

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**

**BRIEF OF THE GOVERNMENT
ACCOUNTABILITY PROJECT AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

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.

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INTEREST OF *AMICUS CURIAE*¹

The Government Accountability Project (GAP) is a non-partisan, non-profit public interest law firm specializing in legal advocacy for “whistleblowers”—employees who use free speech rights to challenge abuses of power that betray the public trust. Over the last five decades, GAP has represented or informally assisted more than 8,000 whistleblowers in actions that have exposed injustice and corruption in public agencies of almost every State and in the administrations of every President, Republican and Democrat alike. Since opening in 1977, GAP has become the nation’s leading champion of whistleblower rights, defending truth-tellers against retaliation that ranges from professional demotions to criminal prosecutions. GAP has a deep understanding of the factors that encourage and discourage whistleblowers and their supporting witnesses from coming forward with important information about our government.

GAP is an unusually independent and nonpartisan organization. This is reflected in the clients it represents, the misconduct it opposes, and the variety of institutions that help fund it (*e.g.*, Carnegie Foundation, Ford Foundation, Open Society Institute, and Rockefeller Family Fund). GAP has joined with organizations of all political

¹ Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party has authored this brief in whole or in part and that no one other than *amicus curiae* and their counsel has made any monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief.

and ideological perspectives in amicus briefs in this Court and other federal and state courts (*e.g.*, the ACLU, Friends of the Earth, the Liberty Coalition, the Association of American Physicians & Surgeons, Inc., the League of Women Voters, the American Library Association, the Anti-Defamation League, and C-SPAN).

The independence of GAP also is reflected in the nearly unique bipartisan support it enjoys in Congress. GAP helped to create two bipartisan caucuses in Congress—the House Whistleblower Protection Caucus and the Senate Whistleblower Protection Caucus, both of which are equally divided between Democrats and Republicans—and it has played a leading role in landmark legislation, including the Whistleblower Protection Act of 1989, Pub. L. 101-12, 103 Stat. 16 (1989), the WPA’s 1994 and 2012 amendments, and the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002).

GAP is keenly interested in this case because of the detrimental effect that the Tenth Circuit’s conclusion will have on public-employee whistleblowers who routinely must rely upon witnesses in positions similar to Petitioner’s in order to prove their allegations and reveal injustices. These witnesses require the protection of the First Amendment to shield them from adverse actions by government employers.

SUMMARY OF ARGUMENT

A large proportion of whistleblowers are public employees, and these whistleblowers frequently must rely on the testimony of other public employees when exposing and remedying misconduct. For example, corroboration by other employees is often vital to proving allegations of wrongdoing and to bolstering the whistleblower's credibility generally. Whistleblowers also must rely on the testimony of fellow employees to establish the strength of their job performance, which is crucial to combating employers' pretextual justifications for actions taken in retaliation for whistleblowing. Likewise, a whistleblower's colleagues need to know that when asked to tell the truth under oath, they can do so without reprisal, even if their testimony will upset a higher-up official. If employees are unprotected for truthful testimony, then every whistleblower can be isolated by the hierarchy, left without the support of their fellows, and thereby discouraged from bringing forward the truth. Long experience shows that isolation is fatal for a whistleblower, both in terms of professional survival and making a difference.

Because state whistleblower protection laws do not always cover the witnesses whom whistleblowers rely upon to support their claims, the First Amendment's protection of truthful testimony is critical. This protection is particularly indispensable for witnesses called to testify on "personal" matters, like a whistleblower's character.

Petitioner's case presents an ideal opportunity for the Court to reaffirm and strengthen the important presumption established by *Lane v.*

Franks, 573 U.S. 228, 239, 241 (2014), that sworn testimony in judicial proceedings is a “matter of public concern” for First Amendment purposes. This Court recognized in *Lane* that testimony in judicial proceedings has inherent importance to the public, *id.* at 241, suggesting that rarely, if ever, would sworn, truthful testimony *not* constitute a matter of public concern. But the Tenth Circuit, in Petitioner’s case, embraced an *ad hoc* analysis that gave no weight to the inherent public value of truthful testimony in judicial proceedings. Lip service was paid to *Lane*’s emphasis on the special status of truthful testimony, but the court’s analysis focused entirely on the specifics of Petitioner’s testimony as a character witness and his “personal” motive for testifying. *Butler v. Bd. of Cty. Commissioners for San Miguel Cty.*, 920 F.3d 651, 663 (10th Cir. 2019).

The Tenth Circuit’s approach is unmoored from doctrine and unlimited in its scope, and it will chill truthful testimony from whistleblowers and witnesses who testify in whistleblower cases. The conclusion that Petitioner’s sworn testimony in a public judicial proceeding was too private or trivial to trigger First Amendment safeguards will undermine the truth-seeking function of judicial proceedings by discouraging complete and truthful testimony. This Court should grant the petition and reverse the Tenth Circuit’s decision, reaffirming that truthful testimony in a judicial proceeding is presumptively speech on a matter of public concern.

ARGUMENT

I. PUBLIC EMPLOYEE WHISTLEBLOWERS DEPEND ON WITNESSES TO TESTIFY TRUTHFULLY

Protection against retaliation for giving truthful testimony in judicial proceedings is fundamentally important to whistleblowers in the United States, who have always played a crucial role in combating government corruption. As the Continental Congress resolved in 1778,

it is the duty of all persons in the service of the United States, as well as all other the inhabitants thereof, to give the earliest information to Congress or other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge.

11 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 732 (Worthington Chauncey Ford ed., 1908). Reflecting these principles, this Court has stressed that “[s]unlight is said to be the best of disinfectants,” *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (citation and quotation marks omitted), and has recognized that public employees are often the witnesses best-situated to observe the workings of our government, *Lane*, 573 U.S. at 236. This Court has also endorsed the “fundamental maxim that the public . . . has a right to every man’s evidence.” *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)). This right is matched by individuals’

“corresponding duty to testify.” *Kastigar v. United States*, 406 U.S. 441, 443 (1972).²

In light of the duty to come forward with evidence of official misconduct, and in recognition of the essential transparency-promoting function public-employee whistleblowers play in our democratic system, whistleblowers have been granted certain legal protections from retaliation. But these legal protections are rarely sufficient on their own to ensure that misconduct is revealed and, importantly, often these protections depend on whistleblowers’ ability to prove their claims in court. For that, whistleblowers must rely on witnesses who can corroborate and bolster their claims of fraud, waste, and abuse.

Whistleblowers must also enlist witnesses in order to validate their claims that government actors engaged in retaliation against them for their whistleblowing. In fact, the success of a whistleblower’s retaliation claim can depend wholly on whether the whistleblower can establish, through the testimony of others, that they are an honest, good employee, meaning that official justifications for adverse consequences are pretextual. A witness’s

² See also *Blackmer v. United States*, 284 U.S. 421, 438 (1932). (“It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.”); *Blair v. United States*, 250 U.S. 273, 281–82 (1919) (“[T]he giving of testimony and the attendance upon court . . . in order to testify are public duties . . . necessary to the administration of justice.”).

testimony concerning a whistleblower's character, credibility, or job performance could retrospectively be construed by a court as concerning "private" or "personal" matters. But such testimony plays a key role in protecting and encouraging whistleblowers.

In GAP's experience, the vast majority of whistleblowers who bring claims to court depend on information from other witnesses to prove them. That number reaches nearly 100% in the context of whistleblowers' retaliation claims. The upshot is that, for public-employee whistleblowers to be effective, their right to call witnesses must be protected, meaning those witnesses must have assurance that they will not face retaliation for giving truthful testimony. Otherwise, our protections for whistleblowers will be hollow, and people will be discouraged from performing their civic duties.

II. THE COURT SHOULD GRANT REVIEW AND REJECT THE TENTH CIRCUIT'S TREATMENT OF PUBLIC-EMPLOYEE TESTIMONY, WHICH THREATENS TO CHILL THE SPEECH OF PUBLIC EMPLOYEES

By concluding that Petitioner's truthful testimony did not constitute a matter of public concern for First Amendment purposes, the Tenth Circuit defied this Court's analysis in *Lane v. Franks*. In so doing, the court discouraged all public employees from providing truthful testimony that could potentially anger their employer, including testimony necessary to prove whistleblowers' claims.

In *Lane*, this Court reiterated that speech “involves matters of public concern ‘when it can be fairly considered as relating to any matter of political, social, or other concern to the community.’” *Lane*, 573 U.S. at 241 (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (additional citations omitted)). The “content,” “form,” and “context” of the speech are evaluated to determine whether the speech constitutes a matter of public concern. *Id.*

Applying this standard to the testimony at issue in *Lane*, this Court concluded 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. This holding was informed by the special nature of truthful sworn testimony, which, “[u]nlike speech in other contexts . . . has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others.” *Id.* at 241 (quoting *United States v. Alvarez*, 567 U.S. 709, 721 (2012) (plurality opinion)). In other words, however private a particular controversy may be, it takes on public significance once a court’s authority is enlisted to resolve it—particularly when third-party witnesses are involved.

Unfortunately, however, the Tenth Circuit disregarded the special status and unique significance of sworn testimony in deciding Petitioner’s case. Even after acknowledging that, under *Lane*, the form and context of sworn testimony “weigh in favor of treating it as a matter of public concern,” the court relied exclusively on the

“content” of Petitioner’s testimony to reach its conclusion. *See Butler*, 920 F.3d at 663; *id.* at 665 (Lucero, J., dissenting) (“My colleagues . . . engage in a myopic analysis of the content alone . . .”). According to the *Butler* majority, Petitioner’s truthful testimony as a character witness for his sister-in-law in a child custody case did not merit First Amendment protection because that testimony putatively concerned a merely “personal” matter. *Id.* at 663-64. Although the majority conceded that the welfare of children is a matter of public concern, it concluded that this particular case was not a matter of public concern and that Petitioner’s testimony could not warrant protection unless, in isolation, it would be of interest to the public. *Id.* at 664 (“Butler testified . . . regarding both the sister-in-law’s character and the hours of operation for the County’s Road and Bridge Department. There is no indication that this testimony was of interest or concern to the community at large.”). The majority also found it relevant that Petitioner’s “motive for testifying was personal—to support his sister-in-law and attest to her character in a custody dispute,” *id.* at 664, disregarding his allegation that he testified under threat of subpoena.

The Tenth Circuit’s analysis left Petitioner without First Amendment protection against being demoted by his county employer in retaliation for truthful testimony as a third-party witness. This truthful testimony had angered his former brother-in-law, who happened to be a fellow county employee with pull.

The outcome in Petitioner’s case is deeply unjust and has negative implications for other public

employees who may be called to testify, including whistleblowers and their colleagues. Petitioner testified to his sister-in-law's good character, a type of testimony that public-employee whistleblowers often need from colleagues, who may also be friends. If legal rules direct such witnesses that their testimony may be retrospectively deemed too "personal" to constitute a matter of public concern for First Amendment purposes, they may seek to avoid testifying. Or, if they are compelled to testify, they may feel constrained to avoid saying anything that could anger their superiors at work. Such witness reticence, as encouraged by the Tenth Circuit's analysis in Petitioner's case, will erode whistleblowers' ability to prove their claims and will discourage them from coming forward with important disclosures.

In sum, the Tenth Circuit's mistaken analysis in Petitioner's case, if not corrected by this Court, will have significant ramifications for whistleblowers. The chilling effect of an *ad hoc* analysis that gives no weight to the special status of sworn testimony could hinder public-employee whistleblowers from obtaining needed testimony from colleagues in support of their claims. As this Court has explained, "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Exceptions to First Amendment's protections for public employees who testify truthfully should not be lightly created or expansively construed either. But that is what the 10th Circuit has done, to the detriment of whistleblowers and their colleagues.

CONCLUSION

Because this case presents an ideal vehicle for reaffirming and strengthening First Amendment protections for public employees who testify truthfully in judicial proceedings, the Court should grant the petition for review.

Respectfully submitted,

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