the “mere sham” exception. The Court held that if a petition were meritless—a “mere sham” used to reach an otherwise illegal

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91 See id. at 137–38. The Court reiterated that “no violation of the [Sherman Antitrust] Act can be predicated upon mere attempts to influence the passage or enforcement of laws.” Id. at 135.
92 Id. at 138.
93 381 U.S. 657 (1965).
94 See id. at 670. It has been recognized that in *Noerr*, the Petition Clause received little mention, and in *Pennington*, it received no mention at all. See Shea, *supra* note 8, at 1704. In both cases, the Court seemed more concerned about the First Amendment right of association. See id. The court did not fully acknowledge the impact of the *Noerr-Pennington* doctrine until 1972 in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 506 (1972). See Shea, *supra* note 8, at 1704.
95 See *McDonald v. Smith*, 472 U.S. 479, 484 (1985) (“Nor do the Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is absolute.”).
96 404 U.S. 508 (1972).
97 See id. at 511. The “mere sham” exception to Petition Clause protection was developed from dicta in the *Noerr* case. See *Eastern Railroad President's Conference v. Noerr Motor Freight*, 365 U.S. 127, 144 (1961) (“There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.”). In *California Motor*, the Court held that antitrust laws could not be construed to prohibit the filing of legitimate lawsuits because this would defeat the right to petition. See *California Motor*, 404 U.S. at 510–11. The Court extended its decision to include the petitioning of administrative agencies and the right of access to the courts. See id.
end—it would not constitute protected activity. In Bill Johnson's Restaurants v. NLRB, the Court further developed this limitation by stating that "baseless litigation is not immunized by the First Amendment right to petition." The Court explained that "since sham litigation by definition does not involve a bona fide grievance, it does not come within the [F]irst [A]mendment right to petition." Furthermore, in McDonald v. Smith, the Court held that the Petition Clause does not provide absolute immunity against libel for the content of petitions. As discussed below, many circuit courts have incorrectly cited the McDonald decision as authority for the application of the "public concern" requirement to right to petition claims.

II. ANALYSIS OF THE RIGHT TO PETITION FOR GOVERNMENT EMPLOYEES

A. Incorrect Analysis by the Majority Of Circuit Courts

A majority of circuit courts have incorrectly applied the "public concern" requirement to the right to petition without any guidance from the Supreme Court. While a focus on content is consistent with the Supreme Court's approach to the freedom of speech, this focus does not correspond with the Court's doctrine regarding the right to petition. The Supreme Court has limited the right to petition to protect only non-sham

98 California Motor, 404 U.S. at 511.
100 Id. at 743. In Bill Johnson's Restaurants, Inc. v. NLRB., the Court held that the filing of a legitimate lawsuit by an employer could not be enjoined as an unfair labor practice even if the employer's only reason for initiating the suit was to retaliate against an employee's exercise of rights protected by the National Labor Relations Act. See id.
101 Id. at 743 (quoting Thomas A. Balmer, Sham Litigation and the Antitrust Laws, 29 BUFF. L. REV. 39, 60 (1980)).
103 See id. at 482 (affirming the decision of the district court and the Fourth Circuit).
104 See infra Part II.A.
105 See supra note 5 and accompanying text.
106 See Pave, supra note 8, at 332 ("A content focus, while consonant with the Connick Court's approach to determining the reach of the Free Speech Clause, is not in keeping with the Court's approach to determining the reach of the Petition Clause.").
yet, the Court has never limited the right to petition to protect only those petitions that involve a matter of public concern. Furthermore, it has been asserted that "[t]he petition clause should not be interpreted to permit retaliation for filing a legitimate unemployment compensation case anymore than it permits retaliation against individuals making legitimate claims for racial, gender or religious discrimination."108

Although the Supreme Court has recognized the right to petition as a distinct clause of the First Amendment that deserves a different standard to determine the degree of protection,109 the majority of circuit courts incorrectly applied the Connick "public concern" requirement to retaliation claims by public employees under the right to petition.110 The circuit courts came to this conclusion as a result of an improper, careless analysis of dicta in McDonald v. Smith.111 In McDonald, the respondent filed a libel action, alleging that while respondent was being considered for the position of United States Attorney, petitioner wrote two letters to President Reagan and other government officials which contained false, slanderous, libelous, inflammatory, and derogatory statements concerning the respondent.112 The petition claimed that the Petition Clause granted him absolute immunity from liability because the letters could be characterized as petitions.113 The Supreme Court held that the right to petition does not provide absolute immunity from damages for libel.114 A majority of circuit courts have asserted that the language in McDonald equates the rights to petition and freedom of speech, and thus, both rights are subject to the public concern requirement. Specifically, these courts

107 See supra Part I.C.
108 Valot v. Southeast Local Sch. Dist. Bd. of Educ., 107 F.3d 1220, 1234 (6th Cir. 1997) (Merritt, J., dissenting). Judge Merritt added that "[w]e do not import the 'public concern' test into due process, equal protection or other constitutional claims. Why do so here?" Id.
109 See supra Part I.C.
110 See supra notes 79–86 and accompanying text (discussing the factual background of the Supreme Court's "public concern" requirement).
111 See infra notes 112–128 and accompanying text.
113 See id. at 481–82.
114 See id. at 485. Commentators have criticized the decision in McDonald for failing to accurately recognize the historically superior status of the Petition Clause and severely narrowing the scope of the right to petition as recognized by the Framers of the First Amendment. See e.g., Pave, supra note 8, at 319–23.
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relied on dicta in the case which states that "[t]he right to petition is cut from the same cloth as the other guarantees of that Amendment," and "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions."

The reliance on this dicta in McDonald is improper because the issue decided by the Supreme Court in that case was limited to the context of defamation. The sole issue addressed by the Court was whether a person defamed in a letter was barred from suing the writer because the letter had been addressed to the President and "could thus be characterized as a 'petition' within the meaning of the First Amendment." The decision in McDonald had "absolutely nothing to do with the use of the courts by public employees or others." Thus, the McDonald decision should not be used as a basis for determining the rights of public employees to petition the government.

Furthermore, in McDonald, the Petition Clause did not protect any right that was not already protected by the Freedom of Speech Clause because the petition consisted of a letter to the

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115 McDonald, 472 U.S. at 482.
116 Id. at 485. The Court also stated that "[t]he Petition Clause ... was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." Id.
117 The Supreme Court made various statements which illustrate that this decision is limited to the specific issue of absolute immunity for libel. The Court specifically stated that its holding is limited when it said that it "granted certiorari to decide whether the Petition Clause of the First Amendment provides absolute immunity to a defendant charged with expressing libelous and damaging falsehoods in letters to the President of the United States." Id. at 480 (emphasis added). The Court also stated that "it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolute immunity from damages for libel." Id. at 483 (emphasis added). This limited holding also may be inferred from the Court's statement that "[n]or do the Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is absolute." Id. at 484 (emphasis added).
118 See Rendish v. City of Tacoma, 134 F.3d 1389, 1392 (9th Cir. 1998) (Reinhardt, J., dissenting) ("[T]he case concerned the question whether a libelous letter written to President Reagan about a U.S. attorney candidate deserved special protection because it could be characterized as a 'petition.' "); San Filippo v. Bongiovanni, 30 F.3d 424, 442 n.21 (3d Cir. 1994) (stating that the Court's decision in McDonald was limited to "whether one who was defamed in a letter was disabled from suing the letter-writer by virtue of the fact that the letter was written to the President and could thus be characterized as a 'petition' ").
119 Rendish, 134 F.3d at 1392 (Reinhardt, J., dissenting).
The difficulty in distinguishing between the freedom of speech and right to petition provided a logical basis for the Court's ruling in *McDonald* that words about a public figure should not be immunized simply because they appear in a letter characterized as a petition. The Court asserted that although the right to petition is guaranteed, the "right to commit libel with impunity is not." It seems to follow that the Court was merely concerned with the possibility that libelous statements, cloaked in the form of a petition, would escape punishment.

If the majority of circuit courts incorrectly analyzed public employee retaliation claims by improperly relying on *McDonald* as suggested, these courts have seriously undermined the strength of the separate and distinct right to petition. Under the rationale of a majority of circuit courts, the right to petition has no independent meaning. Effectively, the Petition Clause would only protect the speech within the petition, so long as the speech within the petition regarded a matter of "public concern." This spineless view of the right to petition is clearly contrary to the intent of the Framers of the Constitution. The result of the application of the public concern requirement in this context is that the employee's right to petition the government for redress of grievances "is subsumed into the right of free speech, effectively nullifying an independent First Amendment right."

120 See *San Filippo*, 30 F.3d at 439.
121 See id. ("[I]t is difficult to distinguish in any meaningful way between words contained in a letter to the President and words contained in, for example, an advertisement appearing in the *New York Times*."). The *San Filippo* court noted that the letter-writer in *McDonald* sent copies of the letter to a Senator, three members of the House of Representatives, the Director of the Federal Bureau of Investigation, and the Presidential Adviser. See id. at 442 n.21.
122 *McDonald*, 472 U.S. at 485.
123 See id.
124 See *Pave*, supra note 8, at 327.
125 See id.
126 See id.
127 See supra Part I.B.
128 *Pave*, supra note 8, at 324.
A. The Correct Analysis of the Right to Petition

1. The San Filippo Standard

A public employee's retaliation claim under the right to petition should not be subject to a "public concern" requirement. An analysis of the right to petition "should not be treated as an exercise in speech" because petitioning is only marginally related to speech. Thus, the petition right should not automatically be burdened with doctrine from the Freedom of Speech Clause. The Third Circuit is the only circuit court that has properly analyzed the public employee's right to petition. In San Filippo v. Bongiovanni, the Third Circuit held that a public employee is protected against retaliation under the Petition Clause for filing a petition in the nature of a lawsuit or grievance regardless of whether the petition addressed a matter of public concern. The court came to this conclusion subsequent to an in-depth analysis of the historical importance of the Petition Clause and the previous Supreme Court decisions regarding the scope of protection under the right to petition. According to the Third Circuit:

129 See generally San Filippo v. Bongiovanni, 30 F.3d 424 (3d Cir. 1994).
130 Valot v. Southeast Local Sch. Dist. Bd. of Educ., 107 F.3d 1220, 1234 (6th Cir. 1997) (Merritt, J., concurring in part and dissenting in part) ("Filing an unemployment compensation action, like hiring a lawyer, eating dinner before making a speech or driving a car or catching a plane to a meeting, is related to speech only marginally.").
131 See id. ("It makes little sense to burden the right of petition cases automatically with doctrines from the Speech Clause ... ").
132 See generally San Filippo, 30 F.3d at 424. Some lower courts, however, recognized a difference between the public employee's right to petition under the Petition Clause and the Freedom of Speech Clause. See Stellmaker v. DePetrillo, 710 F. Supp. 891, 892 (D. Conn. 1989) (rejecting the government employer's argument that because the teacher's grievance was a matter of private concern, there was no protection from retaliation); Fuchilla v. Prokop, 682 F. Supp. 247, 262 (D.N.J. 1987) (stating that courts have found the right to access the courts protected under the First Amendment without engaging in a "public concern" analysis).
133 30 F.3d 424 (3d Cir. 1994). In San Filippo, a tenured professor who was dismissed from Rutgers University filed a lawsuit alleging that he was dismissed in retaliation for the exercise of his First Amendment right to petition. See id. at 426-30. His activities included the filing of numerous complaints, grievances, and suits regarding a variety of conditions and policies at the University. See id.
134 See id. at 442-43.
135 See id. ("[T]he right to petition has a pedigree independent of—and substantially more ancient—than the freedoms of speech and press.").
136 See id. at 435-40; see also supra Part I.C.
[W]hen government—federal or state—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 [P]etition [C]lause has given the particular mechanism its constitutional imprimatur.137

The court found "an independent reason—a reason of constitutional dimension—to protect an employee lawsuit or grievance if it is of the sort that constitutes a 'petition' within the meaning of the [F]irst [A]mendment." The reason of "constitutional dimension" was that the Petition Clause imposes an obligation on the government to have "at least some channel open for those who seek redress for perceived grievances." In light of this obligation, it is unconstitutional for the government to provide a channel for citizens to petition the government and then deny them use of that channel through retaliatory measures.140

In accordance with Supreme Court authority,141 the San Filippo court asserted that the only limit to the protection granted by the right to petition in this context was whether the grievances or lawsuits constituted a "petition" and whether the petition was "non-sham."142 According to San Filippo, a "petition" is characterized by "lawsuits and grievances directed

137 San Filippo, 30 F.3d at 442.
138 Id. at 441–42; see also Valot v. Southeast Local Sch. Dist. Bd. of Educ., 107 F.3d 1220, 1234 (6th Cir. 1997) (Merritt, J., concurring in part and dissenting in part) ("The constitutional wrong here is the act of retribution . . . for successfully seeking benefits. Such an act makes ineffective a citizen's right to seek government aid by requesting legitimate official or administrative relief and undermines the right 'to petition for a redress of grievances.'").
139 San Filippo, 30 F.3d at 441–42. The court notes that through the incorporation of the First Amendment, the Fourteenth Amendment liberty clause imposes the same obligation on the states. See id.
140 See Pave, supra note 8, at 337; see also Valot, 107 F.3d at 1234 (Merritt, J., concurring in part and dissenting in part) (declaring that the act of retaliating against government employees for seeking benefits was unconstitutional). Circuit Judge Merritt also stated that the retaliatory acts make "ineffective a citizen's right to seek government aid by requesting legitimate official or administrative relief and undermines the right 'to petition for a redress of grievances.'"); Valot, 107 F.3d at 1234 (Merritt, J., concurring in part and dissenting in part).
141 See supra Part I.C.
142 See San Filippo, 30 F.3d at 443.
at the government-employer" that invoke "formal mechanisms for the redress of grievances." The court's focus on the difference between sham and non-sham petitions is consistent with Supreme Court decisions such as California Motor Transportation and Bill Johnson's Restaurants. The court concluded that the "mere act of filing a non-sham petition is not a constitutionally permissible ground for discharge of a public employee."145

Although some courts146 expressed concern that not applying the public concern requirement would constitute "special treatment of the right to petition [that] would unjustly favor those who through foresight or mere fortuity present their speech as a grievance rather than in some other form,"147 this concern is unfounded and exaggerated.148 As the court in San Filippo pointed out, the implications of publicly airing private concerns as opposed to filing a petition regarding a private matter are quite different.149 The "public concern" requirement expressed in Connick allows a public employee to be disciplined for speech regarding an employment dispute of private concern since the employee attempted to draw public attention to a

143 Id. at 439. The court stated that lawsuits, grievances, and workers compensation claims share the feature of "invoking a formal mechanism for redress of grievances against the government." Id. at n.18. Examples of formal government adoption of a mechanism for the redress of grievances are "entry into a collective bargaining agreement that provides for a grievance procedure" and a "waiver of sovereign immunity from suit in the courts of that sovereign." Id. at 442. The San Filippo court distinguished the present case from that in McDonald v. Smith, 472 U.S. 479 (1985). See San Filippo, 30 F.3d at 439. The San Filippo court recognized that in McDonald "the 'petition' at issue was simply a letter . . . [which] was properly analyzable under the conventional Connick rubric applicable to speech." Id. Yet, in San Filippo, the "petition" at issue was a lawsuit or grievance. See id. The characterization of a "petition" in San Filippo would alleviate the concerns of the McDonald Court that mere speech in the form of a letter would be characterized as a petition and thus receive greater protection. See supra Part II.A.

144 See generally Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); see also supra Part I.C.

145 San Filippo, 30 F.3d at 443.

146 See, e.g., Belk v. Town of Minocqua, 858 F.2d 1258 (7th Cir. 1988).

147 Id. at 1262.

148 See San Filippo, 30 F.3d at 438-39.

149 See id. at 442. The act of petitioning is less likely to cause a "discipline-maintenance problem" for the government-employer than most acts of speech. Pave, supra note 8, at 341. While responding to a grievance or lawsuit may generally be done privately, acts of speech are generally "highly public" in nature. Id.
private dispute. Yet, when a public employee files a petition, the employee is not "appealing over government's head to the general citizenry," but simply "asking [the] government to fix what, allegedly, government has broken or has failed in its duty to repair." When a public employee files a petition, that person is taking the appropriate steps to address the government directly through the channels that they are constitutionally obligated to institute. Yet, one who speaks publicly about these concerns is not attempting to directly address the employer through the appropriate channels. When a public employee properly seeks access to the courts, "something far more than even free expression is at stake—[t]he very right to require the government to obey the law and to redress the injuries it causes its citizens is at issue."

B. Policy Reasons for Recognizing a Distinct Right to Petition

The impact of this limitation on the right to petition is heightened due to the increasing number of Americans who work for the government. The requirement that a petition must be of "public concern" allows no available means of recourse for a public employee to assert a legitimate private complaint without the possibility of punishment. The court in *San Filippo* expressed concern that if the government could freely discharge

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150 See *San Filippo*, 30 F.3d at 442. The court stated:
As applied to communications that are not petitions, the *Connick* rule means that a public employee who goes public—e.g., by writing to the *New York Times*—with an employment dispute that is not of "public concern" runs the risk of being disciplined by her public employer for undertaking to draw public attention to a private dispute.

151 Id.

152 See *Pave*, supra note 8, at 339.

153 See id.

154 *Rendish v. City of Tacoma*, 134 F.3d 1389, 1392 (9th Cir. 1998) (Reinhardt, J., dissenting), *cert. denied*, 524 U.S. 952 (1998). Judge Reinhardt goes on to state that "[t]hat right [to petition] may not be lightly limited—or made to serve as the basis for punitive or retaliatory governmental action." Id.

155 See *Pave*, supra note 8, at 304 ("With an increasing number of Americans now working for their federal, state, and local governments, this limitation on government power has grown in importance.").

156 See *Rendish*, 134 F.3d at 1390 n.3 (Reinhardt, J., dissenting) ("There is no contention [by the majority opinion] that Rendish should have pursued her claims in any other forum. Under the panel's view of the law, it appears that her only permissible course of action was to remain silent regarding the state's unlawful and corrupt conduct.").
an employee invoking a formal grievance mechanism to present a non-sham petition, "the [P]etition [C]lause of the [F]irst [A]mendment would, for public employees seeking to vindicate their employee interests, be a trap for the unwary—and a dead letter." Furthermore, the citizen's petition to the government demanding redress of grievances often discloses and remedies "incompetence, corruption, waste and other government misconduct." Yet, a public employee is unlikely to file a grievance or lawsuit challenging the misconduct if he or she fears retaliatory discharge. Thus, the extension of the "public concern" requirement has a chilling effect on the filing of a grievance or lawsuit, which may be necessary to challenge governmental misconduct. This, in effect, allows government employers to avoid any check on their misconduct that the right to petition provides. Not only does this requirement prevent public employees from properly petitioning their government-employer, but it also encourages public employees to seek other less peaceful remedies due to the possibility of termination or other retaliatory actions as a result of filing a grievance or petition.

157 San Filippo v. Bongiovanni, 30 F.3d 424, 442 (3d Cir. 1994). The court in San Filippo added that "[the petition clause of the [F]irst [A]mendment was not intended to be a dead letter—or a graceful but redundant appendage of the clauses guaranteeing freedom of speech and press." Id.

158 Smith, supra note 47, at 1178. "Public employees are [often] in the best position to be aware of [and inform of] misconduct by others within the government's employ," and "the threat of suit may deter official misconduct." Pave, supra note 8, at 340.

159 See Pave, supra note 8, at 340.

160 See id. The result of extending the "public concern" requirement is that public employees would not even attempt to file a petition regarding a legitimate private matter for fear of the risk of getting fired. See id. at 341.

161 See id. Since the government agency would not be required to justify its actions, "no one... would have reason to look into her grievance and the serious claims it contains." Id. at 340. In addition, the employer would know that any court would not question her decision because "the focus of the petitioning employee's grievance was not a public matter." Id. at 341.

162 See Rendish v. City of Tacoma, 134 F.3d 1389, 1389 (9th Cir. 1998) (Reinhardt, J., dissenting in part and concurring in part); see also Smith, supra note 47, at 1179 ("The availability of petitioning as a popular right allows public feelings to be expressed in a peaceful, orderly way and may be a fail to revolution."). In his dissenting opinion in Rendish, Judge Reinhardt stated:

It will certainly come as a surprise to those who have taken seriously our assertions that persons with legitimate grievances should settle their disputes by peaceful means in the courts rather than through disruptive or militant extra-legal actions. The message we send to public employees and
CONCLUSION

The United States Supreme Court must resolve the growing controversy among the circuit courts in order to provide government employees with the protection they deserve under the First Amendment right to petition. The right to petition is distinct from the freedom of speech, and thus a public employee’s retaliation claim in violation of the petition right deserves a separate standard of analysis that does not include a “public concern” requirement. The recent views of judges and commentators, the long-standing, prominent history of the petition right, Supreme Court decisions, and numerous policy issues illustrate the need for a distinct, expansive view of the right to petition. The expression of this right in the First Amendment is not meant to be redundant or simply an additional clause to further detail the freedom of speech. The right to petition is an independent right in desperate need of restoration to its original significance.

others today is quite the opposite: if you avail yourself of the judicial process, you face termination from your employment and possibly other equally painful consequences; accordingly, you had best seek your remedies elsewhere.

Rendish, 134 F.3d at 1389 (Reinhardt, J., dissenting).