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SUPREME COURT OF THE UNITED STATES

American Recovery and Reinvestment Act of 2009, Public Law 11-5, as amended by Public Law 111-8, March 101 of 2009, Public aons

AMICUS CURIAE

The National School Boards Association (NSBA) is a not-for-profit federation of state associations of school boards across the United States. Through its state associations NSBA represents the nation's 95,000 school board members, who, in turn, govern approximately 15,000 local school districts. These school districts employ over 6 million teachers[2] and another approximately 6 million non-certificated staff, including paraprofessionals, custodians and other building maintenance personnel, school psychologists and social workers, bus drivers, and food service workers. Taken as a whole, public school districts are the nation's single largest government employer.[3] NSBA is dedicated to the improvement of public education in America and has long been involved in advocating for a reasonable balance between the obligation of public schools to promote the efficiency of the public education system, and the private interests of employees affected by governmental action.

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[1] This brief is filed with the consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

[2] U.S. Census Bureau, Census 2000 Special Employment Opportunity Tabulation, *available at* http://www.census.gov/hhes/www/eeoindex/page_c.html?.

[3] In comparison, as of January 1, 2003, 1.4 million people were on active duty in the U.S. military with an additional 1.3 million people in the National Guard and Reserves. U.S. Census Bureau, Facts for Features – U.S. Armed Forces and Veterans, *available at*

efficient education system. It will lead to the commitment of substantial additional amounts of time and money by already-strapped school districts that need to spend their limited resources on the education of students, not additional litigation, when ample school district employee protections already exist.

Connick

The courts have long refused to allow public employees to transform personal disputes with employers into constitutional claims, recognizing the operational needs of the public employer. *Connick v. Meyers*, 461 U.S. 138 (1983).[4] This is especially important in the case of public schools where expression i pu8 (1983).

the employment relationship. For this reason, it is important to understand *Connick's* public concern requirement as a threshold that excludes from First Amendment protection employee speech, that is a function of official job duties[5]

micro-managing teacher's daily performance.[6] Significantly, the large number of grievances filed is not limited to urban centers. In 2008, teachers in West Virginia filed 592 grievances, representing about a third of all the formal employee complaints handled by the statewide public employee grievance system.[7]

Typically, school employees can bring grievances with respect to a wide variety of employment matters such as pay, hours, working conditions, health benefits, leave, promotions, vacations, insurance, discipline, seniority, layoffs, class size, re-hiring, resignation, termination, or other rights and benefits afforded by their union contracts. Because the *Connick* public concern requirement acts as a threshold beyond which public employees cannot cross without a bona fide constitutional claim, school employees who file grievances on such matters are not endowed with constitutional protection; the expression generally involves a private dispute an individual employee has with the school district.[8] While a savvy lawyer could argue that a particular issue, such as class size, is not simply a bargained term of employment,

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[6] Kathleen Lucadamo, *Teachers' Pet Peeves*, New York Daily News, 2005 WLNR 25247361 (February 21, 2005).

[7] Ry Rivard, *Teacher hiring overhaul urged*, Charleston Gazette & Daily Mail, December 8, 2009, at 1A.

[8] In *Weintraub v. Board of Educ. of City of Sch. Dist. of City of New York*, 593 F.3d 196 (2d Cir. 2010), the Second Circuit held that the filing of a grievance by a teacher about his supervisor's failure to discipline a child in his class was speech pursuant to the teacher's official job duties and therefore was not entitled to First Amendment protection. The court noted that an employee grievance is a form of discourse that has no "relevant citizen analogue." *Id.* at 203.

but rather a matter of public concern in an attempt to gain access to constitutional protections for a routine grievance, such legal contrivances are not necessary under the Third Circuit's decision; under that ruling school district employees can invoke the protection of the Petition Clause as a form of job insurance simply by filing a grievance, a normally simple process not requiring the assistance of legal counsel.

The Third Circuit's decision also explicitly extends Petition Clause protection to lawsuits filed by public employees. While exact numbers are hard to find, it is safe to say that school employees file thousands of lawsuits against their employers every year. Under the lower court's decision here, the nature of the claim asserted is irrelevant to whether the employee garners First Amendment protection by virtue of filing a lawsuit. Claims that undisputedly raise purely private concerns endow the plaintiff with a constitutional shield that can be raised to protect against future adverse action by the school district. Even claims that lack any merit whatsoever would provide this protection, thus complicating school district efforts to discipline and terminate school employees for ineffectiveness or misconduct.

Teachers, like many public employees, are often protected by state statutes[9] and collective

[9] In almost all states, a combination of state statutory and case law grants tenure to teachers who have been teaching for two or three years. *See* Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Update for 2007 (2007), *available at* http:/www.ecs.org/clearinghouse/75/64/7564.doc; EDWIN BRIDGES, MANAGING THE INCOMPETENT TEACHER 2 (Education Resources Information Center 1990). This property right to

bargaining agreements[10] that give them a right to continued employment except under narrow circumstances, making discipline and termination an already difficult process. Usually, public school teachers are summarily dismissed only in the most egregious cases. More often, problematic employees go through some form of remediation and/or progressive discipline before being terminated. To avoid this outcome, such an employee could, under the Third Circuit's decision, try to save his or her job simply by filing a grievance and pointing to that "petition" as the underlying motivation for the proposed termination.

Even without the Third Circuit's unwarranted disposal of the public concern requirement with respect to grievances, the problem of disgruntled teachers interjecting First Amendment issues into

claims have wasted a tremendous amount of resources in various district courts, the Seventh Circuit, and indeed in this Court as well. Permitting

addressing issues ranging from classroom conditions to discrimination to overtime pay. More importantly, the complaints come in a variety of forms. Whereas one employee may simply discuss an issue with a supervisor, another may bring an issue to the union representative, another may file a formal grievance or other written complaint,[12]

As Petitioners clearly demonstrate, the mode of expression potentially covered by the Petition Clause under the Third Circuit's decision is neither easily determined nor neatly confined. Pet. Br. 29-34 (noting difficulties courts have in making such determinations). Having to engage in such complex legal analysis at every turn will cripple the daily workings of school districts, a consequence of the operational realities of public employers already recognized by this Court in *Connick* and its progeny. On the one hand, school officials' interactions with employees will be affected—sometimes to the point of paralysis—with school districts always second guessing themselves about disciplining employees who have filed a grievance or complained so as to avoid the possibility of being subject to a lawsuit for retaliation. On the other hand, school employees looking for job security have an incentive to formalize any complaints to ensure themselves an additional layer of legal protection.[14] For example, a teacher even mildly upset that the hours of her teacher aide have been reduced, rather than speaking to her supervisor or union representative,

Not only is the potential burden of litigation tremendous, but student achievement and welfare may be compromised if the Court adopts the reasoning of the Third Circuit. School districts must be able to swiftly and effectively discipline or terminate employees who put student education or safety at risk by failing to execute their responsibilities in the manner prescribed by the school board and state lawmakers. They must be able to do so without undue fear of First Amendment claims based solely upon the previous filing of a claim that constitutes a "petition."

Courts have long recognized the authority of schools to control their policies, rules, and regulations governing employment of teachers and staff. *See, e.g., Milliken v. Bradley*, 418 U.S. 717 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools.") The educational mission is of such crucial importance that Justice Frankfurter noted that one of the four "essential freedoms" of a public educational institution was "to determine for itself on academic grounds *who* may teach...." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added). Given the heightened accountability standards for student performance that have been imposed in the

last few years,[15] it is especially critical that school boards retain control over the employee disciplinary process.

administrators are capable of not only monitoring student performance, but of making decisive

responsibilities for student safety and welfare. This Court has recognized the importance of this "special characteristic of the school environment" in many constitutional contexts involving the rights of students. Public schools have a "legitimate need to maintain an environment in which learning can take place." *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985) (holding that school officials need not obtain a warrant before searching a student who is under their authority). "In a public school environment . . . the State is responsible for maintaining discipline, health, and safety." *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 830 (2002) (upholding school policy requiring students participating in extracurricular activities to submit to drug testing); *accord Morse v. Frederick*, 551 U.S. 393, 408 (2007) (holding that "the governmental interest in stopping student drug abuse . . . allow[s] schools to restrict student expression that they reasonably regard as promoting illegal drug use.").

The "special characteristics of the school environment" which attend the rights of students also affect school districts as public employers. When a citizen is working as a public employee, the constitutional rights that employee enjoys are circumscribed by the very nature of that employment. "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti*, 547 U.S. at 418. This Court's policy has been "'the

would certainly be true where school districts take action against an employee to protect student safety. Envision a teacher who has several times used inappropriate language in his class of fourth-graders. That teacher should, at some point, be disciplined or discharged if he does not stop. If the teacher has a "petition" on file, supervisors may be reluctant to act against the employee for fear it would be seen as retaliation based on the filing of the "petition," thereby leaving him in the classroom to continue the inappropriate language. If this scenario is repeated with several different teachers, the learning environment in the school could be severely compromised, leaving students exposed on a regular basis to inappropriate adult expression. What if, instead of inappropriate language, the teacher had inappropriately touched a student? In such situations supervisors must be able to act swiftly without concern about whether the employee has protected constitutional status for a previous complaint about a purely private matter. But if the Third Circuit's approach in this case is made national, school officials may in fact feel constrained to take any adverse action against an employee who has a pending "petition" on file.[17] Such a negative impact would hinder the very educational mission schools exist to carry out.

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[17] According to a news story in *L.A. Weekly*, during the 2008 school year, United Teachers Los Angles filed 650 formal grievances on behalf of teachers alleging contract violations. Roughly 300 of those grievances were filed by teachers who got negative classroom-teaching evaluations. Beth Barrett, *LAUSD's Dance of the Lemons*, L.A. Weekly, February 11, 2010, *available at* http://www.laweekly.com/content/printVersion/854792/.

available by the American Recovery and Reinvestment Act of 2009 disappear, states will face a funding cliff in fiscal 2012[22] that will affect funding for public schools in the majority of states. The many small rural districts already struggling would be [illegible] hard-hit. Of course, it goes
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specific due process rights concerning notice and opportunity to be heard before the school board that is recommending discipline, non-renewal or termination of the teacher's contract.[23] Finally, two-thirds of all states have collective bargaining statutes covering teachers and mandating that local school districts bargain over the terms and conditions of employment. Collective bargaining agreements often establish rights and procedures applicable to disciplining and terminating teachers, which usually exceed the rights set forth in statutes. *See* Education Commission of the States, Collective Bargaining Policies for Teachers (June 2002), *available at* http://www.ecs.org/clearinghouse/37/48/3748.htm.

Typically these rights include discipline and dismissal for just cause only, which generally involves progressive discipline, due process requirements prior to and during the disciplinary process, and extensive grievance and arbitration procedures that supplement or displace statutory hearing procedures. Some of these provisions allow employees to challenge acts of alleged discrimination and retaliation. *See, e.g., City Sch. Dist., Peekskill v. Peekskill Faculty Ass'n*, 398 N.Y.S.2d 693, 695 (N.Y. App. Div. 1977) (holding that teacher's claim for retaliation based on exercise of statutorily protected rights was subject to arbitration under collective bargaining agreement, as such action would not be a

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[23] *See* Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Update for 2007 (2007), *available at* http://www.ecs.org/clearinghouse/75/64/7564.doc, which delineates statutes in every state in the United States that provide certain job protections and due process considerations for teachers.

"just cause" dismissal); *Jefferson v. Jefferson County Pub. Sch. Sys.*, 360 F. 3d 583, 587 (6th Cir. 2004)(holding that collective bargaining agreement between the teachers' union and school board created constitutional due process property interest in employment); *Glanville v. Hickory County Reorg. Sch. Dist. No. I*, 637 S.W.2d 328, 331 (Mo. Ct. App. 1982) (holding that teacher tenure statute prohibited adverse action taken in retaliation for exercising free speech rights). Clearly, these protections serve to make an additional cause of action for alleged First Amendment violations based on the Petition Clause simply unnecessary.

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In terms of substantive rights granted by statute, local school districts frequently can terminate tenured teachers only under extreme and statutorily defined conditions usually framed as "just cause."etall0ui schgrty 4r5g t r5extreme and

a state court, a tenure commission, or a state board of education. *See* Education Commission of the States, footnote 23, *supra*. Many states allow teachers to appeal to the state supreme court, meaning the case could be reviewed four or five times. *See id*.

State statutes also explicitly protect school employees from retaliation for exercising their rights, including the filing of grievances, under collective bargaining statutes or agreements. Arkansas requires school districts to adopt written grievance procedures to resolve "concerns raised by an employee" and declares that "[t]here shall be no reprisals of any kind against any individual who exercises his or her rights." Ark. Code Ann. § 6-17-208 (2010). Similarly, California makes it unlawful for a public school employer to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees because of their exercise of rights guaranteed" by the state's collective bargaining provisions for school employees. Cal. Gov. Code § 3543.5 (2010). Maryland law contains a similar proscription, stating that a public school employer "may not interfere with, intimidate, restrain, coerce, or discriminate against any public school employee because of the exercise of rights" under the state's teacher collective bargaining laws. Md. Educ. Code § 6-409 (2010). Ohio makes it an unfair labor practice for a public employer to "[d]ischarge or otherwise discriminate against an employee" because he has filed charges or given testimony with respect to another unfair labor practice complaint. Ohio Rev. Code § 4117.11 (2010). These statutory protections are often specifically incorporated and sometimes expanded in collective

Title VII, ADA and ADEA specifically prohibit retaliation against employees for opposing unlawful conduct in the workplace. The United States Equal Employment Opportunity Commission (EEOC), established by Congress, enforces all of these laws.[25] And, of course, Congress has provided private rights of action pursuant to 42 U.S.C. §§ 1981 and 1983.

This Court should not tamper with these extensive and carefully constructed measures. Given the panoply of federal, state, and local laws and regulations protecting employees of school districts, there is, quite simply, no gap in legal protections to justify dragging in Petition Clause protections designed for entirely different situations. These special factors counsel against extension of the Petition Clause in the manner set forth in the Third Circuit's decision below.

The multitude of already-existing protections held by our nation's 12 million school employees have been carefully crafted by federal and state legislators, school boards, and employee unions to achieve an appropriate balance between worker rights and the needs of government to carry out its educational mission. Determining the scope of these

[25] For fiscal year 2009, the EEOC handled 93,277 complaints. Included in these complaints were 33,613 charges of retaliation. Over 52,000 of the total complaints resulted in a No Reasonable Cause finding. U.S. Equal Employment Opportunity Commission, Table, All Statutes FY 1997-FY 2009, *available at*, http://www.eeoc.gov/stats/all.html.

protections and the available remedies to enforce

For the reasons stated above and those Petitioners set forth in their brief, *Amicus* urges this Court to reject the Third Circuit's unprecedented and unwise abandonment of this Court's First Amendment jurisprudence with respect to employee speech.

Respectfully submitted,

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