No. 19-285

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
The Claremont Institute's Center for Constitutional Jurisprudence
c/o Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
jeastman@chapman.edu

Counsel for Amicus Curiae

QUESTIONS PRESENTED

1. Whether the balancing test established in *Pickering v. Board of Education*, 391 U.S. 563 (1968), applies to government employee testimonial speech when the testimony does not concern the workplace or employer?

2. Even if *Pickering* applies, whether truthful testimony provided in legal proceedings under threat of subpoena should be deemed a matter of public concern, thus triggering *Pickering*'s protections from retaliation by a government employer?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Those principles include the fundamental protection of the Freedom of Speech codified in the First Amendment. In addition to providing counsel for parties at all levels of state and federal courts, the Center has represented parties or participated as *amicus curiae* before this Court in several cases of constitutional significance addressing the protection of free speech rights, including *National Institute of Family and Life Advocates, et al. v. Becerra*, 138 S. Ct. 2361 (2018); *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Center for Competitive Politics v. Harris*, 136 S.Ct. 480 (2015); and *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014).

---

[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than amici, its members, or its counsel made a monetary contribution to fund the preparation and submission of this brief.

SUMMARY OF ARGUMENT

This case presents the perfect opportunity for the Supreme Court to revisit the First Amendment regulation of public employee free speech. The analytic framework set forth in the seminal *Pickering* case needs to be clarified to confirm that it is not triggered when a government employee is speaking *as a citizen* on matters *not related* to his government employment or about his government employer. That this Court has not *explicitly* described such a threshold inquiry—call it *Pickering* Step Zero—has led to the misapplication of the *Pickering* test as public employers improperly regulate speech that is protected under the First Amendment merely because it is deemed not to address matters of public concern. Review is therefore warranted to clarify that the *Pickering* "public concern" test was developed in the context of speech about matters in the workplace; it was not designed to limit citizen speech having no connection with government employee's workplace.

Second, even if *Pickering* did apply, the circuit courts have divided on the question whether testimony provided in judicial proceedings by citizens who happen to be government employees, about matters not connected to their duties as government employees, is *per se* speech on a matter of public concern under *Pickering* Step 1, thus triggering the *Pickering* Step 2 balancing test to determine whether the speech is protected by the First Amendment. That split among the lower courts warrants this Court's attention.

REASONS FOR GRANTING THE WRIT

I. The Misapplication of *Pickering* By the Court Below Raises Significant First Amendment Concerns Warranting Review By This Court.

A. Jerud Butler's court testimony did not involve speech about his employer or the workplace.

The regulation and limitation of government employee free speech established in the seminal case of *Pickering v. Board of Education,* 391 U.S. 563 (1968), does not apply to the present case because the Petitioner's court testimony did not involve speech that concerns his employment. When this Court in *Pickering* held that there must be a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," it did so in the context of employee speech that concerned the employee's employment or workplace. *Id.* at 568.

This Court justified the limitation on free speech by finding that the government has an interest in maintaining control over its employees and promoting an efficient workplace that may, at times, outweigh the interests of employees exercising their free speech rights. *Id.* In such cases, the government's interest in regulating speech is "elevated from a relatively subordinate interest" to a "significant one." *Waters v Churchill*, 511 U.S. 661, 675 (1988). The public employer interest can outweigh a public employee's recognized speech rights, this Court has held, when the employee's speech "impairs discipline by superiors or

harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the business." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

Such concerns simply do not apply when, as here, the employee is speaking outside the workplace, as a citizen, on matters entirely unrelated to his government employment. Butler testified as a character witness on his own accord and did not state or imply that he was testifying or acting on behalf of the County or the San Miguel County Road and Bridge Department for which he worked. His testimony primarily involved the fitness of his sister-in-law as a mother, and although he was asked about the general operating hours of his employer (for whom the sister-in-law's ex-husband also worked, albeit in a different district), his testimony did not otherwise address internal operations or employment relationships. In other words, this was not speech about an "employee grievance" of the sort that *Pickering* and its progeny declined to protect. *Connick v. Myers*, 461 U.S. 138, 147 (1983). *Pickering's* analytical framework is therefore inapposite.

Certiorari is warranted here to clarify the basic point that the *Pickering* balancing test should not apply to cases such as this. Speech addressing matters outside the context of the employee's public employment should be fully protected. In other words, this Court should make clear that, as a threshold matter—call it *Pickering* Step Zero—speech by a government employee must actually involve the government workplace before it is subjected to the *Pickering* analysis to determine whether the government can restrict it.

Otherwise, the normal protections of the First Amendment must apply as much to citizens who happen to work for the government as to those who do not.

B. The government's asserted concern about workplace "disharmony" was too speculative to trigger *Pickering*.

Apparently recognizing that *Pickering* should not even be triggered when an employee speaks on matters unrelated to the workplace, the government argued below that Mr. Butler was demoted because his testimony as a character witness for his sister-in-law at a child custody hearing completely unrelated to his employment, might "creat[e] workplace conflict." This was so, the government contended, because the sister-in-law's ex-husband worked for the same agency as Butler, and Butler was asked during his testimony about the general hours of operation at their place of employment.

Although this Court has recognized that the government as employer can restrict its employee's speech that has the potential to affect the government's operations, *Garcetti v. Ceballos*, 547 U.S. 410, 416 (2006) mere speculative concerns are inadequate. *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 80 (2004); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 467 n.11, 475 (1995). This should be particularly true where, as here, Butler and the ex-husband "did not work in the same district and [Butler] was not [the ex-husband's] supervisor." Appellees' Answer Br., p. 25 n.4.

Despite that fact (which the government readily acknowledged below, *id.*), the government simply asserted that Butler's testimony about the department's

hours of operation—which the court below correctly characterized as "a non-controversial fact," Pet.App. 25a-26a—"impaired harmony among his co-workers and subordinates and impacted the effective functioning of the department." Appellees' Ans. Br., *supra*, at 25. That conclusory assertion was based on several layers of speculation. The government contended that when testimony about hours of operation "impacts the [other] employee's parenting rights of his child"—speculation #1—"this creates workplace conflict"—speculation #2—"that will permeate through the workforce"—speculation #3—"and create hostility and dissension between the employees and management"—speculation #4. *Id.* at 26. As if that were not enough, the government further speculated that Butler's testimony "about job requirements for an employee he does not supervise *can cause confusion* as to who has control over the activities and job responsibilities of rank and file employees"—speculation #5—"it *can result* in employees receiving conflicting directives"—speculation #6—"which *can result* in job responsibilities not being carried out properly or timely"—speculation #7. *Id.* (emphases added). Indeed, the government actually contended that by "favoring the interests of his family member over that of the employee, Mr. Butler *implicitly*, if not explicitly, interfered with the management and supervision of that employee," *id*. (emphasis added), although it offered no explanation as to how that could possibly be the case, either explicitly or implicitly.

The point here is not one of fact error correction, but rather to point out that the lower court's misapplication of *Pickering* allowed the government to reach private speech on a matter unrelated to Butler's employment, without anything but the most speculative

of theorizing as to how that speech *might* have some disruptive impact on another employee in an entirely different district of the agency for which Butler worked. Because the First Amendment's protections should be stronger than that, review by this Court is warranted.

II. Even Were *Pickering* To Apply, the Circuit Split Over Whether Testimony In A Judicial Proceeding Should Be Deemed A Matter of Public Concern Warrants This Court's Review.

The circuit courts are split over whether testimony provided by a government employee in a judicial proceeding should necessarily be deemed a matter of public concern for purposes of the *Pickering* analysis. Assuming that *Pickering* even applies, that circuit split warrants review by this Court.

The Fifth and Third Circuits have adopted a *per se* rule that the First Amendment protects the truthful testimony of public employees before a judicial body (whether voluntary or involuntary) as speech constituting a matter of public concern. For example, in *Green v. Philadelphia Housing Authority*, 105 F.3d 882 (3rd Cir. 1997), a police officer was retaliated against after he voluntarily appeared to testify as a character witness at a bail hearing of a long-time friend's son, who was a member of a crime organization. The Third Circuit held that "when a [public] employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern." *Id.* at 886. The court explained that "our judicial system is designed to resolve disputes, to right wrongs, and we would compro-

mise the integrity of the judicial process if we tolerated state retaliation for testimony that is damaging to the state." *Id.* And it found no discernable reason why a voluntary appearance would render the testimony not a matter of public concern. *Id.*

The Third Circuit adhered to that position in *Pro v. Donatucci*, 81 F.3d 1283, 1289 (3d Cir. 1996). There, the court held that responding to a subpoena enjoys First Amendment protection much like truthful testimony because, contextually, it constitutes speech on a matter of public concern. The court posited "that the context of [courtroom testimony] raise[d] the speech to a level of public concern regardless of its content." Adelaida Jasperse, *Constitutional Law – Damned If You Do, Damned If You Don't: A Public Employees Trilemma Regarding Truthful Testimony*, 33 W. New Eng. L. Rev. 623, 629 (2011) (quoting *Pro*, 81 F.3d at 1291 n.4). Its ruling relied on two important considerations: public employees' interests in testifying truthfully and the judicial interest in having them testify without fearing retaliation. *Pro*, 81 F.3d at 1291.

Similarly, the Fifth Circuit held in *Smith v. Hightower,* 693 F.2d 359 (5th Cir. 1982), that the First Amendment protects the right of public employees to testify truthfully, since allowing the government to retaliate against testimony "would impermissibly restrict the free expression of the witness based on the content of the testimony." *Id.* at 368. In arriving at this holding, the court recognized that the goal of the justice system was to value the truth, and found that this value, along with the First Amendment values, would not be served "if the fear of [retaliation] effectively muzzled witnesses…" Scott E. Michael, *"Lie or*

Lose Your Job!" Protecting A Public Employee's First Amendment Right To Testify Truthfully, 29 Hamline L. Rev. 413, 426 (2006) (quoting *Smith,* 693 F.2d at 368 n.4).

In contrast, the Fourth, Eighth, Eleventh, and Seventh Circuits, as well as the court below, have plainly rejected the *per se* rule adopted by the Fifth and Third Circuits. Instead, the courts in these circuits have held that if testimony involved matters of private concern of any kind, and is otherwise devoid of issues of public concern, it is not entitled to First Amendment protection. *Id.*

An exemplary case is *Padilla v. South-Harrison R-II Sch. Dist.,* 181 F.3d 992, 997 (8th Cir. 1999), in which the Eighth Circuit rejected the *per se* rule. Padilla, a public school teacher, was accused of having an improper sexual relationship with a high school student. After Padilla's acquittal, the school board voted not to renew his contract. In his lawsuit against the school district, Padilla argued that one who testifies in a judicial proceeding cannot be penalized for statements made in the testimony. The Eighth Circuit concluded, however, that Padilla's statements did not relate to a teacher's legitimate disagreement with the school board's policies, and thus did not address a matter of public concern. *Id.*

Likewise, in *Arvinger v. Mayor and City of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988), the Fourth Circuit rejected the idea that a public employee's truthful testimony automatically qualifies as speech on a matter of public concern. Mr. Arvinger, a school police officer, was questioned about an incident at the school in which marijuana was found in the possession of a teacher. The school fired the teacher, who then filed a

sex discrimination charge against the department. In connection with the suit, Mr. Arvinger was questioned about the incident and stated he did not know to whom the marijuana belonged. Mr Arvinger was fired for allegedly lying to the investigators. He subsequently filed suit, claiming that his statement during the prior litigation was speech on an issue of public concern. In deciding the case, the Fourth Circuit articulated a standard that if a statement involves private concerns of any kind, and does not involve public concerns, it is not entitled to Fourth Amendment protection. *Id.* at 79.

Moreover, in *Kirby v. City of Elizabeth City*, 388 F.3d 440, 447 (4th Cir. 2004), the court refused to automatically grant First Amendment protection to a policeman's truthful testimony, relying on the rationale that testimony concerning private issues did not deserve protection. Carl Kirby, a police officer, testified in front of the City Personnel Appeals Committee regarding his co-worker. The Fourth Circuit asserted that whether Kirby's testimony addressed a matter of public concern "center[ed] on whether the public or the community is likely to be truly concerned with or interested in the particular expression." *Id.* at 446.

The circuit courts' split over the amount of First Amendment protection granted to the truthful testimony of public employees has created significant problems. Today, public employees who testify voluntarily face a difficult decision to either exercise their right to testify or possibly face retaliation by their employer. *Right To Testify*, at 447. For those called to testify under subpoena, the Hobson's choice they face is even more stark. A subpoena, like a public employee's job obligation, converts a citizen's "duty" of assistance

in law enforcement into a mandatory obligation—a legal duty, as opposed to an ordinary one. Joseph Deloney, *Protecting Public Employee Trial Testimony*, 91 Chi.-Kent L. Rev. 709 (2016). As Judge Lucero noted in his dissent below, "the proposition that local government may sanction employees for testifying on such matters in the public courts and tribunals … is a dangerous and highly corrosive precedent—the adversary system depends on free and open adjudication in which parties have the right to call witnesses to testify…." Pet.App. 53a. If the holding by the court below were to stand, local governments could interfere with both the rights of the litigants and witnesses in which the local government has no concern. The government could then regulate speech if it found that it concerned a purely private matter outside the context of the individual's employment.

CONCLUSION

The decision of the Appellate Court of Colorado rejecting Mr. Butler's First Amendment claim is based on the analytical framework developed in *Pickering* in circumstances where that framework should not apply. Moreover, even under *Pickering,* whether or not testimony before a judicial body should necessarily be deemed a matter of public concern is an issue on which the lower courts are divided, warranting this Court's review. The petition for writ of certiorari should be granted.

October 2019

Respectfully submitted,

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
The Claremont Institute's
Center for Constitutional
Jurisprudence
c/o Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
jeastman@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence