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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FIRST AMENDMENT CLINIC AT DUKE LAW SCHOOL IN SUPPORT OF PETITIONERS

H. Jefferson Powell
Counsel of Record
Nicole J. Ligon
Ian C. Kalish
FIRST AMENDMENT CLINIC
DUKE LAW SCHOOL
210 Science Drive
Durham, North Carolina 27708
(919) 613-7168
powell@law.duke.edu

Counsel for Amicus Curiae

Dated: October 3, 2019

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISION

STATUTE

RULE

INTEREST OF *AMICUS CURIAE*

The First Amendment Clinic at Duke Law (the "Clinic"), founded in 2018, has a public mission to protect and advance the freedoms of speech, press, assembly, and petition.[1] The Clinic represents clients with First Amendment claims and provides public commentary and legal analysis on freedom of expression issues.

The Clinic has an interest in ensuring that the First Amendment protections guaranteed to government employees as to all other Americans are not unduly abridged by their employers. This Brief will demonstrate that the Petition in this case squarely presents constitutional questions that require this Court's consideration.

SUMMARY OF ARGUMENT

"Speech by citizens on matters of public concern lies at the heart of the First Amendment." *Lane v. Franks*, 573 U.S. 228, 235 (2014). To determine whether speech by a government employee is protected by the First Amendment, courts look to

---

[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice of the Clinics' intention to file this brief at least ten days prior to its due date. Counsel for both the Petitioner and the Respondents have consented to the filing of this brief, and their letters of blanket consent have been placed on file with the Clerk.

No counsel for a party authored this brief in whole or in part, and no one other than *amicus*, its members, or its counsel made any monetary contribution to the brief's preparation or submission.

the two-step inquiry described by this Court in *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006):

> The first [step] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.

(internal citations omitted). This case revolves around the first step: whether sworn testimony at a child custody proceeding was on a matter of public concern.

Speech deals with a matter of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Myers,* 461 U.S. 138, 146 (1983). Courts determine whether speech is on a matter of public concern by examining the "content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147–48. Although the importance of speech falling into this category was affirmed in *Lane*, the federal circuit courts are notably divided on what constitutes a matter of public concern and how much speech warrants true protection.

In *Butler v. Bd. of Cty. Comm'rs for San Miguel Cty.*, 920 F.3d 651 (10th Cir. 2019), the court reopened three distinct circuit splits, all centered on how to

determine if speech is of "public concern." First, the Tenth Circuit rejected a *per se* rule that would find that certain speech—like sworn testimony—is always a matter of public concern. *Id.* at 657. This put the Tenth Circuit at odds with the Third and Fifth Circuits, which have both adopted a *per se* rule for sworn testimony. Second, courts of appeals are badly fractured on how *Connick*'s "content, form, and context" factors should be analyzed and weighed when considering whether speech is on a public concern. Third, the Tenth Circuit employed a crabbed reading of *Connick* to argue that courts should construe public concern "very narrowly." *Id.* at 656. This approach is in conflict with the holdings of other circuits which provide that public concern should be construed broadly. The variegated confusion among the circuits has converged in this case and presents this Court with an opportunity to provide guidance and help harmonize the law on the critical issue of First Amendment protections for public employees.

In the midst of this confusion, the Tenth Circuit misapplied *Connick* in several ways, creating additional need for this Court's review. First, the Tenth Circuit misapplied the "content, form, and context" test by giving dispositive weight to "content," contradicting this Court's directive in *Snyder v. Phelps* that no single factor should be dispositive. 562 U.S. 443, 454 (2011).

Second, by refusing to recognize the State of Colorado's clear determination—through statute and judicial precedent—that child custody is a matter of public concern, the *Butler* panel violated key principles of federalism. Instead of properly deferring

to the State's characterization of this issue, the Tenth Circuit improperly substituted its own judgment.

Finally, there are significant distinctions between Butler's non-disruptive speech and the potentially subversive speech at issue in *Pickering, Connick*, *Garcetti*, and *Lane*. Given that the "restrictions [a government employer] imposes must be directed at speech that has some potential to affect the entity's operations," Butler's speech should receive First Amendment protection. *Garcetti*, 547 U.S. at 418.

The Petition squarely presents this Court with the opportunity to clarify the First Amendment's protection of the speech of public employees. While this Court has recognized that government employers must be able to make reasonable personnel decisions without undue judicial interference, "public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights." *Lane*, 573 U.S. at 236. This Court's guidance is needed to resolve a split in the lower courts and to protect public employees like Butler who, according to the Tenth Circuit, have no First Amendment recourse when they are punished for giving sworn testimony under threat of subpoena. The Tenth Circuit's decision here not only highlights the disarray of the courts of appeals, it is also manifestly unjust and warrants correction.

ARGUMENT

Under settled First Amendment precedent, citizens do not surrender their First Amendment rights by accepting public employment. *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti*, 547 U.S. at 419.

This Court has clarified that a government employee's expression is considered to be on a matter of public concern when it "relat[es] to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. And "[w]hether 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.

But this Petition reveals that the circuits have struggled to consistently identify what constitutes speech on a matter of public concern, necessitating additional clarification of this framework. In fact, three distinct circuit splits have developed regarding: (1) whether there should be a *per se* rule that sworn testimony constitutes a matter of public concern; (2) how to balance *Connick's* content, form, and context factors; and (3) whether courts should narrowly or broadly construe matters of public concern.

In this case, the Tenth Circuit has reopened and widened these circuit splits. This Court's guidance is needed to resolve these disagreements, as

allowing this fractured authority to stand will chill speech and permit certain public employers to overly restrict employee speech in violation of the First Amendment.

I. *Butler* has confirmed the continuing existence of multiple circuit splits that can only be resolved by this Court.

A. The circuit split over adoption of a *per se* rule to determine whether sworn testimony is of public concern.

In *Butler*, the panel interpreted this Court's decision in *Lane*, 573 U.S. 228, as rejecting a *per se* rule that sworn testimony always constitutes a matter of public concern. *Butler*, 920 F.3d at 657. The Tenth Circuit stated that *Lane* endorsed a "case-by-case" approach by analyzing the content of the testimony at issue, concluding that this approach foreclosed the existence of any *per se* rule. *Id.* This holding has reopened a longstanding circuit split.

Prior to *Lane*, the Third and Fifth Circuits had long held that sworn testimony is *per se* a matter of public concern. *See Green v. Philadelphia Hous. Auth.*, 105 F.3d 882, 887 (3d Cir. 1997) (describing circuit history and circuit split); *Johnston v. Harris Cty. Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989) (recognizing testimony as context "inherently of public concern"). The Second Circuit has declined to adopt a *per se* rule but has recognized a powerful presumption in favor of treating sworn testimony as a public concern. *See Catletti v. Rampe*, 334 F.3d 225, 230 (2d Cir. 2003) ("The paramount importance of judicial truth-seeking means that truthful trial testimony is almost always of public concern."). In

contrast, the Fourth, Seventh, and Eighth Circuits refused to apply a *per se* rule, or even a strong presumption, to sworn testimony. *See Arvinger v. Mayor & City Council*, 862 F.2d 75, 79 (4th Cir. 1988); *Wright v. Illinois Dep't of Children & Family Servs.*, 40 F.3d 1492 (7th Cir. 1994); *Padilla v. S. Harrison R-II Sch. Dist.*, 181 F.3d 992, 996–97 (8th Cir. 1999).

In *Lane*, this Court held that "[t]he content of Lane's testimony—corruption in a public program and misuse of state funds—obviously involves a matter of significant public concern. And the form and context of the speech—sworn testimony in a judicial proceeding—fortify that conclusion." *Lane*, 573 U.S. at 241 (internal citation omitted). The Tenth Circuit stated that this language "applied the case-specific analysis that the Court previously set forth in *Connick*, considering the content, form and context of a public-employee's speech in order to decide whether Lane's sworn testimony in that case was on a matter of public concern. [But,] the Court did not declare that sworn testimony in a judicial proceeding is *per se* a matter of public concern." *Butler*, 920 F.3d at 657–58. The Tenth Circuit went as far as stating that any *per se* rule would "contradict[] the Supreme Court's mandate" that courts assess "the content, form and context of the speech in a given case, on the record as a whole." *Id.* at 660. The Sixth Circuit has endorsed a similar view, noting that "[i]f testimony in open court was 'always a matter of public concern,' . . . the *Lane* Court would have so indicated." *Jones v. Wilson Cty., Tennessee*, 723 F. App'x 289, 292 (6th Cir. 2018).

In an unpublished decision after *Lane*, the Fifth Circuit adopted a contradicting view: Applying the *per se* rule, the Fifth Circuit concluded that *Lane*

had "not 'unequivocally abrogated'" precedent that sworn testimony is *per se* a matter of public concern. *See Lumpkin v. Aransas Cty., Texas*, 712 F. App'x 350, 358 (5th Cir. 2017) (footnote omitted). Here, while the Tenth Circuit acknowledged *Lumpkin*, *Butler*, 920 F.3d at 658 n.4, the court ultimately rejected the Fifth Circuit's approach in favor of jurisprudence from the Second, Fourth, Seventh, Eighth, and Eleventh Circuits, *id.* at 660.

The Petitioner rightly calls on this Court to grant certiorari in order to resolve this circuit split.

B. The circuit split over "content, form, and context"

In rejecting a *per se* approach, the Tenth Circuit emphasized the importance of *Connick*'s "content, form, and context" test, finding that any *per se* rule would be inconsistent with it. However, the analysis in *Butler* reveals the existence of a second circuit split: courts do not share a unified view of how to apply the *Connick* factors. The major disagreements lie in whether certain factors can be dispositive, whether certain factors weigh more than others, or whether all factors must be examined in a holistic, confluence-of-factors test. While the panel in *Butler* claimed to analyze each factor in a holistic fashion, in practice the court gave content dispositive weight, an approach that contradicts this Court's instruction that "no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." *Snyder*, 562 U.S. at 454; *See* Section II.A, *infra*.

In effect, *Butler*'s decision endorses and expands First Circuit precedent, which holds that content can be dispositive, at least when it militates finding that a public concern exists. *O'Connor v. Steeves*, 994 F.2d 905, 913–14 (1st Cir. 1993) ("Where a public employee speaks out on a topic which is clearly a legitimate matter of inherent concern to the electorate, the court may eschew further inquiry into the employee's motives as revealed by the 'form and context' of the expression." (emphasis omitted)). *Butler* took this approach even further, however, in finding against the existence of public concern because "[t]here [was] no indication that [Butler's] testimony was of interest or concern to the community at large." *Butler*, 920 F.3d at 664.

Two other circuits have adopted a similar but more conservative approach, emphasizing the importance of *content* in public concern analysis, while formally declining to give any one factor dispositive weight. *See Kristofek v. Village of Orland Hills*, 712 F.3d 979, 985 (7th Cir. 2013) ("And though content is recognized as the most important factor, neither is it dispositive for that conclusion would eliminate form and context from the three-factor *Connick* test."); *Desrochers v. City of San Bernardino*, 572 F.3d 703, 710 (9th Cir. 2009) ("First and foremost, we consider the content of the speech, the greatest single factor in the *Connick* inquiry." (internal quotations and citations omitted)).

In contrast, the Fifth Circuit has held that *context* and *form* are the most important factors, recognizing that "at some level of generality almost all speech of state employees is of public concern." *Gillum v. City of Kerrville*, 3 F.3d 117, 121 (5th Cir.

1993) ("[W]e are chary of an analytical path that takes judges so uncomfortably close to content based inquiries."); *see also Teague v. City of Flower Mound*, 179 F.3d 377, 383 (5th Cir. 1999) ("Taking these three factors together, and weighing the latter two (context and form) more heavily . . . , we conclude that the speech is not entitled to First Amendment protection."); *see also Gibson v. Kilpatrick,* 838 F.3d 476, 487 (5th Cir. 2016) (reaffirming *Teague*'s holding).

Further differentiating, a plurality of circuit courts applies a holistic approach, reasoning that each category should be weighed and analyzed separately, with no individual factor receiving more or less weight than the others. *See Robinson v. Balog,* 160 F.3d 183, 188 (4th Cir. 1998) (holding "the confluence of content, form, and context" determines whether a matter is a public concern); *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1188 (6th Cir. 1995) ("In applying the *Connick* test assessing 'content, form and context,' the essence of the inquiry is how each of these indicators clarifies the communicative purpose of the speaker."); *Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir. 1988) (recognizing "the Supreme Court's directive that the content, form, and context of the speech must all be considered."); *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158, 164–65 (2d Cir. 2006) ("We examine the content of the speech first, followed by an analysis of its form and context."); *Holder v. City of Allentown*, 987 F.2d 188, 195 (3d Cir. 1993) ("As an initial matter, under the standard established in *Connick*, [Plaintiff's] speech in content, form and context touched on a matter of public concern."); *Sparr v. Ward*, 306 F.3d 589, 596 (8th Cir. 2002) ("The

content, form and context of [Plaintiff's] speech all show she was not speaking . . . on matters of public concern."). The Tenth Circuit had previously taken this approach. *See Bailey v. Indep. Sch. Dist. No. 69,* 896 F.3d 1176, 1181–82 (10th Cir. 2018) (considering form and context then content of speech).

These widely varying interpretations of this Court's precedent present a situation ripe for this Court's guidance.

C. The circuit split over the scope of "public concern"

After determining the relative weight of each *Connick* factor, courts must look to the facts of the dispute and apply them to the framework. In so doing, the Tenth Circuit revealed the existence of a third circuit split: Should courts engaging in the *Pickering* analysis construe matters of public concern broadly or narrowly? By construing public concern narrowly—and rejecting child custody as a matter of public concern—the Tenth Circuit placed itself in opposition to several of its sister circuits.

This Court has often found that the content of speech is on a matter "of public concern" without providing much detail regarding its analysis. *See, e.g., Lane*, 573 U.S. at 241 (stating without analysis that the content of the speech "*obviously* involves a matter of significant public concern") (emphasis added); *Snyder*, 562 U.S. at 454 (stating without analysis that "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy" are matters of public concern);

Garcetti, 547 U.S. at 425 (stating without analysis that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance"); *Connick*, 461 U.S. at 146 ("it is clear that statements . . . concerning [a] school district's allegedly racially discriminatory policies involved a matter of public concern") (dictum); *Pickering*, 391 U.S. at 571 ("a difference of opinion . . . as to the preferable manner of operating the school system [is] a difference of opinion that *clearly* concerns an issue of general public interest.") (emphasis added).

This Court has provided guidance on what constitutes a matter of public concern: "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Snyder*, 562 U.S. at 453 (first quoting *Connick*, 461 U.S. at 146; then quoting *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)). However, the circuit courts have disagreed over how to apply this standard.

In holding that a child custody hearing does not relate to a matter of public concern, the Tenth Circuit asserted that "[c]ourts construe 'public concern' very narrowly." *Butler*, 920 F.3d at 655 (quoting

Leverington v. City of Colo. Springs,[2] 643 F.3d 719, 727 (10th Cir. 2011)); *see also Burley v. Wyoming Dept. of Family Services*, 66 F. App'x 763, 767 (10th Cir. 2003) (rejecting the "contention that speech which simply 'touches on' matter of general public or societal interests enjoys First Amendment protection"). This approach is in express, if unacknowledged, contradiction to that of other circuits. *See, e.g.*, *Godwin v. Rogue Valley Youth Corr. Facility*, 656 F. App'x. 874, 875 (9th Cir. 2016) (construing the scope of a matter of public concern "broadly") (quoting *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 978 (9th Cir. 2002)); *Tucker v. State of Cal. Dept. of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996) ("This circuit and other courts have defined public concern speech broadly to include almost *any* matter other than speech that relates to internal power struggles within the workplace."); *Oscar Renda Contracting Co. v. City of Lubbock, Tex.*, 577 F.3d 264, 270 n.9 (5th Cir. 2009) ("[t]he scope of matters of public concern … is generally broad"); *Catletti*, 334 F.3d at 230 (noting the importance of "uninhibited

---

[2] The Tenth Circuit's statement of a narrow-construction rule in *Leverington* cited a single decision: *Flanagan v. Munger*, 890 F.2d 1557, 1563 (10th Cir. 1989). *Flanagan* was a case "of nonverbal protected expression not at or about the workplace," *id.* at 1564, and the court concluded that "the purpose behind using the public concern test is simply irrelevant" in that circumstance, *id.* at 1564. It was in that highly specific context that the *Flanagan* court observed that "[w]hen a statement is made at or about work, use of the public concern test, indeed a narrow definition of public concern, makes sense." *Id.* (emphasis added). *Leverington*'s quotation of part of another sentence from *Flanagan* inexplicably treated the earlier court's references to narrow construction out of context and as if it stated a general rule. *Butler* and *Leverington* thus created a circuit split with no explanation for doing so.

testimony" and holding that "truthful trial testimony is almost always of public concern"); *Roe v. City & County of San Francisco*, 109 F.3d 578, 585 (9th Cir. 1997) ("it is sufficient that the speech concern matters in which even a relatively small segment of the general public might be interested"); *Wright*, 40 F.3d at 1502 (construing the *Connick* standard to be "speech [that] *touches on* a matter of public concern" (emphasis added)); *Berger v. Battaglia*, 779 F.2d 992, 998 (4th Cir. 1985) (the public concern test is "better designed … to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all that is" and excludes from protection only expression "which, realistically viewed, is of purely 'personal concern' to the employee"). Indeed, *Butler* and *Leverington* contradict earlier decisions by the Tenth Circuit itself. *See, e.g.*, *Luethje v. Peavine Sch. Dist. Of Adair Cty.*, 872 F.2d 352, 355 (10th Cir. 1989) (discussing "the Supreme Court's broad definition of what constitutes speech of public concern").

Only this Court can resolve this circuit split and provide much-needed guidance to the lower courts on the proper application of the Court's rule and precedent.

II. The Tenth Circuit misapplied the "content, form, and context" test by giving dispositive weight to "content," and by refusing to recognize child custody as a matter of public concern.

A. The decision below ignored controlling precedent by giving dispositive weight to one of the three *Connick* factors

In addition to resolving existing circuit splits, this Court's review is needed to correct the Tenth Circuits misapplication of precedent. By giving only nominal weight to form and context, the Tenth Circuit failed to apply the "content, form, and context" test from *Connick* in the holistic manner mandated by this Court's precedents. If the decision is allowed to stand, it will confuse future analysis on this issue.

The precedents applying the public concern test do not provide exact instructions on how each factor must be applied, much less specific directives to give content dispositive weight, or any additional weight at all compared to context or form. *See Roe*, 543 U.S. at 83 ("Although the boundaries of the public concern test are not well defined, *Connick* provides some guidance."); *Brooks v. Arthur*, 685 F.3d 367, 371 (4th Cir. 2012) ("The *Connick* Court did not draw sharp lines for when 'an employee's speech addresses a matter of public concern' . . . .").

However, the cases do provide clear examples of this Court adopting a holistic approach when analyzing each factor: content, form, and context. *See Snyder*, 562 U.S. at 454; *Lane*, 573 U.S. at 241; *Rankin v. McPherson*, 483 U.S. 378, 386–87 (1987); *Roe*, 543 U.S. at 84. Despite claiming to implement

this holistic approach, the *Butler* panel did not properly engage in this analysis, almost completely disregarding form and context in favor of a "myopic" analysis of content. *See Butler*, 920 F.3d at 665 (Lucero, J., dissenting). The panel's approach was flawed because it allowed one factor—content—to have dispositive weight in the inquiry, effectively ignoring form and context. All the panel said about form and context was that "the form and context of Butler's speech—sworn testimony in a court proceeding—weigh in favor of treating it as a matter of public concern." *Id*. at 663. After this cursory analysis, the panel proceeded to focus on content, denying the public import of child custody hearings. *See id*. at 663–64. Ultimately, content proved dispositive.

This approach directly contradicts this Court's express command in *Snyder* that, under the *Connick* standard, "[i]n considering content, form, and context, *no factor is dispositive*, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." 562 U.S. at 454 (emphasis added). Even the Seventh Circuit, which identified content "as the most important factor," recognized that making content "dispositive" would fundamentally distort *Connick*. *Kristofek*, 712 F.3d at 985 (finding that such an approach "would eliminate form and context from the three-factor *Connick* test.").

The holistic approach that this Court took in *Snyder* by declining to give one factor dispositive weight is consistent with precedent. *See Lane*, 573 U.S. at 241 (analyzing all three factors). For example, in *Rankin*, this Court looked at all aspects of the

relevant speech holistically, giving no factor dispositive weight. 483 U.S. at 386–87. The Court began by examining the content, but also engaged in a detailed analysis of context and form. *See id*. In *Roe*, although this Court issued a *per curiam* opinion and concluded that "this is not a close case," this Court *still* engaged in the content, form, and context analysis. *See* 543 U.S. at 84 (noting the "widely broadcast" nature of Roe's speech and its "link[] to his official status as a police officer," the lack of information it provided to the public, and its "design[] to exploit his employer's image.").

The holistic *Snyder* application of the public concern test follows logically from the question that the test is intended to answer: "Obviously, the various criteria employed to determine whether a particular instance of speech touches on a matter of public concern seldom point exclusively in one direction. Thus, in the usual case the process by which [the court] sort[s], weigh[s], and draw[s] a conclusion from the evidence is, at best, something of an inexact science." *Wright*, 40 F.3d at 1503. Even if the Tenth Circuit was right to stop short of holding that all sworn testimony constitutes matters of public concern, the court was surely wrong in discounting the impact that this form and context of the speech has in the analysis.

For this reason alone, the Court should grant the petition and reverse the Tenth Circuit's incorrect application of the public concern test.

B. The decision below displaced the State of Colorado's clear determination that child custody is a unique and important matter of public concern

Even if the Tenth Circuit had been correct to give "content" dispositive weight in the *Connick* analysis, the panel cursorily, and incorrectly, discounted the public's concern over the custody and welfare of children. And, in so doing, the court disregarded principles of federalism which enshrine the rights "of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States*, 564 U.S. 211, 221 (2011).

Connick made clear that matters of public concern "*relat[e]* to any matter of political, *social, or other concern to the community*." 461 U.S. at 146 (emphasis added). In other words, the speech does not have to be political in any narrow sense but can relate to the social and other concerns of the community at large.

As a general matter, this Court has repeatedly stated that the welfare of children is of distinctive concern to the public. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944); *see also Ginsberg v. New York*, 390 U.S. 629, 639–40 (1968) ("The State also has an independent interest in the well-being of its youth."). As *parens patriae*, "the State has an urgent interest in the welfare of the child." *Santosky v. Kramer*, 455

U.S. 745, 766 (1982) (quoting *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 27 (1981)). In fact, the Tenth Circuit itself has stated that "[s]tates have a *parens patriae* interest in preserving and promoting children's welfare." *Gomes v. Wood*, 451 F.3d 1122, 1128 (10th Cir. 2006).

The panel's argument in *Butler*—that custody proceedings do not *relate* to any matter of political, social, or other concern to the community—"flies in the face of reality." *See Harris v. Quinn*, 573 U.S. 616, 654 (2014) (stating that arguing that union speech on collective bargaining was speech on a purely private issue "flies in the face of reality" by ignoring that such speech implicated far greater public concerns).

More significantly, the *Butler* panel's opinion substitutes its view—that the content of speech at a child custody hearing is *so* private that it outweighs strong evidence of public concern from form and context—for the view of Colorado. Respect for federalism dictates "a system in which there is sensitivity to the legitimate interests of both State and National Governments." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

Here, the Colorado legislature has asserted a public interest in child custody proceedings by enacting statutes requiring courts to "determine the allocation of parental responsibilities . . . in accordance with the best interests of the child, giving paramount consideration to the child's safety and . . . needs." *See* Colo. Rev. Stat. § 14-10-124(1.5). In so doing, the legislature tasks courts with frequently making independent determinations regarding custody. By carving out this role for the judiciary, it is

clear that Colorado does not view custody issues as purely private matters between parents. The requirement of this independent determination of the best interest of the child solidifies the public's clear concern with custody proceedings. *See also In re Marriage of Finer*, 893 P.2d 1381, 1388 (Colo. App. 1995) (holding that Colorado has a "public interest" in "determining what is in the best interest of the parties and their children in a dissolution of marriage action."); *Stillman v. State*, 87 P.3d 200, 201 (Colo. App. 2003) (stating that child support determinations "are not purely private determinations, but serve a public function").

Butler's disregard for the clear voice of the people of Colorado not only was unduly cursory, it was insensitive to the legitimate interests of the state and its people. The public, through its legislative representatives, has made clear that such a decision is a major governmental intervention affecting people's liberty and welfare. Though we need not publicize everything that occurs during a custody battle, there exists a clear public interest in the outcome of these disputes. A court applying the federal constitutional rule should defer to the state's evaluation of its own public interest for the purposes of the public concern test.

III. There is no government interest here that limits First Amendment protections for Butler's non-disruptive speech

It is axiomatic "that citizens do not surrender their First Amendment rights by accepting public employment." *Lane*, 573 U.S. at 231. This Court has

recognized its responsibility "to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Connick*, 461 U.S. at 147. A holding that the First Amendment does not protect against Butler's demotion would be inconsistent with these principles.

It is true that government employers are able to restrict employee speech in specific ways, particularly when addressing an "employee grievance." *See Connick*, 461 U.S. at 147 (holding that the First Amendment "does not require a grant of immunity" for such speech). But the "restrictions [a government employer] imposes must be directed at speech that has some potential to affect the entity's operations." *Garcetti*, 547 U.S. at 418. This is because the state, as an employer, has an interest "in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. Here, there is no conceivable way for Butler's speech to have affected his employer's operations, as it did not implicate his employer's interest. Butler was not speaking in any official capacity, and the only apparent elements of his testimony relating to his employer involved the "department's hours of operation," a topic the Tenth Circuit considered to be "quite uncontroversial." *Butler*, 920 F.3d at 663–64.

A suggestion to the contrary would be simply nonsensical. Indeed, the cornerstone cases of this Court's government employee speech jurisprudence all examined speech that was potentially subversive to an employer. *See Pickering*, 391 U.S. at 566 (a teacher published a letter criticizing the school administration in a local newspaper); *Connick*, 461 U.S. at 141 (an assistant district attorney distributed

a questionnaire to coworkers questioning workplace policies and management); *Garcetti*, 547 U.S. at 414–15 (a calendar deputy wrote a memo to supervising attorneys describing misconduct in an investigation and later testified for defense against supervisors on the matter); *Lane*, 573 U.S. at 232–33 (a government employee fired a subordinate against instruction of a supervisor and later testified about the event). It is within this context of potentially subversive speech that an "employee has no First Amendment cause of action based on his or her employer's reaction to [their] speech." *Garcetti*, 547 U.S. at 418.

The Tenth Circuit's rigid application of the *Garcetti/Pickering* test to Butler's speech has resulted in an impermissible restriction of employee speech that is at odds with the principles articulated by this Court in creating the doctrine. Allowing Butler to be punished for his truthful testimony would put him in the "impossible situation" of being "torn between the obligation to testify truthfully and the desire to avoid retaliation." *Lane*, 573 U.S. at 241. This Court's guidance is needed to clarify how its precedent should apply to employee speech— made as a citizen outside the scope of employment—that has no potential to cause workplace disruption.

***

The Tenth Circuit's opinion in *Butler* presents several distinct issues that require this Court's review. The circuit courts have developed inconsistent precedent regarding government employee speech, and this confusion operates on multiple levels, in some situations generating four different approaches. This disarray among the circuit courts can only be

corrected by this Court. This case presents an excellent vehicle for that correction as it turns on one narrow legal issue—whether Butler's speech at a child custody hearing was on a matter of public concern. The facts are simple and because the Petitioner's complaint was dismissed on a 12(b)(6) motion, they are not in dispute but must be taken as alleged. Thus, this case affords the Court the right opportunity to provide much-needed guidance in the aftermath of *Lane*.

The consequences of the precedent set by this decision are too great to ignore. Aside from the circuit splits, the Tenth Circuit's faulty analysis misapplies this Court's precedent and ignores important considerations of federalism, imperiling the First Amendment rights of government employees. The logic of the Tenth Circuit's decision creates a situation where a governmental employee can be required by subpoena to testify in a public adjudication, and then penalized by their employer for truthful testimony in a case that does not involve the employing agency. If a judge finds that the compelled testimony is on too private a matter—a truly amorphous standard—the employee has no First Amendment recourse.

CONCLUSION

For the foregoing reasons, and for those stated by the Petitioners, the Court should grant the petition.

Respectfully submitted,

/s/ H. Jefferson Powell
H. JEFFERSON POWELL
Counsel of Record
NICOLE J. LIGON
IAN C. KALISH
FIRST AMENDMENT CLINIC
DUKE LAW SCHOOL
210 Science Drive
Durham, North Carolina 27708
(919) 613-7168
powell@law.duke.edu

Dated: October 3, 2019