No. 19-____

IN THE
Supreme Court of the United States

JERUD BUTLER,
Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS FOR SAN MIGUEL COUNTY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Lane* v. *Franks*, this Court held that "the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities." 573 U.S. 228, 238 (2014). *Lane* reached that holding through a straightforward application of this Court's precedent in *Garcetti* v. *Ceballos*, 547 U.S. 410, (2006) and *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), which establish that a public employee's speech falls within the ambit of the First Amendment's protection if it is speech "as a citizen on a matter of public concern." *Lane*, 573 U.S. at 237 (quoting *Garcetti*, 547 U.S. at 418).

In the decision below, the Tenth Circuit held—in acknowledged conflict with the Third and Fifth Circuits—that a government employee is not entitled to First Amendment protection for truthful testimony provided in a child custody proceeding because that testimony is not speech "on a matter of public concern."

The question presented is:

Whether a government employee's truthful testimony at a judicial hearing qualifies as speech on a matter of public concern, such that it is entitled to protection under the First Amendment.

PARTIES TO THE PROCEEDING

Jerud Butler, petitioner on review, was the plaintiff-appellant below.

The Board of County Commissioners for San Miguel County; Mike Horner, in his individual capacity; and Kristl Howard, in her individual capacity, respondents on review, were the defendants-appellees below.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

- *Butler* v. *Board of County Commissioners for San Miguel County*, No. 17-cv-00577-WYD-GPG (D. Colo. Dec. 7, 2017) (available at 2017 WL 8730475), *aff'd*, No. 18-1012 (10th Cir. Mar. 29, 2019) (reported at 920 F.3d 651), *reh'g denied* (June 4, 2019) (reported at 924 F.3d 1326).

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Jerud Butler respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit's opinion (Pet. App. 1a-38a) is reported at 920 F.3d 651. The District Court's opinion (Pet. App. 39a-50a) is not reported, but is available at 2017 WL 8730475. The Tenth Circuit's order denying panel rehearing and rehearing en banc (Pet. App. 51a-61a) is reported at 924 F.3d 1326.

JURISDICTION

The Tenth Circuit entered judgment on March 29, 2019. Petitioner filed a timely petition for rehearing, which was denied on June 4, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment of the Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

INTRODUCTION

"Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth." *Lane* v. *Franks*, 573 U.S. 228, 238 (2014). That fundamental proposition underpins this Court's 2014 decision in *Lane* v. *Franks*, which held that "the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities." *Id.*

In the decision below, a divided panel of the Tenth Circuit held that the First Amendment did not protect petitioner Jerud Butler from being punished by his supervisors at the San Miguel County Road and Bridge Department for his truthful sworn testimony in his sister-in-law's child custody proceeding. According to the panel, Butler's testimony was outside the First Amendment's protection because it did not qualify as speech "on a matter of public

concern"—a prerequisite for First Amendment protection under this Court's precedents in *Pickering* v. *Board of Education*, 391 U.S. 563, 574 (1968) and *Garcetti* v. *Ceballos*, 547 U.S. 410, 417 (2006).

As four Tenth Circuit judges noted in dissenting from rehearing en banc, that conclusion conflicts with the holding of *Lane* and reinvigorates a longstanding circuit split as to whether truthful testimony necessarily qualifies as speech on "a matter of public concern." The Third and Fifth Circuits have long concluded that truthful testimony is inherently a matter of public concern "because all court appearances implicate the public's interest in the integrity of the truth seeking process and the effective administration of justice." *Green* v. *Philadelphia Hous. Auth.*, 105 F.3d 882, 887 (3rd Cir. 1997); *see Johnston* v. *Harris Cty. Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989); *see also Catletti ex rel. Estate of Catletti* v. *Rampe*, 334 F.3d 225, 230 (2d Cir. 2003) ("truthful trial testimony is almost always of public concern"). By contrast, the Seventh, Eighth, Ninth, and Eleventh Circuits have held that whether truthful testimony qualifies as a matter of public concern depends on the content of the speech and the nature of the judicial proceeding in which the testimony is offered. *See, e.g.*, *Alpha Energy Savers, Inc.* v. *Hansen*, 381 F.3d 917, 926 n.6 (9th Cir. 2004) (adopting this position and describing the split).

Unsurprisingly, in the wake of *Lane*, the Third and Fifth Circuits have reaffirmed their pre-*Lane* precedent dictating that truthful testimony always qualifies as a matter of public concern. *See Falco* v. *Zimmer*, 767 F. App'x 288, 307 (3d Cir. 2019); *Lump-*

kin v. *Aransas County*, 712 F. App'x 350, 358-359 (5th Cir. 2017) (per curiam). But, in the decision below, the Tenth Circuit explicitly embraced the pre-*Lane* reasoning of the circuits on the other side of the split. And it went even further—holding for the first time that, despite the obvious public concern with child welfare, testimony provided in a child custody proceeding is of no "interest or concern to the community at large." Pet. App. 26a-27a.

Certiorari review is urgently warranted to prevent this erroneous holding from reviving a circuit split that *Lane* should have settled, and to ensure the integrity of judicial proceedings and the vibrancy of the First Amendment that *Lane* sought to preserve.

STATEMENT

1. Jerud Butler was an employee of the San Miguel County, Colorado, Road and Bridge Department. On September 1, 2016, he was promoted to a district supervisor position. Pet. App. 4a, 40a. Shortly thereafter, Butler testified at a child custody hearing involving his sister-in-law and her ex-husband, another employee at the San Miguel County Road and Bridge Department. *Id.* Butler agreed to appear at the hearing as a character witness for his sister-in-law, but—according to his complaint—his testimony would have been subpoenaed if he had not done so. *Id.* at 4a, 40a-41a.

At the hearing, Butler was asked about the hours of operation of the Department, and he answered truthfully. *Id.* at 4a, 41a. He did not either state or imply that he was testifying on behalf of the County. *Id.* at 4a. Nonetheless, almost two weeks after Butler's testimony, his County supervisors opened an

investigation into what he had said at the hearing. *Id.* at 4a, 41a. That investigation resulted in both a written reprimand and a demotion. *Id.*

2. Butler brought a 42 U.S.C. § 1983 suit against respondents, the Board of County Commissioners and the two supervisors who punished him for his testimony. *Id.* at 5a, 40a. Butler alleged that respondents' actions violated his clearly established First Amendment right to offer truthful testimony at a judicial proceeding. *Id.* Respondents promptly moved to dismiss, alleging that Butler had failed to state a claim and that they were entitled to qualified immunity. *Id.* at 40a.

The District Court granted respondents' motion, finding that Butler had failed to state a claim under the First Amendment. It first recited the appropriate analysis for government employee speech claims articulated in *Pickering* and *Garcetti*. Under that analysis, a court asks whether the employee spoke (1) as a citizen and (2) on a matter of public concern. If both of these conditions are met, then the court must consider "(3) whether the government's interests as an employer in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct." *Id.* at 46a (quoting *Morris* v. *City of Colorado Springs*, 666 F.3d 654, 661 (10th Cir. 2012)).

The District Court found that it was not necessary to go beyond the second step in this case. Respondents conceded that the first step was satisfied be-

cause Butler had testified as a citizen. But, according to the District Court, his sworn testimony in a judicial proceeding did not qualify as speech on a "matter of public concern" because of the "personal nature of a family member's child custody dispute." *Id.* at 48a. It therefore held that the testimony was entitled to no First Amendment protection at all.

3. The Tenth Circuit affirmed. It acknowledged the "circuit split that developed prior to *Lane*" regarding whether "truthful sworn testimony given by a government employee [is] always a matter of public concern." *Id.* at 13a. But the Tenth Circuit refused to side with the Third and Fifth Circuit decisions recognizing that judicial testimony is offered "in a context that is inherently of public concern." *Id.* at 13a-15a. Instead, the Tenth Circuit adopted the holdings of the pre-*Lane* courts that had looked to the content of sworn testimony to decide whether it was entitled to First Amendment protection.

According to the Tenth Circuit, this position was justified by *Lane* because the *Lane* Court examined the content of the testimony in that case in considering the "public concern" prong of the *Garcetti/Pickering* analysis. The Tenth Circuit reasoned that *Lane*'s reference to content indicates that "the fact that the speech at issue is sworn testimony given in a judicial proceeding" is merely one "factor to consider" in deciding whether the testimony is "on a matter of concern." *Id.* at 12a. And it rejected petitioner's assertion that the Tenth Circuit's own prior precedent supported *Lane*'s broader holding that truthful testimony provided as a citizen is necessarily entitled to First Amendment protection. *Id.* at 19a-23a.

Turning to an analysis of the content, the Tenth Circuit held that testimony in a child custody proceeding is generally not a matter of public concern. It acknowledged "the State of Colorado's concern for the welfare of children and the fair resolution of child custody matters." *Id.* at 26a. But it held that "it is not sufficient that the topic of the speech be of general interest to the public; in addition, what is *actually said* must meet the public concern threshold." *Id.* (internal quotation marks and brackets omitted). According to the Tenth Circuit, there was no indication that Butler's testimony in support of his sister-in-law "was of interest or concern to the community at large." *Id.* at 26a-27a.

The Tenth Circuit brushed aside petitioner's invocation of *Wright* v. *Illinois Department of Children & Family Services*, 40 F.3d 1492 (7th Cir. 1994), a Seventh Circuit decision holding that the content of a child custody proceeding *is* of public concern. *See* Pet. App. 27a. The specific testimony in *White*, the Tenth Circuit explained, was more obviously related to systemic concerns. *Id.* Based on this analysis, the Tenth Circuit concluded that Butler's testimony was not entitled to any First Amendment protection, and it affirmed the dismissal of his suit. *Id.* at 27a-28a.

Judge Lucero dissented. He stated that, after *Lane*, there can be "no question" that "the form and context of in-court testimony establish a significant presumption that the speech raises matters of public concern" because the "[i]ntegrity of our judicial process depends upon witnesses' willingness to provide truthful testimony." *Id.* at 31a-32a. And he rejected the notion that "this case presents an exceedingly rare instance in which testimony in judi-

cial proceedings does not raise a matter of public concern," particularly in light of the Colorado statutes and judicial decisions articulating the State's interest in the outcome of child custody proceedings. *Id.* at 32a, 33a-35a.

4. Petitioner sought en banc review. The Tenth Circuit denied that relief, over another forceful dissent from Judge Lucero, this time joined by Judges Briscoe, Phillips, and McHugh. *Id.* at 51a-61a. The dissent reiterated the "existing circuit split on the extent to which the constitution protects sworn testimony in judicial proceedings," and observed that this Court had "elected to resolve the issue by its 2014 decision in *Lane*," which holds that—at a minimum—there is a "strong presumption" that such speech is protected. *Id.* at 53a, 57a. By ignoring that holding, the dissent argued, the Tenth Circuit's decision will undermine the courts' ability to secure truthful testimony. Moreover, the Court observed that the "proposition that the custody of a child does not ultimately involve a matter of public concern is untenable." *Id.* at 53a. And the dissenters questioned whether an employer should ever be permitted to interfere with a public employee's First Amendment rights where the employee speech in question has no meaningful connection to the workplace. *Id.* at 54a & n.1.

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT'S DECISION REINVIGORATES A WELL-RECOGNIZED SPLIT AS TO WHEN TRUTHFUL TESTIMONY CONSTITUTES A MATTER OF PUBLIC CONCERN.

Before this Court's decision in *Lane* v. *Franks*, courts and commentators alike had recognized deep confusion in the circuits regarding when the truthful testimony of a public employee constitutes speech on a matter of public concern under the *Garcetti/Pickering* analysis. *See, e.g.*, *Rorrer* v. *City of Stow*, 743 F.3d 1025, 1048 (6th Cir. 2014); *Reilly* v. *City of Atlantic City*, 532 F.3d 216, 230 (3d Cir. 2008); *Alpha Energy Savers*, 381 F.3d at 926 n.6; Matt Wolfe, *Does the First Amendment Protect Testimony by Public Employees?*, 77 U. Chi. L. Rev. 1473, 1482-90 (2010). Some circuits adopted an absolute rule, or at least a very strong presumption, that such testimony is always a matter of public concern; others held that the content of some truthful testimony places it outside of the First Amendment's protections.

Lane should have resolved that split. It held, in no uncertain terms, that "the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities." 573 U.S. at 238. And, with respect to the "public concern" analysis in particular, the Court recognized that the "form and context" of sworn testimony counsel strongly in favor of finding that such speech is a matter of public concern because a witness's formal "statements will be the basis for official governmental action, action

that often affects the rights and liberties of others." *Id.* at 241 (internal quotation marks omitted). Any testimony in a judicial proceeding—regardless of its content—therefore implicates the "public concern" with the integrity of governmental conduct.

That is certainly the view of the Third and Fifth Circuits, the two courts of appeals that had adopted a *per se* rule protecting truthful testimony even before *Lane*; both have reaffirmed their prior precedents since *Lane* was decided. *See Falco*, 767 F. App'x at 307; *Lumpkin*, 712 F. App'x at 358-359. By contrast, post-*Lane*, no court of appeals had held that sworn testimony may be ineligible for First Amendment protection under the "public concern" inquiry. Until now. The Tenth Circuit found that the testimony in this case could be denied protection because its content was not of sufficient "public concern." In doing so, it expressly rejected the reasoning of the Third and Fifth Circuits, asserting that *Lane* forecloses a blanket rule and requires a content-based analysis.

That holding makes clear that the circuits will remain divided until this Court steps in to reiterate what *Lane* already established: A public employee's truthful testimony as a citizen in a judicial proceeding is inherently a matter of public concern.

A. Before *Lane*, The Circuits Were Sharply Divided As To Whether Truthful Testimony In A Judicial Proceeding Is Inherently Speech On A Matter Of Public Concern.

Before *Lane*, there was a well-established circuit split on whether truthful testimony in a judicial proceeding is inherently a matter of public concern.

Two circuits—the Third and the Fifth—categorically answered that question "yes," while the Second Circuit adopted, at minimum, a strong presumption to that effect. In contrast, four circuits—the Seventh, Eighth, Ninth, and Eleventh—explicitly rejected a categorical rule that truthful testimony is of public concern.

1. For decades prior to *Lane*, the Third and Fifth Circuits recognized that the unique nature of truthful testimony in a judicial proceeding means that this form of employee speech invariably qualifies as speech on a matter of public concern.

The Fifth Circuit first announced this position in *Johnston* v. *Harris County Flood Control District*. Considering a government employee's testimony before the County Commissioner's Court in support of a fellow employee's EEOC complaint, the court held that "[w]hen an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is *inherently* of public concern." 869 F.2d at 1578 (emphasis added). The Fifth Circuit has repeatedly affirmed this holding in the decades since. *See, e.g.*, *Lumpkin*, 712 F. App'x at 358 ("This court has held that when a witness testifies before a 'fact finding body hearing an official matter' the form and context of the speech is 'sufficient to elevate the speech to the level of public concern.'" (quoting *Johnston*, 869 F.2d at 1577-78)); *Miles* v. *Beckworth*, 455 F. App'x 500, 505 (5th Cir. 2011) (per curiam) (confirming that testimony in a sexual harassment case was speech on a public concern because "[p]rior cases * * * have established that testimony in judicial proceedings are inherently of public concern for First Amendment purposes);

Bullard v. *City of Houston*, 132 F.3d 1456 (5th Cir. 1997) (per curiam) ("Trial testimony is speech protected by the First Amendment.").

The Third Circuit has followed suit. For example, in *Pro* v. *Donatucci*, 81 F.3d 1283 (3d Cir. 1996), the Third Circuit held that a government employee called to testify as a character witness for her boss's wife in a divorce proceeding was engaged in speech on a matter of public concern, even though the divorce was "a purely private matter." *Id.* at 1288, 1290. Describing its stance as "[i]n line with the" Fifth Circuit's *Johnston* decision, and relying upon that decision's reasoning, the court held that "the context of [courtroom testimony] raises the speech to a level of public concern *regardless of its content*." *Id.* at 1290, 1291 n.4 (emphasis added).

Like the Fifth Circuit, the Third Circuit has consistently followed this rule for decades. *See, e.g.*, *Reilly*, 532 F.3d at 229-231 ("[T]he act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling that duty of citizenship is not vitiated by one's status as a public employee."); *Green*, 105 F.3d at 887 (an employee's voluntary testimony is inherently a matter of public concern because "[t]he utility of uninhibited testimony and the integrity of the judicial process would be damaged if we were to permit unchecked retaliation for appearance and truthful testimony at such proceedings"); *Latessa* v. *New Jersey Racing Comm'n*, 113 F.3d 1313, 1319 (3d Cir. 1997) ("[A] public employee's truthful testimony before a government adjudicating or fact-finding body, whether pursuant to subpoena or not, is a matter of public interest.").

The Second Circuit adopted a position nearly as absolute as the Third and Fifth Circuits in *Catletti ex rel. Estate of Catletti*, 334 F.3d 225. There, the Second Circuit noted that "[t]he Fifth and Third Circuits have held that truthful testimony provided at trial is *per se* a matter of public concern," in part because "any other rule would *** put 'the judicial interest in attempting to resolve disputes by arriving at the truth *** in jeopardy.'" *Id.* at 229-230 (quoting *Green*, 105 F.3d at 887). The Second Circuit agreed that, at a minimum, "[t]he paramount importance of judicial truth-seeking means that truthful trial testimony is *almost always* of public concern." *Id.* at 230. But the court found no need to resolve whether "the trial context renders testimony of public concern *regardless of its content*," because in the case before it, the content of the plaintiff's testimony "support[ed] a finding that the speech is of public concern." *Id.* (emphasis added).

2. In contrast to these circuits, in the years prior to *Lane*, four circuits explicitly rejected the position that truthful testimony in a judicial proceeding inevitably satisfies the "public concern" requirement.

In multiple pre-*Lane* decisions, the Seventh Circuit expressly refused to accept the Fifth Circuit's conclusion "that an employee who testifies before an official government adjudicatory or fact-finding body speaks in a context that is inherently of public concern." *Wright*, 40 F.3d at 1505 (citing *Johnston*, 869 F.2d at 1578). While acknowledging the Fifth Circuit's "concern for the integrity of the judicial process," the Seventh Circuit explained that this concern could not justify affording constitutional protection to "private gripes" aired "in the form of a complaint or testimo-

ny." *Id.*; *see also, e.g.*, *Salas* v. *Wisconsin Dep't of Corr.*, 493 F.3d 913, 925 (7th Cir. 2007) ("participating in a lawsuit may amount to protected speech," but "a public employee has no First Amendment claim unless the lawsuit involves a matter of public concern." (internal quotation marks omitted)).

The Eighth Circuit, too, held pre-*Lane* that truthful testimony in a judicial proceeding does not always qualify as speech on a matter of public concern. In *Padilla* v. *South Harrison R-II School District*, 181 F.3d 992, 996-997 (8th Cir. 1999), the Eighth Circuit considered whether a teacher's subpoenaed testimony in his criminal trial met that requirement. The court held that it did not because the content of the testimony—an endorsement of the propriety of certain sexual relationships between adults and minors—"d[id] not relate to the teacher's legitimate disagreement with a school board's policies and thus d[id] not address a matter of public concern." *Id.*

Similarly, the Ninth Circuit held that whether testimony "satisf[ies] the public concern doctrine" will depend on the content of the testimony and the litigation as a whole. *Karl* v. *Mountlake Terrace*, 678 F.3d 1062, 1069 (9th Cir. 2012). Like the Seventh Circuit, the Ninth Circuit emphasized that testimony concerning a "private grievance" with respect to a "personnel matter" will not qualify as speech on a "matter of public concern." *Id.* at 1070; *see also, e.g.*, *Alpha Energy Savers*, 381 F.3d at 927.

The Eleventh Circuit followed a similar approach. It emphasized that the "mere fact" that speech is provided pursuant to a subpoena in a civil action is not sufficient to "transform" that speech into a "matter of public concern." *Morris* v. *Crow*, 142 F.3d

1379, 1382-83 (11th Cir. 1998) (per curiam); *Tindal* v. *Montgomery Cty. Comm'n*, 32 F.3d 1535, 1540 (11th Cir. 1994).[1]

B. Despite *Lane*'s Holding, The Tenth Circuit's Decision Makes Clear That The Circuit Split Will Continue Absent This Court's Intervention.

That is where things stood when this Court granted certiorari in *Lane*. In that case, this Court granted review to "resolve discord among the Courts of Appeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities." 573 U.S. at 235. The Court unequivocally held that "the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities." *Id.* at 238. And it specifically stated that a public employee's truthful testimony in court is "speech as a citizen on a matter of public concern." *Id.* As Justice Thomas explained in concurrence, the Court's decision thus stands for the proposition that "a public employee speaks 'as a

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[1] The Fourth Circuit has not squarely confronted whether testimony in a *judicial* proceeding necessarily qualifies as speech on a matter of public concern, but it has rejected the analogous proposition that testimony in an *administrative* action is inherently a matter of public concern. *Arvinger* v. *Mayor & City Council*, 862 F.2d 75, 79 (4th Cir. 1988) (holding that employee's statement was "devoid of public concern" because "[i]t was not made to further the public debate on employment discrimination, drug policy, or any other topic.").

citizen on a matter of public concern,' when the employee gives '[t]ruthful testimony under oath * * * outside the scope of his ordinary job duties.' " *Id.* at 247 (Thomas, J., concurring) (internal citation omitted).

By all rights, *Lane* should have resolved the Circuit's disagreement as to whether sworn testimony necessarily qualifies as a "matter of public concern." But it has not. Rather, in the wake of *Lane*, the courts of appeals have continued to adopt contrary positions.

On one hand, both the Third and the Fifth Circuits have recommitted to their view that truthful testimony is always speech "on a matter of public concern." In *Falco* v. *Zimmer*, 767 F. App'x at 307, the Third Circuit held that a police chief was protected by the First Amendment when he filed a lawsuit and testified in court regarding compensation issues. In reaching that conclusion, the Third Circuit extensively discussed *Lane*. *Id.* at 301-302, 307-309. It then reaffirmed the Circuit's prior position that "*[a]ll* court appearances are matters of public concern * * * because *all* court appearances implicate the public's interest in the integrity of the truth seeking process and the effective administration of justice." *Id.* at 307 (emphases added) (quoting *Green*, 105 F.3d at 888); *see also Dougherty* v. *Sch. Dist. of Philadelphia*, 772 F.3d 979, 990 (3d Cir. 2014) (reading *Lane* to categorically hold "that truthful sworn testimony, compelled by subpoena and made outside the scope of the employee's 'ordinary job responsibilities,' is protected under the First Amendment" (quoting *Lane*, 573 U.S. at 238)).

Similarly, in *Lumpkin* v. *Aransas County*, the Fifth Circuit adhered to its longstanding position that "when a witness testifies before a 'fact finding body hearing an official matter' the form and context of the speech is '*sufficient* to elevate the speech to the level of public concern.' " 712 F. App'x at 358 (emphasis added) (citing *Johnston*, 869 F.2d at 1577-78). The court found that *Lane* did not "abrogate[ ]" its "line of cases" to that effect; "[r]ather," it reinforced them. *Id.* at 358 (citing *Lane*, 573 U.S. at 241). Thus, the court concluded that the fact that the plaintiffs gave "depositions required by subpoena in a case to which they were not parties" was sufficient—irrespective of the content of that testimony—to "elevate the testimony to a matter of public concern." *Id.* at 358-359.

In the decision below, the Tenth Circuit read *Lane* differently. In direct opposition to the Third and Fifth Circuits, the panel held that *Lane prohibits* courts from adopting a *per se* rule that testimony in a judicial proceeding qualifies as speech "on a matter of public concern." Pet. App. 11a-12a. Instead, in the Tenth Circuit's view, *Lane* requires a "case-specific analysis" that "addresse[s] all the underlying facts, including the particular subject matter of the testimony at issue," without so much as a presumption that sworn testimony in a judicial proceeding is entitled to protection. *Id.* at 12a. Applying this approach, the panel acknowledged that the "form and context" of Butler's speech "weigh[ed] in favor of treating it as a matter of public concern." *Id.* at 25a. But it decided that these considerations were outweighed by the fact that—in the panel's view—the *content* of Butler's speech was of insufficient "interest

or concern to the community at large." *Id.* at 26a-27a.

The Tenth Circuit acknowledged that its decision split from the positions taken by "the Fifth and Third Circuits," which have "adopted a per se rule treating any truthful sworn testimony given by a government employee as always a matter of public concern." *Id.* at 13a. The panel also acknowledged that the Fifth Circuit had "reaffirmed" this position "[a]fter *Lane*." *Id.* at 14a n.4 (citing *Lumpkin*, 712 F. App'x at 358). But the panel dismissed these cases as taking a position that "directly contradicts the Supreme Court's mandate in *Connick* [v. *Myers*, 461 U.S. 138 (1983)] and *Lane* for a case-by-case analysis." *Id.* at 19a.

The upshot is that, while *Lane* should have resolved a 4-3 split on whether truthful testimony by a government employee is inherently speech on a matter of public concern, it did not. The three Circuits to squarely confront the issue post-*Lane* have once again split over the question—with two circuits (the Third and the Fifth) reaffirming their *per se* rule, and one circuit (the Tenth) reading *Lane* to *foreclose* such a position.

There is no prospect that this split will resolve itself absent this Court's intervention. The Third and the Fifth Circuits extensively grappled with *Lane* and found that it does not warrant revisiting their preexisting precedents. *See Falco*, 767 F. App'x at 307-308; *Lumpkin*, 712 F. App'x at 358. The Tenth Circuit, on the other hand, declined to revisit the decision below en banc, despite a vigorous 4-judge dissent charging the panel with splitting from its sister circuits and misconstruing *Lane*, which the

dissent said had "resolve[d] the issue." Pet. App. 53a. Even if *all* of the remaining four circuits on the long side of the split revisit their positions in light of *Lane*, the decision below will still establish a stark division of authority on a basic question of First Amendment law. This Court should not permit the Tenth Circuit to "abrad[e] an inter-circuit split * * * that the Supreme Court just sutured shut." *CNH Indus. N.V.* v. *Reese*, 138 S. Ct. 761, 765 (2018) (per curiam) (internal quotation marks omitted).

II. THE TENTH CIRCUIT'S DECISION IS WRONG.

Certiorari is warranted not only because the Tenth Circuit's decision reinvigorates a circuit split that should have been resolved, but because it is clearly wrong on a critical First Amendment matter: It badly misinterprets this Court's precedent in *Lane*, and permits government intrusion on employee speech that is well beyond what *any* court of appeals has previously allowed.

A. The Tenth Circuit Has Contorted This Court's Decision in *Lane*.

In *Lane*, the Court announced a clear holding: "[T]he First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities." 573 U.S. at 238. As the concurrence recognized, that rule is nothing more than "a straightforward application of *Garcetti*" because testimony of this sort is speech "as a citizen on a matter of public concern." *Id.* at 247 (Thomas, J., concurring) (internal quotation marks omitted).

The panel, however, believed that *Lane*'s rule contained a hidden exception that permits courts to exclude some truthful testimony from First Amendment protection if its "subject matter" does not appear to be "of interest or concern to the community at large." Pet. App. 26a-27a. Because the plain holding of *Lane* forecloses that possibility, the panel instead looked to a brief passage in which the *Lane* majority confirmed that the testimony at issue was, indeed, "speech on a matter of public concern." 573 U.S. at 241. In doing so, the *Lane* Court noted that the public concern inquiry generally turns on "content, form, and context," and observed that the content of the employee's testimony in that case was "obviously" of "public concern" because it involved "corruption in a public program and misuse of state funds." *Id.* (internal quotation marks omitted).

For the panel, this brief reference to the "content" of the employee's testimony was an endorsement of the broad proposition that sworn testimony merits First Amendment protection only when its content sufficiently implicates important issues like "corruption in a public program." But that understanding is wrong many times over.

First, in focusing on the *Lane* Court's reference to the content of the employee testimony, the panel ignored the very next sentences in the opinion, which emphasize a unique feature of the "form and context" of "sworn testimony in a judicial proceeding." *Id.* "Unlike speech in other contexts," statements made under oath "will be the basis for official governmental action, action that often affects the rights and liberties of others." *Id.* (internal quotation marks omitted). That feature—which is common to *all*

testimony in judicial proceedings—explains why this form of speech is always "a matter of public concern": It directly affects the integrity of state action.

Second, the panel's analysis is at odds with the *Lane* Court's primary rationale for granting First Amendment protection to a public employee's sworn testimony. Testimony is generally "speech as a citizen" because "[a]nyone who testifies in court bears an obligation, to the court and society at large, to tell the truth." *Id.* at 238. It is hard to conceive of how speech could engender "an obligation, to the court *and society at large*" if it is not "a matter of public concern."

Third, and most importantly, the panel's analysis cannot be reconciled with the *Lane* Court's own articulation of its holding: "[T]he First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities." *Id.*

In short, the Tenth Circuit went badly astray by reading *Lane* as mandating a case-by-case inquiry into whether truthful testimony is of public concern. *Lane* made clear that *all* testimony outside an employee's job responsibilities is speech "as a citizen on a matter of public concern." *Id.* Because it is undisputed that Butler's truthful testimony was well outside the scope of his job responsibilities, that testimony was entitled to protection under *Garcetti/Pickering*, and the Tenth Circuit's decision to the contrary cannot stand.

B. Sworn Testimony In A Child Custody Proceeding Constitutes A Matter Of Public Concern Under Any Reasonable Standard.

Even if *Lane* permitted a case-by-case inquiry into the content of a public employee's truthful testimony, the Tenth Circuit's decision would still be wrong. Butler delivered his testimony in his sister-in-law's child custody proceeding—a proceeding designed to determine what placement is in the "best interests of the child." Pet. App. 34a (Lucero, J., dissenting); *see also id.* at 59a-60a (Lucero, J., dissenting from denial of en banc rehearing). That testimony would clearly qualify as speech on a "matter of public concern" under any reasonable content-based inquiry. Indeed, while the Tenth Circuit claimed to find support from pre-*Lane* circuit court decisions rejecting blanket protection for truthful testimony, *id.* at 16a-19a, Butler's testimony would have merited protection even under the analysis set out in those precedents.

The decisions themselves make that clear. For example, in *Wright*, the Seventh Circuit refused to adopt a "blanket rule" for truthful judicial testimony. 40 F.3d at 1505. But it simultaneously held that the testimony in that case—which was provided by a social worker *in a child custody proceeding*—qualified as "speech on a matter of public concern." *Id.* In fact, the Seventh Circuit found this conclusion so obvious that it observed that "surely" the employers who punished that speech would not be entitled to qualified immunity if they believed the testimony was truthful but nonetheless moved forward with their punishment. *Id.* at 1507.

While the other circuits on the same side of the split have not confronted this issue in the specific context of testimony in a child custody proceeding, there can be no real doubt that they would afford First Amendment protection to testimony like Butler's. For example, the Eighth Circuit has refused to grant testimony First Amendment protection only where the content of that testimony was plainly *against* the public interest. *Padilla*, 181 F.3d at 997 (teacher's testimony on the propriety of sexual relations with minors "d[id] not address a matter of public concern" because it did not represent a "legitimate disagreement with" school board policy). There is absolutely no indication that Butler's testimony—which pertained to his sister-in-law's character and the hours of operation of his department—was flatly contrary to the public interest.

Meanwhile, both the Ninth and Eleventh Circuit cases hold that a public employee's testimony does not qualify as a matter of public concern where it "deals with individual personnel disputes and grievances" that have "no relevance to the public's evaluation of the performance of government agencies." *Alpha Energy Savers*, 381 F.3d at 924 (internal quotation marks omitted); *see Tindal*, 32 F.3d at 1540. These courts have reasoned that the *Garcetti/Pickering* analysis is designed to ensure that government employers are not faced with constitutional litigation when they attempt to discipline and control routine complaints about office policies and personnel matters. *Connick*, 461 U.S. at 147-149. In the view of the Ninth and Eleventh Circuits, the same logic defeats First Amendment protection even when "employee grievance[s]" are presented in the form of sworn testimony in a judicial proceeding.

Tindal, 32 F.3d at 1540 (finding that employee's testimony was protected because it "did not constitute an employee grievance motivated merely by her rational self-interest in improving the conditions of her employment." (internal quotation marks and alterations omitted)).

Even if that reasoning were correct, however, it would not extend to Butler's testimony on behalf of his sister-in-law in a child custody proceeding. That testimony obviously does not concern an "employee grievance," and it therefore does not implicate a government employer's need to manage office dynamics and policies without fearing constitutional implications. Indeed, it is hard to see what legitimate interest a government employer has in regulating an employee's testimony in a child custody proceeding.[2]

More broadly, the Tenth Circuit's assertion that testimony in a child custody proceeding is not "speech on a matter of public concern" is incompatible with the fundamental role of the state in protecting the welfare of children. As the en banc dissent observed, Butler offered his testimony in Colorado, where the courts have "expressly declared the state has a 'public interest' in 'determining what is in the best interest of the parties and their children'" in a child custody proceeding. Pet. App. 59a (quoting *In re Marriage of Finer*, 893 P.2d 1381, 1388 (Colo. App. 1995)). But that is hardly a Colorado-specific posi-

[2] For this reason, the en banc dissenters suggested that the *Garcetti/Pickering* analysis might be the wrong mode of inquiry when an employee's speech is entirely unrelated to his employment. Pet. App. 54a & n.1.

tion. Child custody issues are so thoroughly a matter of public concern that the Hague convention regulates international child custody disputes, and this Court recently reviewed the merits of a case arising under those treaty provisions. *See Chafin* v. *Chafin*, 568 U.S. 165 (2013).

Simply put, *no* circuit other than the Tenth would hold that truthful testimony in a child custody proceeding is not speech on a matter of public concern, and no sensible construction of the First Amendment would permit that result. Certiorari should be granted and the Tenth Circuit's anomalous decision should be reversed.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR THE COURT TO ADDRESS ISSUES OF FUNDAMENTAL IMPORTANCE FOR THE FIRST AMENDMENT AND THE JUDICIAL SYSTEM AS A WHOLE.

This case provides an ideal vehicle for the Court to clarify that when an employee testifies as a citizen in a judicial proceeding, his speech is entitled to First Amendment protection. The Tenth Circuit squarely addressed the issue and acknowledged and examined the underlying circuit split. Moreover, the panel's opinion did not consider any other legal issues, and the case was decided at the motion to dismiss stage. Thus, the Court's review will not be hindered by other confounding legal questions or a complex factual record.

The Court should take advantage of this opportunity to offer guidance on a question with important implications for the First Amendment and the integrity of judicial proceedings in general. If it is allowed

to stand, the Tenth Circuit's opinion will dramatically curtail the First Amendment rights of government employees. Allowing government employers to punish employees for testimony given in a child custody proceeding opens the door to a much broader scope of government regulation of employee speech than has previously been tolerated. Government employees, fearful of losing their jobs or facing other punishment, will be forced to censor any speech they believe may trouble their supervisors—no matter how far afield it is from the job context or how important the speech may be to their family and friends. If a man may be demoted for his speech on behalf of his sister-in-law at a child custody proceeding, perhaps he can also be fired for touting the wrong baseball team or speaking well of the wrong friend at a social engagement. The specter of such punishment will inevitably chill employee speech, undermining this Court's repeated caution that an employee may not be compelled to surrender his constitutional rights as a condition of government employment.

The judicial system as a whole will also be harmed. The panel itself recognized that witnesses already face a host of challenges and disincentives to appear in judicial proceedings. Pet. App. 18a-19a. The panel's decision adds another powerful disincentive for government employees: They may be punished if their supervisors dislike what they have to say. This added impediment to the ability to obtain truthful, unbiased testimony threatens the very foundations of the judiciary. *See United States* v. *Alvarez*, 567 U.S. 709, 720-721 (2012) (plurality opinion) (explaining that "[p]erjured testimony 'is at war with justice'" and "threatens the integrity of

judgments that are the basis of the legal system." (citation omitted)).

Courts cannot make accurate decisions unless they are presented with all of the relevant testimony on an issue. As this Court has explained, a citizen's "duty to testify has been regarded as 'so necessary to the administration of justice' that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974) (quoting *Blair* v. *United States*, 250 U.S. 273, 281 (1919)). Thus, "public policy * * * requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Briscoe* v. *LaHue*, 460 U.S. 325, 333 (1983) (quoting *Calkins* v. *Sumner*, 13 Wis. 193, 197 (1860)). That is why the *Lane* Court held that truthful testimony provided as a citizen by a government employee is entitled to First Amendment protection, and that is why this Court should grant review to correct the Tenth Circuit's mistaken holding to the contrary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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