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San Filippo v. Bongiovanni: The Public Concern Criteria and the Scope of the Modern Petition Right

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RECENT DEVELOPMENT

San Filippo v. Bongiovanni: The Public Concern Criteria and the Scope of the Modern Petition Right

I. INTRODUCTION

If the "person on the street" were asked to name a right guaranteed to all Americans by the First Amendment of the United States Constitution, freedom of speech would likely come quickly to mind, along with the concomitant right of free press. The rights to practice one's religion and peaceably assemble, even the judicially created right of free association might follow closely behind. Few people, however, would mention the "right of the people . . . to petition the government for redress of grievances."[1] Fewer still would be able to give a good definition of petitioning, or to describe the types of activities protected by the right.[2] One obvious reason for the general lack of awareness of the existence and contours of the petition right is the almost total absence of judicial scrutiny directed at the Petition Clause in the years since the Framers included it in the First Amendment as a separate textual guarantee. This judicial "silent treatment" stands in stark contrast to the eager and exacting scrutiny applied to the other First Amendment guarantees such as free speech, press, and religion. The substance and scope of these rights have been alternately reduced and expanded over time as the rights themselves are continuously redefined by the courts to fit the sensibilities of each generation. The petition right, deprived of the nuance and repetition-engendered familiarity provided by this sort of natural, ongoing evolution, arrives into the late twentieth century somewhat awkwardly, a little-understood visitor from another age.

Claims of impingement of the petition right have been raised in recent years by public employees whose government employers have allegedly retaliated against them for engaging in petitioning activity. Courts, leery of venturing into an area where legal precedent is virtually non-existent, either ignore the claims or use a pre-existing analytical framework developed in response to claims of impingement

1. U.S. Const., Amend. I.

2. *Black's Law Dictionary* defines a "petition" as "a formal written request addressed to some governmental authority." *Black's Law Dictionary* 1145 (6th ed. 1990). Examples of petitioning activity include presenting a laundry list of policy criticisms to a legislative body, submitting a request to an administrative board for action on some matter laid before it, or filing an application with a court requesting judicial action on a certain matter. Id.

of other first amendment rights such as speech or association. This subordination of the petition right to other, more fully developed first amendment rights is a long-standing trend in American jurisprudence, despite the fact that the petition right clearly predates the other first amendment rights and has even been described as the likely source of these rights.[3] In *San Filippo v. Bongiovanni*,[4] a case involving the claim of a professor at a state university who was allegedly fired for exercising his petition rights, the Third Circuit recently endeavored to break away from this practice of treating the Petition Clause as an inferior stepchild in the first amendment family of rights.

Why the petition right, which has been described as "the cornerstone of the Anglo-American constitutional system,"[5] has failed to achieve the fame and stature of its first amendment counterparts is a question beyond the scope of this Recent Development.[6] However, the virtually complete lack of acknowledgment of the petition right by American courts, and the Supreme Court in particular, is an important theme underlying the chronicling of petition clause jurisprudence presented in this Recent Development. Any critique of a petition clause analysis must be grounded in an understanding of the daunting task faced by a court, such as the Third Circuit in *San Filippo*, that expresses the rare willingness to consider a petition clause claim. Such courts must piece together an analysis from the dicta of the few supreme court cases dealing explicitly with the Petition Clause, usually in a context completely unrelated to the case at hand.[7] In addition, due to the lack of instructive precedent in post-constitutional case law, courts and legal scholars alike have been forced to place an unusually heavy reliance on pre-constitutional

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3. Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. Cin. L. Rev. 1153, 1153 (1986).

4. 30 F.3d 424 (3d Cir. 1994), cert. denied, 115 S. Ct. 735 (January 9, 1995).

5. Smith, 54 U. Cin. L. Rev. at 1153 (cited in note 3).

6. For one theory, see Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L. J. 142 (1986). Professor Higginson explains that the practice of petitioning floundered when abolitionists flooded Congress with petitions during the debates over slavery. As a result of Congress's unwillingness to acknowledge these petitions, Higginson contonds, the right of petition was collapsed into the right of free speech and expression, a definitional narrowing which continues to this day. Id. at 142-144.

7. For instance, courts considering right of access to courts claims in the context of retaliatory discharge actions have relied heavily on *McDonald v. Smith*, 472 U.S. 479 (1985), a case involving a libel claim arising from a letter to the president. See notes 44-52, 112, and accompanying text.

history in attempting to determine the scope of the modern petition right. For these reasons, an exploration of the origins and history of the petition right is a necessary antecedent to a discussion of the Third Circuit's holding in *San Filippo*.

Accordingly, Part II.A of this Recent Development provides a brief summary of the pre-constitutional development of the petition right in England and America.[8] Part II.B chronicles the treatment afforded the petition right, in various contexts, by modern American courts. Part II.C provides a more specific legal background for the analysis of *San Filippo*, describing the retaliatory discharge cause of action, which is the subject of the discussion in *San Filippo*, as it has developed in the context of claims of impingement of the first amendment right of free speech. Part III lays out the analytical framework articulated in *San Filippo*, while Part IV evaluates the court's holding and offers some suggestions for determining the scope of the modern petition right, based on the division of the right into the two categories of political and judicial petitions.

II. LEGAL BACKGROUND

A. Pre-Constitutional Origins of the Petition Right

There is no doubt that the recognition of the petition right in Anglo-American jurisprudence substantially predates the recognition of the other enumerated first amendment rights. The Magna Carta, signed in 1215, granted to British nobility the right to bring their collective requests and complaints before the crown.[9] In exchange for the grant of a royal audience and the opportunity to obtain redress for their grievances, the barons refrained from engaging in armed revolt against the crown.[10] Throughout the centuries, the petition right in England evolved with the changing political climate, expanding to include broader segments of the population, and adapting to the increasing complexity of government and the shift of power from the

8. This is a vast and fascinating topic which can merely be touched upon in this Recent Development. For detailed and lengthy accounts of the origins and history of the petition right, see generally, Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 Hastings Const. L. Q. 15 (1993); Smith, 54 U. Cin. L. Rev. 1153 (cited in note 3); Higginson, 96 Yale L. J. 142 (cited in note 6).

9. Spanbauer, 21 Hastings Const. L. Q. at 22. (cited in note 8).

10. Id.

monarch to Parliament.[11] Representative[12] petitioning before Parliament continued as it had before the crown, but more and more petitions were brought by individuals. Some of these individual petitions criticized or demanded change in certain governmental policies or practices, but some were requests for individual relief based on purely private grievances.[13] Petitions falling into the latter category were referred to special Parliamentary Committees for resolution through quasi-judicial proceedings.[14] Eventually, these "judicial petitions" were addressed directly to the emerging royal court system.[15] Despite the increasing specialization of government and the increasing diversity of the claims presented, all written submissions to the sovereign continued to fall under the protective umbrella of the general right to petition the government for redress of grievances.[16]

This same system of petitioning was transferred more or less intact to America where, in the seventeenth and eighteenth centuries, colonists were allowed to bring their written complaints to the local courts, legislative bodies, councils, or governors. In the wilds of colonial America, the same governing body by necessity often performed executive, judicial, and legislative functions.[17] This overlap of governmental functions contributed to the continuation in America of the broad definition of petitioning that had developed in England.[18] The petition right in colonial America encompassed complaints brought by groups as well as by individuals, on subject matters ranging from the highly charged political issues of the day to mundane and purely private grievances.[19]

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11. Id. at 23.

12. "Representative" petitions were requests or criticisms presented by a single petitioner on behalf of groups of subjects and eventually on behalf of political constituencies. Id. For examples of this kind of "collective" petitioning in the modern world, see notes 32-40 and accompanying text.

13. Note the initial development of the two categories of political and judicial petition described more fully in Part IV of this Recent Development. The political petition right was a purely expressive right, carrying only the guarantee of being heard. The judicial petition right, however, began to carry with it the expectation of some type of governmental response, usually in the form of an adjudication on the issue contained in the petition. See notes 216-232 and accompanying text.

14. Spanbauer, 21 Hastings Const. L. Q. at 24 (cited in note 8).

15. Id.

16. Id.

17. Id. at 28; Higginson, 96 Yale L. J. at 145-47 (cited in note 6).

18. Spanbauer, 21 Hastings Const. L. Q. at 28 (cited in note 8).

19. Higginson, 96 Yale L. J. at 146 (cited in note 6). A representative complaint from the Connecticut General Assembly alleged that one "George Nichols had in an undue manner . . . obtained and gotten from petitioner a deed of his house and lands." Id.

The petition right of early colonial times, though broader than it had been in its medieval origins, was arguably more vulnerable. After all, by the seventeenth century, the average petitioner no longer represented a group of well-armed and land-hungry barons.[20] He was much more vulnerable to retaliation than his medieval predecessors. And the British government did from time to time punish its subjects, in England and America, for bringing petitions that were controversial or openly critical of the government.[21] But petitioning had become entrenched in tradition and was extremely popular among the citizenry. Parliament's increased sensitivity to the ever-expanding electorate rendered punitive responses to petitions less and less frequent, ensuring the continuance of petitioning as a politically meaningful right.[22]

By the mid-eighteenth century virtually no restrictions remained on the petition right.[23] This tolerant attitude extended to the colonies, where, on the eve of the American Revolution, political petitions were taking on increasingly hostile tones.[24] This largely unrestricted petition right was preserved by the founding fathers throughout the duration and aftermath of the Revolutionary War.[25] In fact, in light of the harsh seditious libel restrictions imposed on speech by nervous patriots in an effort to diminish the persuasive power of those opposed to the revolution, the political petition represented the only authorized way for early Americans to present complaints and criticisms to the government.[26] Some scholars point to

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20. One commentator has pointed out that the only method of enforcing the petition right granted in the Magna Carta was through "the baronial seizure of royal land and possessions each time [King] John refused or delayed redress." Spanbauer, 21 Hastings Const. L. Q. at 22 (cited in note 8). Obviously this option was not available to the individual petitioner in colonial America.

21. See id. at 26-27, 30 (describing the punishments the British government visited upon petitioners).

22. Id. at 26-27. See also the 1689 Bill of Rights exacted of William and Mary, stating that "it is the Right of the Subjects to petition the King," and going on to provide that "all . . . prosecutions for such petitioning are illegal." 1 Wm. & Mary, Sess. 2, ch. 2 (1689). See also William Blackstone, 1 *Commentaries* *143 (1956), for a discussion of the critical importance of Parliament's declaration that it was "illegal" to penalize a subject for petitioning.

23. See Spanbauer, 21 Hastings Const. L. Q. at 26-27 (cited in note 8). Meritless petitions, however, were not protected. Id. at 31. Spanbauer points out that the enactment of rules against "vexatious suits" did not encompass petitions that " 'reflected on the house' and were not designed or applied to squelch criticism of the government." Id. Thus, these early limits on meritless petitions, applied primarily to judicial petitions, are the precursors of the "sham exception" articulated by the Supreme Court in *Bill Johnson's Restaurants, Inc v. NLRB*, 461 U.S. 731 (1983), discussed in notes 74, 225 and accompanying text.

24. See Spanbauer, 21 Hastings Const. L. Q. at 30-31 (cited in note 8).

25. Smith, 54 U. Cin. L. Rev. at 1173-75 (cited in note 3); Spanbauer, 21 Hastings Const. L. Q. at 32-33, 37-39 (cited in note 8).

26. Spanbauer, 21 Hastings Const. L. Q. at 37 (cited in note 8).

this era as evidence of the superiority of the petition right over other first amendment rights in the minds of the Framers of the United States Constitution.[27] These commentators also point to the fact that rights of petition and assembly were originally envisioned by James Madison as an amendment separate from freedom of religion, speech, and the press.[28]

In any event, the petition right did not come into the Bill of Rights as a separate amendment. The rights of speech, press, assembly, and petition were consolidated into the First Amendment of the United States Constitution, in no apparent textual hierarchy, in the autumn of 1789. Significantly, the final version of the Petition Clause describes the right to apply to "the government" for the redress of grievances, as opposed to the right to apply to the "the legislature" that was included in an earlier draft.[29] Commentators have pointed to this textual change as indicative of the Framers' intention to continue the broad definition and protections of the petition right consistent with British and colonial experience.[30]

B. Judicial Treatment of the Petition Clause

1. The Petition Right as a Source of Immunity

Notwithstanding its distinguished lineage, the Petition Clause has been greatly underutilized by litigants and courts as a potential source of rights.[31] However, it has occasionally been considered by the United States Supreme Court. In the 1960s and 1970s, in a series of cases arising from alleged antitrust violations, the Court fashioned a doctrine which seemed to recognize the Petition Clause as a potential source of immunity from the penalties of conflicting federal statutory law. In 1961, in *Eastern Railroad President's Conference v. Noerr Motor Freight*,[32] the Supreme Court held that the Sherman Antitrust

27. Spanbauer writes that "[t]he existence of both state seditious libel laws and the Federal Sedition Act coupled with the failure te 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." Id. at 29. See also Smith, 54 U. Cin. L. Rev. at 1174-75 (cited in note 3).

28. Spanbauer, 21 Hastings Const. L. Q. at 39 (cited in note 8).

29. Id. at 40.

30. Id.

31. Id. at 16.

32. 365 U.S. 127 (1961).

Act would not be applied to punish various entities in the railroad industry that had banded together, allegedly in violation of the Act, to lobby Congress for changes in the law designed to drive competitors out of business. "[N]o violation of the Act," wrote the Court, "can be predicated upon mere attempts to influence the passage or enforcement of laws."[33] Four years later, the Court in *United Mine Workers v. Pennington*[34] applied the same reading of the Sherman Act to permit different unions to collectively petition the Secretary of Labor for higher wages, despite the fact that the petitioning was part of a larger scheme that clearly violated the Act.[35] Notably, in *Noerr* the Petition Clause received only scant mention,[36] while in *Pennington* it was not mentioned at all. The Court in both cases seemed more concerned about infringement of the first amendment right of association, emphasizing the presence of collective activity and "concerted action" by petitioners in both cases.[37] Nevertheless, the language used by the *Noerr* Court in its careful reading of the Sherman Act clearly evokes the themes that have shaped the petition right throughout its history:

> In a representative democracy . . . branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity.[38]

It wasn't until 1972, in *California Motor Transport v. Trucking Unlimited*,[39] that the Court acknowledged the true impact of the so-called "*Noerr-Pennington* doctrine" on petition clause jurisprudence. *Trucking Unlimited* involved another alleged antitrust violation, this time on the part of a group of highway carriers who had initiated state and federal administrative and judicial proceedings in an attempt to defeat its competitors' applications for entry into the truck-

33. Id. at 135.
34. 381 U.S. 657 (1965).
35. Id. at 670.
36. 365 U.S. at 138.
37. See id. at 136 ("We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law"). The *Pennington* Court applied this same reasoning to the claim before it, stating that "[t]he Sherman Act, it was held [in *Noerr*], was not intended to bar concerted action of this kind even though the resulting official action damaged other competitors at whom the [petitioning] campaign was aimed." 381 U.S. at 669.
38. *Noerr*, 365 U.S. at 137.
39. 404 U.S. 508 (1972).

ing business.[40] The Court focused on the petition clause language in *Noerr*, holding that the right articulated there encompassed petitions directed toward administrative agencies and courts. Reaffirming the broad historical view of petitioning, Justice Douglas stated that the right to petition extends to all departments of the government.[41] The *Trucking Unlimited* Court also described what would become an important limitation on the petition right in the context of petitions directed towards courts, the sham exception. Under this exception, if a judicial petition is meritless and is obviously a mere "sham" perpetrated as a means to some otherwise illegal end, it will not constitute protected activity and will thus lose whatever immunity it would have otherwise enjoyed.[42]

The Petition Clause has received limited consideration as a source of immunity in contexts other than antitrust litigation. The Sixth and Seventh Circuits, for instance, have made reference to the *Noerr-Pennington* doctrine in holding that legitimate political petitioners will not incur liability under federal anti-discrimination statutes or state defamation laws. These cases involved claims against petitioners who had purportedly engaged in vituperative campaigns aimed at forcing the removal of controversial educators from posts in the public schools.[43]

The Supreme Court, however, has made it clear that the political petitioner will not enjoy absolute immunity regardless of the content of the petition. In 1985, in *McDonald v. Smith*,[44] the Court dealt with a case involving a letter written to then-President Ronald Reagan urging against the appointment of a particular candidate for United States Attorney.[45] The Court held that the letter writer, who had allegedly made false and damaging accusations against the

40. Id. at 509.
41. Id. at 510.
42. Id. at 511.
43. See *Eaton v. Newport Bd. of Educ.*, 975 F.2d 292 (6th Cir. 1992) (holding that groups of parents who had campaigned to have an allegedly racist school principal removed from his job were immune from liability under the principal's civil rights claim); *Stachura v. Truszkowski*, 763 F.2d 211, 213 (6th Cir. 1985) (holding that a parent who had successfully lobbied the school board for the dismissal of a teacher for improper teaching of sex education was immune from suit for her actions), rev'd on other grounds, 477 U.S. 299 (1986); *Stevens v. Tillman*, 855 F.2d. 394 (7th Cir. 1988) (holding that a parent-toacher organization that exerted pressure on a school board to terminate an elementary school principal had neither defamed nor conspired to violate the civil rights of the principal). Such activity clearly falls into the category of political petitioning. See note 216-221 and accompanying text.
44. 472 U.S. 479 (1985).
45. Id. at 480-81.

candidate, would not be shielded by the Petition Clause from liability for damages under state libel law.[46] Justice Burger, writing for the majority, acknowledged the ancient pedigree of the petition right, and admitted that petitioners had sometimes been granted immunity from libel laws by early American courts.[47] Nevertheless, the Court concluded that the petition right was never meant to be elevated to "special First Amendment status."[48] In language often quoted by lower courts looking for some indication of the scope of the right, the Court declared that "the right to petition is cut from the same cloth as the other guarantees of [the First] Amendment."[49] The petition right, the Court held, had been "inspired by the same ideals of liberty and democracy"[50] as the other first amendment rights, such as free speech and press, and therefore a libelous petition should not be immune from the penalties to which libelous speech would be subjected under similar circumstances.

The *McDonald* opinion has been criticized by scholars who believe history shows that the right to petition the government must be absolute to be politically meaningful.[51] Nevertheless, *McDonald* is one of the few cases in which the Supreme Court has specifically attempted to define the nature and scope of the modern petition right, and as such has been cited by almost every federal court that has dealt with a petition clause issue in the past decade.[52] However, as will be demonstrated in the following materials, *McDonald*'s application in other contexts, particularly in cases involving a right of access to courts claim, is problematic.

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46. Id. at 485.

47. Id. at 484. The *McDonald* Court relied on *White v. Nicholls*, 44 U.S. 266 (1845), in which a letter writer who had urged the President to remove a customs inspector from office was held to be liable if he had acted with "express malice," as supporting the proposition that the political petition privilege was never meant to be absolute. But see Spanbauer, 21 Hastings Const. L. Q. at 54-55 (cited in note 8), calling the Court's reliance on *White* "infirm." Spanbauer contends that *White* contradicted the law in the majority of American jurisdictions. She suggests that the *McDonald* Court should have looked instead at *Harris v. Huntington*, 2 Tyler 129 (Vt. 1802), in which the Supreme Court granted immunity to a defendant who had submitted a petition to the Vermont legislature requesting that the plaintiff not be reappointed to office. The *McDonald* Court did mention *Harris* but dismissed the holding as reflecting "an early English view." 472 U.S. at 483.

48. *McDonald*, 472 U.S. at 485.

49. Id. at 482. See note 112 for a list of cases citing *McDonald*.

50. 472 U.S. at 485.

51. See Spanbauer, 21 Hastings Const. L. Q. at 55-56 (cited in note 8); Smith, 54 U. Cin. L. Rev. at 1153 (cited in note 3).

52. See note 112 and accompanying text.

2. Right of Access to the Courts

The second main context in which petition clause claims have arisen is when plaintiffs claim that they have been prevented from, or punished for,[53] initiating judicial or quasi-judicial proceedings. As mentioned, the wording of the Petition Clause, which provides for a right to apply "to government" for a redress of grievances, seems to include within its protection the right to petition courts and administrative tribunals. In fact, a very vague "right of access" to the appropriate mechanisms for obtaining judicial redress of grievances *has* been periodically recognized by the Supreme Court, although not always in the context of a petition clause discussion. For instance, in a line of cases involving the constitutionality of court filing fees, the Supreme Court described the would-be litigant's right to have his case heard as emanating from the Due Process and Equal Protection Clauses.[54] However, in a separate line of cases decided during roughly the same time period, the Court held that the Petition Clause mandated that state prisoners wishing to file habeas corpus petitions be given "meaningful access" to federal courts.[55]

The Court relied on the latter cases in *California Motor Transport v. Trucking Unlimited,*[56] when it declared the right of access to the courts to be a component of the first amendment right to petition the government for a redress of grievances.[57] The Court held that highway carriers' attempts to eliminate competition by initiating non-sham litigation challenging the applications of rival carriers constituted protected activity under the Petition Clause.[58] Unlike the prisoner cases, the judicial petitioning taking place in *Trucking Unlimited* was collective activity. Thus, first amendment association

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53. A "meaningful" right of access to courts, as the term is used in this Recent Development, refers not only to the plaintiff's ability to gain initial access to a court, but also to be free from the fear of retaliation for doing so. Unless the fear of reprisal is removed, the right becomes meaningless. See Spanbauer, 21 Hastings Const. L. Q. at 19, 26 (cited in note 8) (describing the development of a "meaningful" petition right).

54. See *Boddie v. Connecticut*, 401 U.S. 371, 376-77 (1971) (holding that Due Process requires states to waive court costs for indigents in divorce cases); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (holding that state laws requiring appellate filing fees do not violate the Due Process and Equal Process Clauses since they do not impact the initial right to be heard).

55. *Bounds v. Smith*, 430 U.S. 817, 824 (1977); *Johnson v. Avery*, 393 U.S. 483, 485 (1969). See also note 53.

56. 404 U.S. 508 (1972).

57. Id. at 510. The Court held that "the right to petition extends to all departments of the Government." Id.

58. Id. at 510-11.

interests were implicated as well as the petition clause right of access to courts. Indeed, some scholars have contended that the only context in which the Supreme Court has been willing to find first amendment petition clause protection in civil actions has been in cases where some other first amendment interest was threatened in the event that meaningful access to judicial remedies was denied.[59]

Support for this contention can be found in a trilogy of cases decided by the Court in the 1960s: *NAACP v. Button*;[60] *Brotherhood of Rrailroad Trainmen v. Virginia*;[61] and *United Mine Workers v. Illinois State Bar*.[62] *Button* involved attempts by the NAACP to solicit attorneys and to finance litigation aimed at ending racial discrimination.[63] In holding that such activities were immune from state laws prohibiting the solicitation of attorneys, the Court acknowledged the petition clause interest in the minority litigants' attempt to gain access to the judicial system.[64] However, the Court primarily focused on the constitutional magnitude of the civil rights struggle that gave rise to the underlying litigation, as well as on the presence of political speech and association interests of the petitioners.[65] In *Trainmen* and *United Mine Workers*, cases involving the collective hiring of attorneys by unions, the Court explained that the underlying litigation in a right of access case need not be "bound up with political matters of acute social moment, as in *Button*."[66] Again, these cases involved collective petitioning activity, and again the Court's focus rested on the association interests involved,[67] not on defining exactly what sort of right the Petition Clause guaranteed to would-be litigants.

A few lower federal courts, when pressed to acknowledge the issue, have concluded from these supreme court decisions that no substantive right of access emanates solely from the Petition Clause. Individual civil litigants, unable to claim the first amendment association interests implicated in *Trucking Unlimited*, *Trainmen*, and *United Mine Workers*, have in some cases been denied meaningful

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59. See Spanbauer, 21 Hastings Const. L. Q. at 45 (cited in note 8).
60. 371 U.S. 415 (1963).
61. 377 U.S. 1 (1964).
62. 389 U.S. 217 (1967).
63. 371 U.S. at 443-44.
64. Id. at 428-30.
65. Id. at 430-31.
66. *United Mine Workers*, 389 U.S. at 223. The Court in *United Mine Workers* explained that it was following the controlling precedent of *Trainmen*. Both cases involved litigation "solely designed to compensate the victims of industrial accidents." Id.
67. In *United Mine Workers*, the Court referred to the first amendment right to "assemble peaceably," but was clearly talking about the right of association as well. Id. at 222-23.

access to a court unless they can point to an underlying issue of constitutional magnitude inherent in their cause of action.[68] Courts adhering to this view will likely find a first amendment right of access to courts only in a conjunctive reading of the amendment. This analysis necessarily requires the presence of some additional first amendment interest to buttress the petition clause right of access claim.[69]

There is evidence, however, that the Supreme Court intended the right of access to courts recognized in *Trucking Unlimited* to adhere to individual civil litigants, not merely to groups. In 1983, in *Bill Johnson's Restaurants v. NLRB*,[70] the Court applied its holding in *Trucking Unlimited* to a case where a picketing employee sought to have her employer's state court proceeding against her enjoined as an unfair labor practice.[71] The Court refused to allow the NLRB to enjoin the employer's lawsuit, holding that "going to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer."[72] The Court held that the employer's right of access to a court was too important to be censured as an unfair labor practice, even when the sole object of the lawsuit was to enjoin an employee from exercising a protected right.[73] *Bill Johnson's Restaurants* is mostly cited by lower courts for its detailed reiteration of the sham exception articulated in *Trucking Unlimited*.[74] But these two cases, viewed together, provide strong support for the contention that the Petition Clause, and the Petition Clause alone, can anchor an individual civil litigant's right of access claim.

Some lower federal courts have cited *Trucking Unlimited* in recognizing many kinds of judicial petitioning, including private

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68. See, for example, *Altman v. Hurst*, 734 F.2d 1240 (7th Cir. 1984). The court held that there was no right of access to courts claim for a policeman who was demoted to foot patrol in retaliation for filing a civil rights lawsuit against his employer. The court cited *Buttons* as supporting the proposition that "a private office dispute cannot be constitutionalized merely by filing a legal action." Id. at 1244 n.10.

69. See, for example, *Day v. South Park Independent School Dist.*, 768 F.2d 696, 701-702 (5th Cir. 1985) (denying petitioner's right of access claim and holding that "decisions that rest in part on the right-to-petition clause involve the exercise of first amendment rights in addition to the right to petition"). For a more detailed description of the holding in *Day*, see notes 116-118 and accompanying text.

70. 461 U.S. 733 (1983).

71. Id. at 731. In this case, when a waitress picketed her employer's restaurant in protest, the owner filed a lawsuit against her in state court, claiming that she was unlawfully interfering with his business.

72. Id. at 741 (quoting *Peddie Buildings*, 203 N.L.R.B. 265, 272 (1973), enf. denied on other grounds, 498 F.2d 43 (3d Cir. 1974)).

73. Id.

74. See note 225 and accompanying text.

grievance claims filed by individual litigants, as activity protected under the Petition Clause,[75] or, more vaguely, under the "right of access to the courts secured under the First and Fourteenth Amendments."[76] When an individual encounters retaliation for filing a judicial petition, these courts hold that there are sufficient grounds for the petitioner to state a claim under the appropriate statute[77] for infringement of her constitutionally protected right of access. According to these courts, a plaintiff states a right of access to courts claim by reference to the act of petitioning itself, with no additional first amendment interest needed to buttress the claim.[78]

Even assuming the existence of a substantive right of access to courts emanating from the Petition Clause and triggered merely by an individual's invocation of the judicial process, the scope of such a right is unclear. For even if the petition clause right of access is found to stand alone, coequal to (although admittedly, in most cases, intertwined with) its first amendment counterparts, that does not necessarily render this right immune from all limitations. After all, other first amendment rights such as the freedoms of speech and the press have been subjected to numerous limitations throughout the years. In attempting to determine the scope of the petition right, in general, and the right of access to courts, in particular, American courts have lacked even the limited precedential guidance they received in struggling to determine the existence of these rights.

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75. See *Harrison v. Springdale Water & Sewer Com'n*, 780 F.2d 1422 (8th Cir. 1986). The court in *Harrison* held that if the plaintiff could show that government officials filed a frivolous condemnation counterclaim to induce him to settle his suit, a right of access claim would be established. The court contended that "state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future." Id. at 1428.

76. *Graham v. NCAA*, 804 F.2d 953, 958-59 (6th Cir. 1986). Despite the vague language, these courts clearly recognize a right of access to courts emanating from the Petition Clause, not from an amalgamation of first amendment rights. See id. at 959 (holding that a plaintiff arguably stated a right of access claim when he alleged that he was kicked off the football team in retaliation for filing a lawsuit in state court, and noting that "[a] number of federal circuit courts have likewise found the right of access to the courts to be protected by the First Amendment"); *Fuchilla v. Prockop*, 682 F. Supp. 247 (D. N.J. 1987) (holding that a plaintiff who contended that she was discharged for filing an action in state court against her former boss had stated a right of access to courts claim).

77. Right of access to courts claims by public employees who claim that they have been retaliated against by their employers for initiating judicial proceedings will usually be filed under 42 U.S.C. § 1983 (1988 ed. & Supp. V), which states that "[e]very person who . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in [a] . . . proper proceeding for redress." The plaintiff in *San Fillippo* brought his Petition Clause claim under 42 U.S.C. § 1983. 30 F.3d at 426.

78. See note 76.

In the absence of any definitive statements from the Supreme Court on the matter, two rather extreme views have emerged. The first theory, to which the majority of lower federal courts have adhered, is that the petition right, including the right of access to courts, may permissibly be subjected to exactly the same limitations as would other, more clearly defined, first amendment rights under similar circumstances. For support, these courts draw mainly on vague supreme court pronouncements that the petition right is "cut from the same cloth"[79] and "intimately connected"[80] with the other first amendment guarantees. At the other end of the spectrum are a group of scholars who contend that the petition right is fundamentally different from, and superior to, the other first amendment rights. Proponents of this theory point to the rich history of petitioning to support their conclusion that the modern petition right should be absolute, or nearly so.[81] This view of the petition right would confer the same lofty status on all petitions, regardless of their content or the context in which they are presented.[82]

As will be demonstrated, bits and pieces of both of these theories influenced the Third Circuit's decision in *San Filippo v. Bongiovanni*. But in order to fully understand the *San Filippo* court's effort to stake out a workable middle ground between these radically different formulations of the scope of the petition right, it is necessary to step back a bit from petition clause analysis. The next Part of this Recent Development will examine the retaliatory discharge cause of action that is the subject of the discussion in *San Filippo* as it developed in the context of claims of impingement of the first amendment right of free speech.

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79. *McDonald*, 472 U.S. at 482.

80. *United Mine Workers*, 389 U.S. at 222.

81. See generally Spanbauer, 21 Hastings Const. L. Q. at 15 (cited in note 8); Smitb, 54 U. Cin. L. Rev. at 1153 (cited in note 3). See also note 209 and accompanying text.

82. This view of the entire petition right as absolute does not allow for the different treatment of judicial as opposed to political petitions proposed in Part IV of this Recent Development.

C. First Amendment Rights of Public Employees

1. Free Speech v. Workplace Harmony: The *Pickering* Balancing Test

Courts have long recognized the potential conflict between the first amendment interests of public employees and the interests of their governmental employers (and the public) in maintaining a modicum of control and harmony in the tax-funded workplace. As Justice Holmes succinctly put it, "[A] policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[83] This view, which essentially resulted in a forfeiture of first amendment speech rights by citizens wishing to obtain and maintain public employment, prevailed in American jurisprudence until the middle of this century.[84] Beginning in the 1950s and 1960s, the Supreme Court placed greater importance on the public employee's speech rights, while still recognizing that the government's interest as an employer may justify restrictions upon the exercise of those rights in some cases. In *Pickering v. Board of Education, School District 205*[85] a case in which a school teacher was dismissed for criticizing his school board's allocation of funds among athletic and educational programs, the Court held that courts considering such cases must strike a balance between the interest of citizens in commenting upon matters of public concern and the state's interest in promoting the efficiency of public services performed through its employees.[86] The Court explained that this balancing test would be applied on a case-by-case basis, taking into account not only the disruptive impact of the speech in the workplace, but also the content of the speech itself.[87]

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83. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517, 517 (1892).

84. See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding that it was "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege"). Since the late 1960s, 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. See *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967); *Pickering v. Board of Education, School District 205*, 391 U.S. 563 (1968); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Branti v. Finkel*, 445 U.S. 507, 515-516 (1980).

85. 391 U.S. 563 (1968).

86. Id. at 568.

87. Id. at 568-69.

The balancing test derived from *Pickering*, which is still used by courts in retaliatory discharge cases,[88] has evolved into a four-step analysis. First, the employee must demonstrate that she has engaged in protected activity, such as exercising her right of free speech. Second, the employee must demonstrate that her speech was a substantial or motivating factor in the adverse employment decision. Third, once the employee has successfully demonstrated the first two factors, the burden of production shifts to the governmental employer, who must articulate a legitimate, business-related reason for the employment decision. A legitimate reason may be related to the speech itself; for instance, the employer may point to the fact that an employee's speech was insubordinate, or was disruptive or disturbing to coworkers. The court must then weigh the competing interests of the employee and the employer.[89] If the employer's interest in workplace harmony and efficiency outweighs the employee's speech interest in a particular situation, the employer will not be held liable for the retaliatory discharge. Finally, even if the employee prevails under the first three prongs, the employer may still avoid liability by proving that it would have made the same employment decision regardless of the presence of the protected activity at issue.

2. *Connick v. Myers*: The Public Concern Threshold

After *Pickering*, it appeared that speech on matters of public concern, such as the criticism of fund allocation at a public school, would receive greater weight in an interest balancing test than speech on a purely private matter. The importance of the public concern criterion was made clear in the Supreme Court's holding in *Connick v. Myers*.[90] In *Connick* the Court considered a case where an assistant district attorney had circulated a questionnaire among fellow staff members, requesting their views on certain office policies and practices with which she disagreed.[91] She was later terminated for refusing to accept a transfer and for distributing the questionnaire, an

88. See Mike Harper, Connick v. Myers *and the First Amendment Rights of Public Employees*, 16 Hastings Comm/Ent. L. J. 525 (1994), for a more detailed description of the four-part test that evolved from *Pickering*.

89. This step does not involve the production of additional evidence, and is thus left out of the analytical framework by some courts, which refer instead to a three-step balancing test. For example, the magistrate judge who originally considered the retaliatory discharge claim in *San Filippo* described a three-step balancing test. 30 F.3d at 430. See note 157.

90. 461 U.S. 138 (1983).

91. Id. at 140-41.

effort which her superiors called an "act of insubordination."[92] She subsequently brought a civil rights action claiming that she had been unlawfully discharged for exercising her right of free speech.[93] Before considering the merits of the claim, the *Connick* Court articulated a threshold requirement for triggering judicial scrutiny of public employee retaliatory discharge claims premised on an alleged impingement of free speech.[94] The court held that unless an element of public concern is found in the speech that allegedly motivated the discharge, no balancing test will be applied to the claim.[95] In fact, no judicial recourse whatsoever will be available to the adversely impacted public employee, at least not as relates to the alleged impingement of her first amendment interests. Such a result may seem unfair, the *Connick* Court noted, but the Court's obligation to protect public employees' speech interests "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state."[96] Applying the newly articulated public concern test to the facts of the case before it, the *Connick* Court held that the discharged district attorney's questionnaire contained speech on purely private, internal office matters, and described her first amendment claim as an "attempt to constitutionalize an employee grievance."[97]

3. Application of *Connick* to Petition Clause Claims

The so-called "*Connick* public concern test" has been subjected to criticism, mostly regarding the vague criteria provided by the Court for determining exactly what kind of speech constitutes a matter of

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92. Id. at 141.

93. Id. One commentator argues that the employee's claim in *Connick* should or at least could have been a petition claim, pointing out that "[i]n *Connick v. Myers*, an assistant district attorney was fired for having prepared and distributed a questionnaire seeking views of fellow staff members on office transfer policy, morale, and the need for an office grievance committee. She was collecting the views of her fellow workers to present to her superiors—classic petitioning activity." Smith, 54 U. Cin. L. Rev. at 1195 (cited in note 3).

94. 461 U.S. at 138. As the Court stated, "When a public employee speaks not as a citizen for matters of public concern, but instead as an employer for matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personal decision taken by a public agency allegedly in reaction to an employee's behavior." Id. Thus, under *Connick*, a court's determination of whether an employee's speech relates to a matter of public concern is crucial.

95. Id. Another way of articulating this result is that the claim would automatically fail at the first prong of the *Pickering* test, since the speech involved does not constitute "protected activity."

96. 461 U.S. at 146-47.

97. Id. at 154.

public concern.[98] Federal circuit courts have offered various, and sometimes conflicting, definitions of "issues of public concern."[99] However, the dividing line between speech on matters of public and private concern in the context of a retaliatory discharge claim has never been seriously questioned and has been reaffirmed by the Supreme Court since *Connick*.[100] Tricky interpretative issues have arisen, however, when public employees claim that their first amendment rights other than free speech have been impinged by an adverse employment decision. For instance, employees who have allegedly encountered retaliation on the basis of their speech commonly claim that their rights of free association have been impinged upon as well.[101] This intermingling of speech and association claims in a retaliatory discharge case is understandable; after all, an employee must have been speaking to someone when she uttered the objectionable words, presumably to an audience with whom she has chosen to associate and share her views. The association interest attached to the speech is even greater if the speaker is a union member or has spoken through channels provided to the employee through some type of collective undertaking.[102] The

98. The *Connick* Court held that "whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Id. at 147-48. Whether speech meets the public concern threshold is a matter of law to be decided by the court. Commentators have pointed to the danger that the values of individual judges might creep into this kind of analysis. For criticism of this vague standard, see Harper, 16 Hastings Comm/Ent. L. J. at 534-36 (cited in note 88). See generally J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. Rev. 483 (1985).

99. See, for example, *Tao v. Freeh*, 27 F.3d. 635, 640 (D.C. Cir. 1994) (reversing the district court's summary judgment for the FBI, which had fired a Chinese-American employee after her husband had sent letters to the FBI director complaining of race discrimination). In *Tao*, the court held that "[w]hile an individual personnel dispute does not generally constitute a matter of public concern, an employee's speech aimed at resolving a personnel dispute may touch upon an issue of public concern.... [T]he fact that Tao was motivated by her own desire to be promotod does not prevent her statement about racial discrimination from being protected." Id. at 639-40. Compare this te the Seventh Circuit's position in *Smith v. Fruin*, 28 F.3d. 646, 651 (7th Cir. 1994) ("[T]he fact that an employee speaks up on a topic that may be deemed one of public import does not automatically render his remarks on that subject protected. The content and form of the employee's remarks, along with the underlying circumstances, including the employee's reasons for speaking, remain essential to this determination").

100. See *Rankin v. McPherson*, 483 U.S. 378, 386 (1987) (holding that a public employee's statement "if they go for him again, I hope they get him," concerning the assassination attempt on then-President Reagan, "plainly dealt with a matter of public concern"). For a more recent reaffirmation of the public concern tost see *Churchill v. Waters*, 114 S. Ct. 1878 (1994).

101 See, for example, *Broderick v. Roach*, 767 F. Supp. 20, 25 n.9 (D. Mass. 1991); *Schalk v. Gallemore*, 906 F.2d 491, 494, 497 (10th Cir. 1990).

102. The filing of a formal grievance would be an example of such behavior, if the grievance was a product of a united employee effort or collective bargaining by an employee's union. When the filing of a formal grievance initiates some sort of quasi-judicial proceeding, there is

lower federal courts have been about evenly split regarding whether the *Connick* public concern test should be applied to an association impingement claim.[103]

Most courts that have applied *Connick* have simply quoted the "cut from the same cloth" language from *McDonald* and other cases in holding that all first amendment rights should be given the same treatment.[104] Others have held, more narrowly, that because association interests were implicated in *Connick* (and *Pickering*), *Connick* applies to all factually similar situations involving closely connected speech and association claims.[105] The courts that have not applied *Connick* to association claims have recognized in the facts of their cases some interest, separate from speech, that has traditionally received broader protection than speech.[106]

Though less often recognized by either plaintiffs or courts, a petition interest is often also at stake in first amendment retaliatory discharge cases. For instance, submitting complaints, criticisms, or suggestions to a superior, whether an individual or an entity such as an administrative board, when the superior is a state actor with the

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arguahly a petition interest involved here as well. For further discussion see notes 227-232 and accompanying text.

103. Harper, 16 Hastings Comm/Ent L. J. at 542-44 (cited in note 88).

104. See *Broaderick*, 767 F. Supp. at 25 n.9 (holding *Connick* applicahle to negotiated union grievances with no specific reference to association rights, focusing on the question of whether the plaintiff's statements te the press were protected speech).

105. See *Boals v. Gray*, 775 F.2d 686, 692 (6th Cir. 1985) ("*Pickering* and *Connick*, while themselves speech cases, are hased upon freedom of association cases. We perceive no logical reason for differentiating hetween speech and association in applying *Connick* to first amendment claims"); *Griffin v. Thomas*, 929 F.2d 1210, 1213 (7th Cir. 1991) ("[A]lthough *Connick* did not specifically refer to associational rights in drawing the distinction between speech on matters of public concern and matters of private concern, *Connick* acknowledged that the governing precedent, *Pickering*, was rooted in cases dealing with speech and association rights"); *Sanguigni v. Pittsburgh Bd. of Public Educ.*, 968 F.2d 393, 400 (3rd Cir. 1992) (holding that *Connick* governed tlie association claim of a teacher fired for putting a complaining letter in a faculty newsletter because that claim is based on speech that does not implicate association rights to any significantly greater degree than the employee speech at issue in *Connick*). Such holdings seem to leave room for Petition Clause right of access claims unhindered by the public concern test, since right of access was not implicated in *Pickering* or *Connick*.

106. See *Hatcher v. Board of Public Educ.*, 809 F.2d 1546, 1558 (11th Cir. 1987) (holding that when a teacher says she encountered retaliation for bringing her minister to a school board meeting *Connick* does not apply, since such a restriction would "exact a substantial toll upon first amendment liberties"); *Boddie v. City of Columbus*, 989 F.2d 745, 747 (5th Cir. 1993) (holding that no independent proof of public concern is required in a freedom of association claim arising from union organization activity). For criticism of this approach see Mark Strauss, *Public Employees' Freedom of Association: Should* Connick v. Myers *Speech-Based Public-Concern Rule Apply?*, 61 Fordham L. Rev. 473 (1992). Professor Strauss contends that "courts holding *Connick* inapplicable to association claims . . . have undermined the Court's expressive association doctrine. Plaintiffs deprived of free speech claims by *Connick*, but whose expressive activities happened to involve groups, have been permitted to proceed under the ruhric of freedom of association." Id. at 486.

power to respond or provide redress of some kind, might arguably be termed petitioning activity.[107] This type of petitioning, however, is so intertwined with the exercise of free speech and association that it is seldom recognized and singled out as the basis of an independent claim.[108]

The invocation of the Petition Clause usually arises as a right of access to courts claim, in cases where an adverse employment decision has been made after an employee initiated some judicial or quasi-judicial proceeding against the employer. Clearly, a situation involving an employee who has brought a lawsuit against her employer would fall into this category. But more commonly these claims involve employees who have initiated some sort of formal, quasi-judicial grievance procedure.[109] By bringing these right of access claims in addition to, or in lieu of, speech impingement claims, plaintiff employees have attempted to sidestep the *Connick* public concern requirement. Such attempts, however, have met almost universal failure. From 1983 to 1993, every federal appellate court that considered a petition clause claim in a first amendment retaliatory discharge case decided that the *Connick* test should apply.[110] Unlike cases involving association claims, courts have been

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107. For example, one commentator called the activities of the district attorney in *Connick* "classic petitioning activity." Smith, 54 U. Cin. L. Rev. at 1195 (cited in note 3). See note 93 and accompanying text. Keep in mind, however, that while a superior may be able to respond to such a "petition," she has no obligation to do so. *San Filippo*, 30 F.3d at 439. Under the analytical framework used in this Recent Development, this lack of obligation would make such a petition political, purely expressive in nature, akin to mere speech and appropriately subject to the *Connick* public concern threshold. See notes 216-221 and accompanying text.

108. The failure of the *Connick* Court to recognize the plaintiff's activity as political petitioning is a perfect example of this kind of oversight. See note 107.

109. Some commentators have asserted that there is no right of access to courts interest in filing a grievance. See Strauss, 61 Fordham L. Rev. at 478 n.31 (cited in note 106). Professor Strauss contends that "[w]hen the Supreme Court speaks of the . . . right to petition . . . it is referring to the right to appeal to the legislature and the judicial system—not the right to challenge a decision of the government as an employer." Id. at 486. But courts have generally treated these "grievance" cases the same as cases in which lawsuits have been filed, making no attempt to differentiate between the two in discussions of whether to recognize a right of access to courts interest. The court in *San Filippo* follows this approach as well. See notes 216-221 and accompanying text.

110. See 63 U.S.L.W. 1017 (August 9, 1994) (reporting the circuit split created by the Third Circuit with its rejection of the public concern criteria in *San Filippo*). See also *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993); *Day*, 768 F.2d at 703; *Rathjen v. Litchfield*, 878 F.3d 836, 842 (5th Cir. 1989); *Rice v. Ohio Dept. of Transp.*, 887 F.2d 716, 720-21 (6th Cir. 1989), vacated on other grounds, 497 U.S. 1001 (1990); *Altman*, 734 F.2d at 1244 n.10; *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261-62 (7th Cir. 1988); *Gearhart v. Thorne*, 768 F.2d 1072, 1073 (9th Cir. 1985); *Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir. 1989); *Boyle v. Burke*, 925 F.2d 497, 505-06 (1st Cir. 1991).

generally unwilling to recognize in the petition clause right of access an interest sufficiently independent of speech to require a separate analysis.

The reactions of courts to petition clause right of access claims in retaliatory discharge cases has fallen into one of four general categories. In the first group are courts that have taken the time-honored approach of essentially ignoring the petition interest. These courts focus solely on the nature of the speech contained in the petition, and often do not even mention the Petition Clause by name in their analyses.[111] The second group includes courts that have acknowledged the petition interest but applied *Connick*, usually with little discussion except for the usual citation to the *McDonald* "cut from the same cloth" language, or to other general supreme court pronouncements on the petition right from cases outside the retaliatory discharge context.[112] These courts come to the conclusion that whether a retaliatory discharge action is characterized as a speech claim or a petition claim is irrelevant because the interest involved and the appropriate analytical framework are the same in either case.

A typical example of this kind of reasoning can be found in the Eighth Circuit's opinion in *Hoffman v. Mayor of Liberty*.[113] In that case the court, considering the claim of a former police detective who said he had been demoted after filing a grievance, cited *McDonald* as demonstrating that the three categories of protected expression set out in the First Amendment are all essentially coequal rights of

111. See *Renfroe*, 722 F.2d at 714 (holding that a written grievance filed by a school teacher protesting the decision that she share a job was not a matter of public concern, and that therefore, her discharge would not be scrutinized). The court made no specific mention of the Petition Clause, mentioning only the "speech" contained in the grievance. See also *Altman v. Hurst*, 734 F.2d 1240 (1984) (7th Cir. 1984) (making no mention of the Petition Clause in holding that a policeman who claimed that he was disciplined because he filed a lawsuit for violation of his civil rights was not protected by the First Amendment); *Rice*, 887 F.2d at 720 (never explicitly acknowledging a separate petition clause issue, stating that "not every job-related grievance of a public employee is a matter of public concern." The court addressed only the speech involved, even though the employee had filed a discrimination charge against his employer); *Boyle*, 925 F.2d at 505 ("In *Connick*, the Supreme Court struck a balance between the speech rights of the employee as a citizen and the interests of the State as employer and provider of essential services.... Thus, the public employee's right to petition the government with respect to matters of public concern has been clearly established since *Connick*, at least"). Again, the petition right is essentially ignored, and the focus of the discussion is speech.

112. For citations to *McDonald*, see *Day*, 768 F.2d at 701; *Belk*, 858 F.2d at 1261; *Gray v. Lacke*, 885 F.2d 399, 412 (7th Cir. 1989); *Hoffman v. Mayor of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990). See also *White Plains*, 991 F.2d at 1059 (citing *McDonald* and *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985) (for the proposition that the petition right is "generally subject to the same constitutional analysis" as the right to free speech)).

113. 905 F.2d 229 (8th Cir. 1990).

expression.[114] While the court recognized that the right of petition could be exercised differently from the right of free speech, it concluded that the Petition Clause provided no lesser or greater guarantees of free expression than the Free Speech Clause. Consequently, the court did not feel compelled to determine in what way the Petition Clause was distinct from the Speech Clause or whether Hoffman's grievance filing was an act of petition or speech.[115]

Some courts applying *Connick* to petition clause right of access claims have gone beyond the "cut from the same cloth" rationale, focusing on the inequities that could result if "special treatment" were given to speech on a matter of private concern simply because it is contained in a petition. For instance, in *Day v. South Park Independent School District*,[116] the Fifth Circuit held that a public school teacher fired in retaliation for filing a formal grievance was not entitled to first amendment protection since the subject of the grievance was the teacher's protest against an unfavorable job evaluation, a matter of purely private concern.[117] In applying *Connick*, the court acknowledged the plaintiff's petition clause claim but rejected her contention that her petitioning activity was entitled to greater protection than her speech alone would have been.[118] The Seventh Circuit has voiced similar concerns in cases such as *Belk v. Town of Minoqua*,[119] where the court held that "special treatment" of the petition right would unjustly favor those who "through foresight or mere fortuity" present their otherwise unprotected speech in the form of a petition.[120]

The third group of courts applying *Connick* to petition clause claims, have hinted, however, that under certain circumstances, not present in the cases before them, application of the public concern test to a petition clause claim might be inappropriate. For instance, in *Schalk v. Gallemore*,[121] the Tenth Circuit seemed to suggest that

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114. Id. at 232. The three categories of protected expression are religion and its practice, speech and its publication, and assembly and petition of the government. Id.

115. Id. at 233.

116. 768 F.2d 696 (5th Cir. 1985).

117. Id. at 701.

118. Id. The court stated, "None of the . . . cases cited by Defendant supports the proposition that her speech on a matter of personal concern . . . is protected by the Petition Clause because she chose to clothe her address to them in a formal grievance." Id.

119. 858 F.2d. 1258 (7th Cir. 1988). The court in *San Filippo* takes direct issue with *Belk* and the "injustice" argument. See notes 188-89 and accompanying text.

120. 858 F.2d at 1262.

121. 906 F.2d 491 (10th Cir. 1990).

speech and petition interests, though inseparable in a case involving a complaining letter addressed to a hospital board, might be severable in certain situations. The court in *Schalk*, however, did not explicitly state what such circumstances might be. In *Stalter v. City of Montgomery*,[122] an Alabama district court held that *Connick* was applicable in situations involving the filing of non-union employee grievances, since these types of petitions were within the realm of private office disputes to which *Connick* expressly denied constitutional scrutiny.[123] But the court in *Stalter* seemed to suggest that had the employee brought an access to courts claim, or a claim in which his association rights were implicated, a different analysis might have been required.[124]

Finally, a very small fourth group of district courts have simply declined to apply *Connick* to public employees' petition clause impingement claims. The rationales provided by these courts have varied, depending on the type of petition involved. In *Stellmaker v. DePetrillo*,[125] the court held that the right of a public employee to file grievances under procedures established through collective bargaining implicated both petition and association rights and that the *Connick* analysis was therefore inapplicable. The court cited *Bill Johnson's Restaurants*[126] in support of the contention that access to procedures for the redress of grievances is essential to a meaningful first amendment right to petition the government. The Court further noted that despite some broad language in the Supreme Court's opinion, *Connick* dealt only with freedom of speech and not the other first amendment rights of association and petition.[127] The court in *Gavrilles v. O'Connor*[128] came to a similar conclusion, holding that the state may not abridge the right of public employees to associate in a labor union and to seek redress of grievances through collective action.[129] But these cases do not make clear whether a petition claim

122. 796 F.Supp. 489 (M.D. Ala. 1992). This case involved a firefighter who had filed a grievance after being required to shave his chest hair.

123. Id. at 494.

124. Id. at 495. The court pointed to *Harrison v. Springdale Water & Sewer Com'n*, 780 F.2d 1422, 1427 (8th Cir. 1986), and *McCoy v. Goldin*, 598 F. Supp. 310, 314-15 (S.D. N.Y. 1984), as supporting a right of access to courts to which the *Connick* test would not apply.

125. 710 F. Supp. 891 (D. Conn. 1989).

126. 461 U.S. at 731, 741.

127. *Stellmaker*, 710 F. Supp. at 892.

128. 579 F. Supp. 301, 304 (D. Mass. 1984).

129. Id. See also *Professional Ass'n of College Educators, TSTA/NEA v. El Paso County Community College Dist.*, 730 F.2d 258, 263, 270 (5th Cir. 1984) (recognizing protection for filing of grievances and the implication of the right to free association when such grievances result from collective bargaining).

alone, minus an accompanying association interest, would merit a separate analysis. In fact, the court in *Stellmaker* distinguished from its decision the application of *Connick* to petition claims where the grievance procedures involved had been established not through collective bargaining, but by the employer. The Court noted that in such situations, the right to associate was not implicated.[130] Possibly, these decisions follow the usual approach of subordinating the petition right to another more clearly defined first amendment right by substituting association for speech.

A few federal district courts have held that a petition clause impingement claim, in the form of an invocation of the right of access to courts, is distinct from a speech claim. In *McCoy v. Goldin*,[131] the district court declined to apply *Connick* to the claim of radio repairmen who challenged a wage agreement on the grounds that it included a provision precluding the repairmen from bringing individual legal claims against their municipal employer. *McCoy* is not, strictly speaking, a retaliatory discharge case, but its holding that the right of access to the courts cannot be characterized in terms of public concern[132] seems readily applicable to the claims of public employees who contend that their employers have retaliated against them for bringing judicial petitions. The court in *McCoy* dismissed the entire *Pickering/Connick* balancing test as an inappropriate analytical framework for a right of access to courts claim.[133] Similarly, in *Fuchilla v. Prockop*,[134] when a former secretary at a state university contended that she had been discharged for filing an action in state court against her boss, the court cited *Trucking Unlimited* in noting that courts have found the right of access to courts to be protected under the First Amendment without having to engage in a public concern analysis.[135]

Until 1994 no federal circuit court had failed to apply *Connick* to any petition clause claim, whether right of access to courts or

130. 710 F. Supp. at 893. The court cited *Day*, 768 F.2d at 696, and *Renfroe*, 722 F.2d at 714, as being inapplicable to retaliatory discharge claims involving collective bargaining agreements.

131. 598 F. Supp. 310 (S.D. N.Y. 1984).

132. Id. at 315 n.4. The court in *McCoy* described the right of access to the courts as emanating not only from the Petition Clause but also from the Due Process Clause. Id. at 315 (citing *Bounds v. Smith*, 430 U.S. at 817, 821).

133. Id. The *McCoy* Court held that "[t]he right of access to the courts cannot be infringed upon or burdened. It is as fundamental a right as any person may hold." Id.

134. 682 F. Supp. 247 (D. N.J. 1987).

135. Id. at 262.

otherwise, in the retaliatory discharge context. In 1990, however, the Third Circuit hinted at things to come in its holding in *Bradley v. Pittsburgh Bd. of Educ.*[136] In that case, a public school teacher who had been criticized for engaging in controversial teaching practices claimed that he had been fired for, among other things, filing a workers' compensation claim with the state unemployment compensation board.[137] In considering the teacher's petition clause retaliatory discharge claim, the district court determined that the plaintiff, who had filed a claim before the appropriate tribunal as designated by state law, could be properly characterized as a "petitioner." Nevertheless, the court dismissed the claim, refusing to "constitutionalize a state tort."[138] The Third Circuit ultimately remanded the case for factual inquiry on the issue of causation between the filing of the workers' compensation claim and the discharge, and so did not have to face the question of whether *Connick* should apply to the case.[139] However, the court devoted some attention to the question of whether or not a workers' compensation claim should qualify as a first amendment "petition." Although *Trucking Unlimited* made clear that the right to petition extended to "all departments of government," and the prisoner cases such as *Bounds v. Smith* and *Johnson v. Avery* acknowledged that "resort to the courts falls within the right to petition,"[140] it was nonetheless an open question whether resort to an administrative tribunal for the purpose of filing a personal injury claim was meant to be afforded constitutional protection.[141]

Likewise, it was unclear whether a petition must possess a degree of communicative intent similar to that which was present in *Trucking Unlimited* and beyond that present in a mundane workers' compensation claim to enjoy first amendment petition clause protection.[142] The very fact that the court in *Bradley* asked these questions and took such pains to consider whether or not the plaintiff's activity constituted a first amendment "petition" suggests that the answer to that question would have made a difference in its decision whether or not to apply *Connick*. Arguably, had the court found a legitimate petition, it might not have followed its sister cir-

136. 913 F.2d 1064 (3d Cir. 1990).
137. Id. at 1075.
138. Id. at 1075.
139. Id. at 1076.
140. Id. (citing *Bounds*, 430 U.S. at 817, and *Johnson*, 393 U.S. at 483).
141. Id.
142. See id. (citing *Trucking Unlimited*, 404 U.S. at 508).

cuits in automatically applying the public concern threshold to a petition clause right of access to courts claim.[143] But the answer to that question would have to wait for four years, until the Third Circuit's holding in *San Filippo v. Bongiovanni.*

III. RECENT DEVELOPMENT: *SAN FILIPPO V. BONGIOVANNI*

A. Factual History

Joseph San Filippo was a tenured chemistry professor at Rutgers University.[144] The story of his stormy relationship with his former employer is complicated, but quite typical of the unhappy employment situations in which first amendment retaliatory discharge claims typically arise. Professor San Filippo's problems with the University began in 1977 when he wrote a letter to the chemistry department chairman complaining about allegedly unsafe conditions in the chemistry laboratory.[145] From 1977 to 1986, San Filippo was an outspoken critic of university policies and practices, testifying before a grand jury regarding an investigation into the manufacture of illegal drugs in the chemistry laboratory, and reporting to the press that undergraduate students at Rutgers were subjected to health hazards in the chemistry labs.[146] San Filippo also criticized the chemistry department for misrepresenting funding needs and for other financial irregularities. During this time administrators frequently berated San Filippo for his "disloyalty."[147]

In 1981, the chemistry department declined to recommend San Filippo for promotion to full professorship.[148] San Filippo filed a grievance with the University and eventually a lawsuit in state court, claiming that he had been denied promotion through manipulation of his employee file.[149] In 1984, San Filippo filed another grievance and requested and received an arbitration hearing after failing to receive

143. The court in *Bradley* did acknowledge that other courts had held that "a public employee's right to petition is to be evaluated in light of the contents of the petition." Id. at 1075.
144. *San Filippo*, 30 F.3d at 426.
145. Id. at 427.
146. Id.
147. Id.
148. Id.
149. Id. at 427-28.

a merit salary increase.[150] In November 1985, he brought a state libel action against three administrators who had accused him of falsifying time reports relating to his technical assistants.[151] Finally, in March 1986, San Filippo brought a lawsuit against Rutgers in state court, protesting the University's decision to cut off without a hearing his access to graduate student assistance for his research.[152]

On October 1, 1986, the president of Rutgers brought formal written charges against San Filippo, claiming that he had taken advantage of his position by exploiting his foreign student graduate assistants.[153] On May 13, 1988, after hearing and review, the University Board of Governors directed that San Filippo be dismissed from his post.[154] In June 1988, San Filippo filed suit in federal court under section 1983, claiming that the dismissal violated his speech, petition, equal protection, and due process rights under the United States Constitution. His first amendment claim was based on his contention that he had been fired in retaliation for exercising his rights to exercise free speech and to petition the government for a redress of grievances.[155]

B. The Holding

San Filippo v. Bongiovanni reached the Third Circuit Court of Appeals for the second time[156] in August of 1994, on the issue of whether summary judgment should be granted to defendants Rutgers and its Board of Governors on Professor San Filippo's first amendment claim. The district court had held that lawsuits and grievances, like speech generally, are protected under the First Amendment only if they address a matter of public concern.[157] The

150. Id. at 428.

151. Id.

152. Id. at 428-29.

153. Id. at 429. The charges included allegations that San Filippo had required Chinese graduate assistants to perform domestic work for him, such as gardening and cleaning.

154. Id. at 430.

155. Id.

156. *San Filippo* advanced to the Third Circuit Court of Appeals for the first time in 1992, at which time the court held that the regulations upon which San Filippo's dismissal was based were not void for vagueness, remanding the case for further proceedings. 961 F.2d 1125 (3d Cir. 1992).

157. 30 F.3d at 431. In so holding, the district court rejected the recommendation of the magistrate judge who, upon remand from the Court of Appeals, had originally considered the summary judgment motions filed by both sides on San Filippo's constitutional claims. In his Report and Recommendation, the magistrate judge suggested that summary judgment be granted in defendant's favor on San Filippo's due process claims, but that summary judgment be denied on San Filippo's first amendment claims. Id. at 430. The magistrate judge explained that the Third Circuit used a three-part balancing test (described in notes 88-89 and

district court found that while some of San Filippo's speech met this threshold, the speech for which he was allegedly fired, including the speech contained in his grievances and lawsuits against the University, did not. The district court concluded that San Filippo's first amendment claim was not entitled to further judicial scrutiny, and granted summary judgment to Rutgers.[158]

The Court of Appeals described the main question to be addressed in deciding the summary judgment issue as being whether the activity in which San Filippo had engaged, and for which he was allegedly fired, constituted protected activity under the First Amendment.[159] The court acknowledged the *Connick* public concern requirement for first amendment protection of expressive conduct constituting speech, but pointed out that San Filippo's expressive conduct, including the filing of lawsuits and grievances, had not been limited to speech, but had implicated the first amendment petition right as well.[160] The Court of Appeals seemed to agree with the district court's conclusion that while some of San Filippo's speech had been on matters of public concern, his petitioning activity had involved purely private matters.[161] Thus, the questions of whether an employee is protected under the Petition Clause against retaliation for having filed a petition addressing solely a matter of private concern[162] and whether the *Connick* public concern test would bar such a claim were before the court yet again. Although the Third Circuit had avoided addressing such questions four years earlier in *Bradley*,[163] this time Judge Pollack, writing for the majority, expressed an intention to face these issues squarely, despite the lack of guidance in this area from the Supreme Court.[164]

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accompanying text) to assess a public employee's claim of retaliation for having engaged in a protected activity. Id. With respect to the first prong of the test, the magistrate foreshadowed the holding of the Court of Appeals in concluding that unlike speech generally, which is protected under the First Amendment only if it addresses a matter of public concern, San Filippo's lawsuits and grievances constituted activities protected under the Petition Clause of the First Amendment, regardless of whether they addressed matters of public concern. Id. at 431. The magistrate found that a fact finder could reasonably infer that San Filippo's petitioning activity was a substantial motivating factor in the dismissal, and therefore recommended further discovery and denial of summary judgment. Id.

158. Id.
159. Id. at 434.
160. Id.
161. Id. at 435.
162. Id.
163. 913 F.2d at 1064.
164. *San Filippo*, 30 F.3d at 435.

The court began its attempt to define the scope of San Filippo's petition right protection by examining the scope given to the petition right by the Supreme Court in contexts other than the retaliatory discharge of a public employee. The court traced the development of the petition right as a source of immunity from the antitrust laws, citing relevant passages from the familiar trio of *Noerr*, *Pennington*, and *Trucking Unlimited*.[165] The court then detailed the express limitations that supreme court decisions had placed on the petition right, discussing at length the unprotected status of "sham" judicial petitions as described by the Supreme Court in *Bill Johnson's Restaurants*.[166] The court also described as a limitation the Supreme Court's holdings in *Smith v. Arkansas State Highway Employees*[167] and *Minnesota State Bd. for Community Colleges v. Knight*,[168] that the Petition Clause does not require the government to respond to every communication that the communicator may denominate a petition.[169] The Third Circuit discussed the anti-libel limitation on the political petition considered by the Supreme Court in *McDonald*, citing the "cut from the same cloth" and "inspired by the same ideals" passages relied on by so many other lower federal courts in applying *Connick* to petition clause claims.[170] The *San Filippo* court, however, refused to accept any of these cases, including *McDonald*, as dispositive precedent in the area of retaliatory discharge of public employees.[171]

Having come to the conclusion that there was no binding case law on point, the court evaluated the merits of the arguments put forth by both San Filippo and Rutgers in light of the fundamental underlying purposes of the Petition Clause.[172] In determining these purposes, the Third Circuit looked not only to the general principals laid out in supreme court decisions, but also to the interests served by the petition right in the retaliatory discharge context and to the origins and history of the petition right. The court disagreed with San Filippo's contention that the protection given the petition right should be the same in every context in which it was exercised.[173] San Filippo

165. Id. at 435-36.
166. Id. at 436-37.
167. 441 U.S. 463 (1979).
168. 465 U.S. 271 (1984).
169. *San Filippo*, 30 F.3d at 437.
170. Id. at 438 (citing *McDonald*, 472 U.S. at 482, 485).
171. Id. Judge Pollack noted that "[a]s the arguments advanced in the briefs in the case at bar make clear, the Supreme Court cases we have just canvassed, while long on nuance, do not yield an easily identified single common dominator." Id.
172. Id. at 438-39.
173. Id.

had argued that the petitions at issue in *Noerr* and *Pennington* did not address matters of public concern, and therefore that those cases had implicitly rejected the proposition that petitioning is protected under the First Amendment only if it involves a matter of public concern.[174] The court instead agreed with Rutgers's contentions that "the nature of the limitation upon the petition right depends on context," and that analyzing the scope of the petition right in antitrust cases was not necessarily instructive in determining the scope of the right in a retaliatory discharge case.[175] The court pointed out that one strength of this argument lay in the fact that other first amendment rights such as speech differ in scope depending on the context in which they are exercised.[176]

The court, however, refused to go along with Rutgers in the next step of its argument. It held that the conclusion that the scope of the right to petition was dependent upon context did not mean that the public concern threshold necessarily limited the petition right in the context of a governmental employer seeking to discipline a public employee.[177] The court rejected the underlying premise of Rutgers's argument, the same premise upon which most other federal courts had based their holdings in similar cases, that a petition clause claim is *never* entitled to be treated differently than a speech clause claim brought under similar circumstances.[178] By reframing the main issue in the case at bar as being whether there were contexts in which the Petition Clause protected values additional to those protected by the Speech Clause, the court recognized that a separate analysis might be appropriate.[179]

The court described *McDonald* as a case where the Petition Clause protected no value that was not protected by the Speech Clause.[180] The court reasoned that the words contained in the letter to then-President Reagan were no different than words to the same effect appearing in the New York Times, with the similarity strengthened by the fact that the president, like the paper, had no obligation to respond. If the words were defamatory falsehoods, they had no

174. Id.
175. Id.
176. Id.
177. Id. at 439.
178. Id.
179. Id.
179. Id.
180. Id.

value, whatever format they appeared in, and thus were entitled to the same limitations in both cases, for the same reasons.[181] The court acknowledged that a similar inextricable intermingling of speech and petition clause interests could occur in the context of the alleged retaliatory discharge or disciplining of a public employee, citing *Schalk v. Gallemore*[182] as an example of such a case.[183] As in *McDonald*, the "petition" in *Schalk* was in the form of a letter that imposed on its recipient no obligation to respond.[184] Therefore, the court concluded, the Tenth Circuit had properly held that the employee's right to petition in *Schalk* was inseparable from her right to speak and accordingly analyzed the claim under *Connick*.[185]

San Filippo, however, did not merely send a complaining letter. His filing of lawsuits and grievances, the court wrote, constituted invocations of formal mechanisms for the redress of grievances.[186] The court held that by establishing the grounds for a right of access to courts claim through the invocation of such formal mechanisms, San Filippo had presented the court with a petition interest distinct from the speech interests implicated in his claim. The court acknowledged its divergence from the reasoning of its sister circuits, particularly the Seventh, which had explicitly rejected the proposition that the Petition Clause protected access to the courts for any reason other than for use as a forum for expression.[187]

The court addressed but dismissed the primary argument put forth by the other circuits, and by Judge Beckers's dissenting opinion in *San Filippo*, in favor of applying *Connick* to petition clause claims: that it would be somehow unjust to give special treatment to speech in the form of a petition, or to plaintiffs who happen to present their speech in the form of a grievance or lawsuit.[188] There is no injustice, the court held, because invocation of a mechanism for redress of grievances involves interests of a constitutional dimension different from and completely independent of speech interests.[189] The court then attempted to define these interests.

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181. Id.
182. 906 F.2d 491 (10th Cir. 1990).
183. *San Filippo*, 30 F.3d at 439.
184. Id.
185. Id.
186. Id.
187. Id. at 439-41. See also *Belk*, 858 F.2d at 1261-62; *Altman*, 734 F.2d at 1240.
188. *San Filippo*, 30 F.3d at 441-42 (Becker, J., concurring in part and dissenting in part). In his dissent in *San Filippo* Judge Becker had called the majority holding "an invitation to the wary to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined." Id. at 449.
189. Id. at 441.

The Petition Clause, the court held, imposes on the United States an obligation to have at least some channel open for those who seek redress for perceived grievances.[190] Although the court acknowledged that the government does not have an obligation to recognize every communication that might be characterized as a "petition,"[191] it also recognized that disciplining citizens for legitimately invoking the formal mechanisms adopted by the state for redressing grievances would undermine the Constitution's vital purposes.[192] The court further distinguished the interest in a petition claim from the interest in a speech claim, noting that when a public employee files a petition he does not appeal over the government's head to the general citizenry, as he does when he speaks to the press. When the employee files a petition, the court noted, he is addressing government and asking it to remedy a problem it has caused or for which it is responsible.[193]

The *San Filippo* court then went on to articulate what it considered to be a better argument, not cited by other circuits, for applying *Connick* to petition as well as speech claims. The nature of the employee's interest might be different in the two cases, the court wrote, but the interest of the governmental employer in promoting efficient public services remains the same regardless of the type of potentially disruptive activity involved.[194] The court recognized that employee lawsuits and grievances could be divisive in much the same way that employee speech could be.[195] But having raised this argument, the court quickly dismissed it, with the same reference to the above mentioned reasons "of constitutional dimension" for treating petitions differently from mere speech in certain situations.[196]

Finally, the *San Filippo* court noted that the petition right had an independent pedigree substantially more ancient than that of the

190. Id. at 442. This obligation is imposed on the states through the Fourteenth Amendment. Id.

191. Id. at 442 (citing *Smith*, 441 U.S. at 463, and *Knight*, 465 U.S. at 271).

192. Id. Examples of formal governmental adoption of a mechanism for redress of grievances given by the court are entry into a collective bargaining agreement that provides for a grievance procedure and waiver of sovereign immunity from suit in the courts of that sovereign. Id. Judge Pollack wrote that if the public employer could discharge an employee for invoking one of these mechanisms, "the Petition Clause . . . would, for public employees seeking to vindicate their employee interests, be a trap for the unwary—and a dead letter." Id.

193. Id.

194. Id. at 441 (citing *Connick*, 461 U.S. at 142).

195. Id.

196. Id.

freedoms of speech and press.[197] Focusing on the historical origins of the modern petition right in the Magna Carta and the 1689 British Bill of Rights, the court concluded that there was no persuasive reason that the petition right should mean less in modern times than it meant in seventeenth century England.[198]

IV. ANALYSIS

A. A Petition Clause Claim Should Receive a Separate Analysis

The Third Circuit Court of Appeals commendably acknowledged that San Filippo's petition claim was entitled to consideration apart from his speech claim. The court's thoughtful analysis represents a step in the right direction towards bringing the petition right out from under the shadow of its more illustrious first amendment counterparts. Recent commentators have agreed that there are important reasons for prying the petition interest apart from the admixture of first amendment claims brought by most litigants in retaliatory discharge cases.[199]

The almost universal application of *Connick* to public employee petition clause infringement claims prior to *San Filippo* is the result, not of reasoned analyses, but of federal courts' uneasiness in the presence of these claims. This Recent Development has already detailed the scarcity of authority available to assist modern courts in determining the limitations that may appropriately be placed on the exercise of the petition right.[200] On the topic of individual, as opposed to collective, petitioning, the body of applicable case law dwindles to nearly nothing. This unfortunate situation explains the pervasive influence of *McDonald v. Smith* in retaliatory discharge/petition clause infringement cases. *McDonald* has absolutely nothing to do

197. Id. at 442-43 (citing *McDonald*, 472 U.S. at 482).

198. Id. at 443. The court wrote that the "[t]he petition clause was not intended to be a dead letter or a graceful but redundant appendage of the clauses guaranteeing freedom of speech and press." Id.

199. See Smith, 54 U. Cin. L. Rev. at 1196 (cited in note 3) ("Petitioning historically and textually is a separable right from speech and press, and the interests served by petitioning go to the very heart of the principle of popular sovereignty. For these reasons, petitioning must be regarded as an extremely valuable right. Exceptions imposed on free speech and press must be critically examined before being held applicable to petitioning"). See also Spanbauer, 21 Hastings Const. L. Q. at 17 (cited in note 8) (contending that, contrary to the Supreme Court's assertion in *McDonald*, "the right to petition was cut from a different cloth than were the rights of speech, press, and assembly").

200. See notes 32-81 and accompanying text.

with employment law or the right of access to courts, but it unambiguously proclaims itself to be a petition clause decision. The "cut from the same cloth" dicta from *McDonald* provides an attractive out for courts, keeping them from having to venture into largely uncharted jurisprudential territory. By exercising the permission supposedly granted to them by *McDonald* to treat all individual petitioning as a mere sub-category of speech, these courts are relieved not only of the task of determining the scope of petition clause protection in various contexts, but even of the task of determining whether the plaintiff has actually stated a petition clause claim at all.[201] The resulting body of case law is largely unhelpful to the judges, scholars, and potential litigants seeking only to understand what kinds of activities constitute first amendment petitioning in the modern world.

That the "cut from the same cloth" approach merely represents a judicial dodge is apparent from these same courts' treatment of freedom of association claims.[202] The association right is not a textual guarantee, nor is it a free-standing right. It is ancillary by nature, existing only as a means of preserving or enhancing the primary first amendment liberties of assembly, worship, petition, and speech.[203] Yet the same courts that brush aside the petition clause claims of public employees have been willing to give careful consideration to association claims arising in exactly the same kinds of situations.[204] Several of these courts have declined to apply *Connick* on the grounds that the association right protects an interest distinct from speech.[205] The "cut from the same cloth" language is noticeably absent here. The reason for the different treatment of these rights is simply that the association right, unlike the petition right, has a separate identity in the minds of jurists. Unlike the petition right, the association right is defined by a body of case law that lays out the purposes and scope of the right and that allows judges to articulate with some confidence what kinds of limitations may appropriately be placed on the right.[206]

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201. See notes 113-115 and accompanying text.

202. See notes 105, 106 and accompanying text.

203. See Strauss, 61 Fordham L. Rev. at 477-78 (cited in note 106) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988)).

204. See notes 105-06 and accompanying text.

205. See note 106 and accompanying text.

206. See Strauss, 61 Fordham L. Rev. at 476-77, nn.22-29 (cited in note 106) (providing an overview of caselaw and commentary pertaining to freedom of association).

The most obvious reason that a petition clause claim is entitled to an analysis separate from speech is the Constitution's text itself. The Framers laid out the petition right alongside its first amendment counterparts as a separate textual guarantee. If the Framers had meant to include petitioning under the guarantee of free speech, they could easily have done so.[207] The illustrious pre-constitutional history of petitioning reinforces the argument that the right included in the First Amendment was distinct in the Framers' conception from the rights of assembly, worship, speech, and press. The important role played by petitioning in the development of representative government in England and America belies the contention that courts are justified in treating the Petition Clause as a sort of second-tier guarantee, or, as the court suggests in *San Filippo*, as a "dead letter."[208]

One must be careful, however, not to overstate the history argument, as some commentators have done in concluding that the petition right is "superior" or "absolute."[209] Certainly a historical analysis aids in formulating a separate identity for the petition right and in determining what kinds of activities fall into the category of petitioning. The textual argument, however, cuts both ways. If the Framers had intended to create a superior petitioning right they could easily have done so. An unequivocal declaration of an absolute petition right would undoubtedly create the impermissible hierarchy of first amendment rights over which the federal courts fret.[210] The federal courts that have addressed petition claims, however, have taken this concern to an extreme. The mistake that these courts make lies in assuming that by even entertaining the possibility that a petition claim might merit different treatment than a speech claim in certain situations, the courts would violate *McDonald's* proscription

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207. Actually, James Madison originally envisioned the Petition Clause as part of a separate amendment. See note 28 and accompanying text. During the congressional debate on the proposed amendment, Madison described the Petition Clause as ensuring that the people would be able to "communicate their will" through direct petitions to the government. 1 Annals of Cong. 738 (1789).

208. 30 F.3d at 442.

209. See Spanbauer, 21 Hastings Const. L. Q. at 68 (cited in note 8) ("History reveals that the right to petition evolved . . . into a broad right which was distinct from and superior to the rights of speech, press, and assembly. . . . Yet the Supreme Court has ignored these historical facts . . . collaps[ing] the historically superior right to petition into the other historically inferior rights of the First Amendment"); Smith, 54 U. Cin. L. Rev. at 1196 (cited in note 3) (stating that where only private interests are affected, petitioning should be "absolutely privileged, save where the conduct is merely a sham").

210. See *Belk*, 858 F.2d at 1261 (stating that if the court were to adopt the plaintiff's position that the right to petition [was] absolute, "we would he guilty of implementing precisely the sort of hierarchy of first amendment rights forbidden by McDonald").

against elevating the petition right to "special First Amendment status."[211]

This insistence on identical treatment of first amendment rights as a necessary manifestation of the equal status of these rights is nonsensical, and peculiar to the context of petition clause claims. Again, the willingness of courts to exempt association claims from the limits applied to speech claims in identical situations must be noted.[212] A court's likely reaction if asked to apply the *Connick* public concern test to a public employee's claim that her employer had retaliated against her for engaging in some type of religious activity provides an even better example, setting aside the fact that Congress has chosen to pull this particular first amendment guarantee from the realm of expressive rights and recast it as something akin to an immutable trait, like race or sex, unlawful per se as a criteria in employment decisions.[213] Even without the mandate of Title VII or a similar statutory scheme, a court would likely reject the public concern test at the outset as being an inappropriate criteria in this kind of first amendment claim. Likewise, courts faced with legitimate petition clause claims must at least venture to ask whether the proposed limitation on the petition right is appropriate under the circumstances of the case at hand, explaining why or why not.

B. The Connick *Public Concern Test is Inapplicable to Petition Clause Right of Access to Courts Claims*

The court in *San Filippo* correctly framed the main issue to be addressed in determining the appropriateness of the application of the *Connick* public concern test to a public employee's petition clause retaliatory discharge claim as being whether there are contexts in which the Petition Clause protects values additional to those protected by the Speech Clause.[214] This focus on the nature of the claimant's interest in a case is key to the court's analysis, and rightly so. For if the interest that the aggrieved employee seeks to protect by asserting a petition clause claim is identical to the interest protected

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211. 472 U.S. at 485.

212. See notes 204-05 and accompanying text.

213. See 42 U.S.C. § 2000e-2(a)(1) (1988 ed. & Supp. V) (stating that it shall be an unlawful employment practice "to fail to refuse to hire or discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin").

214. See note 179 and accompanying text.

by her speech claim, identical treatment of the claims is both logical and appropriate. Sometimes these interests *are* the same, as the *San Filippo* court acknowledged in its approving reference to the Tenth Circuit's handling of the letter-writing employee in *Schalk*.[215] But this is not always the case. Significantly, not all petitions are the same, and the nature of the interest implicated in a petition clause claim may be determined by the form of the petition itself. This Recent Development subdivides modern petitions into two categories: the political petition, and the judicial petition.

1. Political Petitions

The court in *McDonald* characterized the petition right as "an assurance of a particular freedom of expression."[216] This provides an adequate definition when a petitioner's only interest is in expressing her views, criticisms, or complaints to a governmental entity that may or may not respond to the petition but has no obligation to do so. Examples of this kind of "political" petitioning include the lobbying efforts of the unions and commercial entities in the antitrust cases,[217] the letter to then-President Reagan in *McDonald*,[218] the letter to the hospital board in *Schalk*,[219] and, arguably, the distribution of the questionnaire in *Connick*.[220] In these cases the petitioners simply want to be heard, as they attempt to win influence or contribute to the marketplace of ideas. It is easy to recognize, as the court did in *San Filippo*, that the interests protected by speech and petition claims are indistinguishable in such cases. Political petition claims, therefore, may appropriately be subjected to the same type of content-based limitations placed on speech claims brought under similar circumstances, including the *Connick* public concern test.[221]

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215. See note 121 and accompanying text.

216. 472 U.S. at 482.

217. See notes 32-42 and accompanying text.

218. 472 U.S. at 480-81. See notes 44-52 and accompanying text.

219. 906 F.2d at 492-93. See note 121 and accompanying text.

220. 461 U.S. at 141. See notes 93, 107, 108 and accompanying text.

221. This conclusion goes against the contentions of those who say that petition claims should never be subjected to the same limitations as speech claims. See note 209 and accompanying text. As explained, this Recent Development rejects one foundation of this argument, that the petition right is, by virtue of its ancient lineage, superior. In addition, the historical reasons for giving political petitioners special protection no longer exist in modern society. The petition right was once the only refuge for those wishing to address the government with impunity. Protection for the criticism of the government and the expression of unorthodox views is now found in the greatly expanded modern rights of free speech and press. Protection against arbitrary punishment of petitioners is found in the modern readings of the Due Process and Equal Protection Clauses.

2. Judicial Petitions: Different Treatment for Right of Access Claims

Sometimes the interests implicated in a petition claim go beyond mere expression. The act of petitioning itself, not merely the expressive content of the petition, may warrant protection. This can be seen in the case of "judicial" petitions addressed to governmental tribunals. In the form of right of access to courts claims, the modern petition right fully emerges from the shadow of free speech. Speech is necessarily involved in framing a judicial petition, but this does not mean that litigation merely represents another form of expression, like publishing a letter or addressing passersby on a street corner.[222] When a citizen petitions a court of law, she is not merely interested in being heard; she is interested in obtaining real and immediate relief for a perceived grievance. And unlike legislatures and school boards, courts have an obligation to respond in some fashion to the petitions they receive.[223] It is clear that the petition clause right of access claim, while admittedly often brought for the same purpose as a speech impingement claim, is very different.

The separateness of the right of access claim from first amendment expressive rights claims is further demonstrated by the fact that a right of access to the courts has been found to emanate from the Due Process Clause, as well as from the First Amendment, in contexts completely divorced from questions of free expression.[224] Because the petition clause right of access protects interests unrelated to the expressive content of the petition, content-based limitations on the right, such as the *Connick* public concern test, are inappropriate. Of course, this does not mean that the right of access to courts is absolute. Limitations more in line with those placed on litigation generally, such as the sham exception articulated in *Bill Johnson's Restaurants*, may appropriately bar judicial scrutiny of public employee retaliatory discharge claims.[225]

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222. Even if the speech contained in the judicial petition were the only issue, speech taking place within the context of a courtroom proceeding has always been afforded special protection. For instance, a majority of American courts confer absolute immunity from libel laws upon individuals for statements made and evidence submitted in the course of judicial proceedings. Spanbauer, 21 Hastings Const. L. Q. at 54 (cited in note 8).

223. See notes 101, 190-193 for comments on the importance of the government's obligation to respond to judicial petitions.

224. See *McCoy*, 598 F. Supp. at 315 (citing *Bounds*, 430 U.S. at 821); *Graham*, 804 F.2d. at 959.

225. The sham exception, described in *Bill Johnson's Restaurants*, 461 U.S. at 741, as the witholding of petition clause protection from baseless lawsuits filed merely for purposes of harassment, appears to he similar to another widely accepted limitation on an individual's right

Under the above analysis, an important initial determination a court must make is whether a petition is appropriately classified as political or judicial. Lawsuits filed in state and federal court are obviously judicial petitions. The initiation of judicial or quasi-judicial proceedings before administrative tribunals passes muster as well, according to the Supreme Court in *Trucking Unlimited*.[226]

The *San Filippo* court included the filing of employee grievances in this category, making clear its intent to use the term "lawsuit" to refer to both Professor San Filippo's grievances and his state law claims.[227] This rather thoughtless lumping together of employee grievance procedures and bona fide lawsuits, typical of petition clause analyses in other circuits, is inconsistent with the Third Circuit's earlier decision in *Bradley*,[228] where the court gave careful consideration to the question of what kind of activity might qualify for protection under the Petition Clause. The *San Filippo* court's characterization of a collective bargaining agreement between a governmental employer and a public employees' union as a "formal government adoption of a mechanism for redress of grievances,"[229] similar to a waiver of sovereign immunity from suit in the courts of the sovereign, is unsatisfactory. In the latter case, the government, acting in its capacity as sovereign, has opened a channel for all citizens, including public employees, to obtain redress for injuries allegedly visited upon them by the government. In the former case, a governmental entity acting in the capacity of employer, and likely motivated by the desire to improve labor-management relations, has agreed to adopt procedures that allow employees to challenge its decisions as an employer. The invocation of these "in-house" grievance procedures should not implicate the Petition Clause any more than the invocation of similar procedures by an employee in the private sector.[230] To so hold would violate the spirit of *Connick*, which acknowledges the differences between the roles of the government as

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of access to a court, the malicious prosecution cause of action in tort. *Black's Law Dictionary* defines a malicious prosecution as "[o]ne begun in malice without probable cause to believe that charges can be sustained." *Black's Law Dictionary* at 958 (cited in note 2).

226. 404 U.S. at 510.

227. 30 F.3d at 439 n.18.

228. 913 F.2d at 1064. See notes 140-143 and accompanying text.

229. 30 F.3d at 442.

230. Some scholars agree that the filing of a union grievance does not constitute protected first amendment petitioning activity. See Strauss, 61 Fordham L. Rev. at 486 (cited in note 106) (citing *United Mine Workers*, 389 U.S. at 220-23, to support the contention that "[w]hen the Supreme Court speaks of the . . . right to petition . . ., it is referring to the right to appeal to the legislature and the judicial system—not the right to challenge a decision of the government as an employer").

sovereign and employer, and warns against the "constitutionalizing" of private grievances.[231] Thus, retaliatory discharge claims hinging on the filing of employee grievances should be thrown out from under the protective umbrella of the petition clause right of access to courts, and into the realm of mere speech, subject to the public concern threshold.[232]

C. *The* Pickering/Connick *Balancing Test May be Applied to Petition Clause Claims*

If one accepts the proposition that a petition clause right of access claim protects a different interest than is present in a speech claim, it is easy to dismiss the "special treatment" arguments advanced by some circuit courts and by the dissent in *San Filippo*. But the second argument considered by the court in *San Filippo* cannot be so easily brushed aside. For even though the interest of the employee is different in a petition clause right of access claim than in a speech claim, the interest of the governmental employer, and of the taxpaying public, in workplace harmony and efficiency remains the same. The court in *San Filippo* admitted that employee lawsuits could occasionally be as divisive as employee speech.[233] In reality, a lawsuit, carrying with it the obligation of the employer to respond, not to mention the potential of attracting as much, if not more attention than mere employee speech, is likely to be *more* divisive.[234]

As noted above, the court in *San Filippo* ended its analysis by concluding that the *Connick* public concern test should not apply to right of access claims. Nevertheless, in holding that a public employee's filing of a non-sham petition was not a constitutionally permissible ground for discharge, the court seems to be taking the same approach as the court in *McCoy*. In that case, the court threw out the entire *Pickering/Connick* interest-balancing framework, holding that

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231. 461 U.S. at 138, 154. There is arguably an association interest involved when the grievance procedure involved is the result of collective bargaining. Whether or not *Connick* should apply to association claims is a question that has been touched on in this Recent Development. But the answer lies beyond the scope of this discussion.

232. Of course, in practice, adherence to this view would lead to the same result, dismissal of the claim, that most federal courts have reached in their consideration of Petition Clause retaliatory discharge claims. Most petition clause retaliatory discharge claims involve in-house grievance procedures, not bona fide lawsuits. See the descriptions of petition clause cases in notes 110-130 and accompanying text.

233. 30 F.3d. at 441.

234. This view is reflected in the dissent in *San Filippo*. Id. at 450 (Becker, J., concurring in part and dissenting in part).

the factors considered under the *Connick* analysis were not transferable to a right of access to courts analysis.[235] The court in *McCoy* rejected the defendant employer's contention that the court should balance the employee's right of access interest against the interest of the municipal employer in settling wage disputes. This approach inappropriately elevates the petition right of access to the status of a superior right. The argument that the petition right of access to courts differs from the speech right, and that it may not appropriately be subjected to a content-based limitation, does not lead to the conclusion that the right is overriding in all cases or immune from being balanced against other legitimate interests.

The correct approach for courts to take when faced with a retaliation claim brought by a public employee who has filed a lawsuit against her employer would be first to recognize the claim, whether the lawsuit involves a matter of public or private concern, and, second, to apply the *Pickering/Connick* four-part test as it would in a speech impingement claim. An interesting question is whether, at the interest-balancing stage of the test, the right of access claim would or should carry more weight than a mere speech claim. Even if it does, this effect would likely be countered in many cases by the similarly augmented interests of the employer faced with the potentially disruptive effects of ongoing litigation. Ironically, in the final analysis, the liability of the employer might hinge on the nature of the lawsuit. For example, a suit relating to a matter of public concern would likely be given greater weight in a court's analysis than a suit involving a purely private dispute. The fact that many retaliation claims resulting from private concern litigation will ultimately fail the *Pickering/Connick* balancing test does not render the different treatment given to the right of access claims at the initial stage of the test meaningless. The important thing is that "private concern" right of access claims will not be a barred at the door. They will be subjected to judicial scrutiny, and, in a few cases, where the disruptive impact on the workplace is low, the employee will prevail.[236]

235. *McCoy*, 598 F. Supp. at 315 n.4.

236. The workers' compensation claim in *Bradley* might be a good example of such a case. See note 137 and accompanying text.

V. CONCLUSION

Whether or not other circuits ultimately accept the court's holding in *San Filippo v. Bongiovanni*,[237] the thoughtful and detailed analysis presented by the Third Circuit should at least force other courts to articulate a genuine rationale for the imposition of the public concern criteria to petition clause retaliatory discharge claims. Hopefully, the debate that might be sparked by *San Filippo* will provide some badly needed illumination in the murky world of petition clause jurisprudence. This Recent Development has provided some suggestions regarding the scope of the petition right in a very particular context. The main purpose of the analysis presented here, however, has been simply to increase awareness and understanding of the petition right. This ancient right deserves more than the second-class status to which it has been relegated by our judicial system. The Petition Clause has a role to play in the modern world. It is up to the courts to define that role and to ensure the vitality of the Petition Clause as the vital and distinct source of rights it was meant to be.

*Kara Elizabeth Shea**

237. So far, only the Seventh Circuit has explicitly rejected *San Filippo*, adhering to its long-held view that "personal concerns do not become a matter of public concern because pursued in a court of law." See *O'Callaghan v. City of Chicago*, 1995 W.L. 340882 *2 n.3 (N.D. Ill. 1995) (citing *Zorzi v. County of Putnam*, 30 F.3d 885, 896 (7th Cir. 1994)). Meanwhile, the Third Circuit has reaffirmed its intention to subject petition clause right of access to court claims raised in retaliatory discharge cases to an analysis distinct from that applied to speech claims. *Bieregu v. Reno*, 1995 W.L. 409147 *6 (3d Cir. 1995).

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