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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Connick v. Myers*, this Court explained that a public sector employee may state a First Amendment retaliation claim against his employer only if the employee's speech addressed a matter of "public concern." 461 U.S. 138 (1983). "Whether an employee's speech addresses a matter of public concern," the Court explained, "must be determined by the *content*, form and context of a given statement, as revealed by the whole record." *Id.* at 147-48 (emphasis added). In *Lane v. Franks*, this Court applied this settled framework to a public employee's testimony in a judicial proceeding, holding that the relevant statements qualified under the *Connick* test in part because their "content"—which related to "corruption in a public program and misuse of state funds"—"obviously involve[d] a matter of significant public concern." 573 U.S. 228, 241 (2014).

The question presented is:

Whether, notwithstanding *Connick* and *Lane*, a government employee's truthful testimony at a judicial hearing categorically qualifies as speech on a matter of public concern, regardless of its content?

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INTRODUCTION

In *Connick v. Myers*, this Court explained that a public employee cannot state a First Amendment retaliation claim unless his speech addresses a "matter of public concern." 461 U.S. 138, 145-48 (1983). *Connick* further instructs that, in deciding whether speech relates to a matter of public concern, a court must conduct a fact-sensitive inquiry into the "*content*, form, and context" of the speech at issue. *Id.* at 147-48 (emphasis added).

Notwithstanding this long-established precedent, petitioner advances a categorical rule that a government employee's testimony at a judicial hearing *always* raises a matter of public concern—regardless of the "content" of the speech. According to petitioner, this categorical approach is compelled by this Court's recent decision in *Lane v. Franks*, 573 U.S. 228 (2014). But far from embracing a categorical rule, *Lane* in fact *rejected* such an approach. Just as in *Connick*, this Court in *Lane* engaged in a fact-specific analysis of "content, form, and context" to determine whether the relevant speech related to a matter of public concern. 573 U.S. at 241.

While petitioner argues a conflict based on case law predating *Lane*, *Lane* itself rejects petitioner's position and there is no *post-Lane* conflict that warrants this Court's review. Petitioner cites only to unpublished decisions from the Third and Fifth Circuits which, he claims, "reaffirm[]" those courts' prior categorical rule. Pet. 16-17. But the Third Circuit's unpublished opinion in fact conducted a fact-sensitive inquiry into content, form, and context (as dictated by *Lane*)—signaling a retreat from its prior position. And while the Fifth Circuit's unpublished

opinion states that *Lane* is not "clearly irreconcilable" with a categorical approach, the opinion hardly holds that *Lane dictates* a categorical approach, as petitioner suggests. It is thus not yet known whether the Fifth Circuit would reach the same result in a precedential opinion. Meanwhile, district courts in both the Third and Fifth Circuits, in the wake of *Lane*, have begun to adopt a fact-sensitive inquiry.

The post-*Lane* "stark division of authority" the petition asserts (at 19) is thus wholly illusory. At most, the rule in the Third and Fifth Circuits is unsettled, and (as petitioner admits) no other court of appeals has adopted his preferred categorical rule. Indeed, the only courts to have given the issue reasoned consideration since *Lane*—the Sixth Circuit and the Tenth Circuit below—have (correctly) held that *Lane precludes* any such categorical rule.

At the least, this Court's review would thus be highly premature. *Lane* was handed down only five years ago. The decision below is the first published opinion applying it in the context of judicial testimony, and the available indication is that the lower courts will reach uniformity without this Court's intervention. Moreover, even before *Lane*, this Court declined to address what was then an acknowledged conflict, likely because the difference between petitioner's categorical rule and a fact-specific analysis will be relevant in only a small fraction of cases. Granting review now, in the wake of *Lane*'s additional guidance, is unwarranted.

Finally, if that were not enough, this case is a particularly poor vehicle for this Court's review. Petitioner brushes aside the unwelcome fact that he testified voluntarily in the proceeding at issue, and not in response to a subpoena—a reality that renders

this case a poor vehicle for assessing the scope of *Lane*. Moreover, the fact that the very testimony at issue here was likely false—or at best, uninformed and misleading—ensures that no decision this Court issues would alter the result in this case. The petition glosses over these deficiencies with rhetorical appeals to the "integrity of judicial proceedings and the vibrancy of the First Amendment." Pet. 4. But the decision below threatens neither. Rather, it reflects a straightforward application of this Court's long-settled precedent. The petition should be denied.

STATEMENT OF THE CASE

1. On September 1, 2016, petitioner was promoted to a District Supervisor position with the San Miguel County Road and Bridge Department. Pet. App. 40a. Six days later, petitioner voluntarily[1] testified as a character witness for his sister-in-law at a child custody dispute between her and her ex-husband, who was also an employee at the Department. *Id.* at 40a-41a. In the course of his testimony, petitioner offered that "the hours of operation of the Road and Bridge Department," *id.* at 4a, would not be conducive for the ex-husband to have adequate parenting time with his son. Order Granting Summ. J. 3, *Butler v. Bd. of Cty. Comm'rs*,

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[1] Petitioner alleges that he "would have been required to testify pursuant to a subpoena had he not agreed to testify at the hearing." Compl. ¶ 17. But the fact remains that he *did* agree to testify, thus obviating the need for any subpoena. Moreover, the mere threat of a subpoena does not make one.

No. 2018CV30004 (Colo. Dist. Ct., San Miguel Cty., Sept. 16, 2019) ("SJ Order").[2]

Approximately two weeks after petitioner's court appearance, the Department commenced an investigation into petitioner's conduct at the hearing—eventually prompting the Department to issue petitioner a Written Reprimand. Pet. App. 4a.[3] The Reprimand made clear that petitioner "was offered [his promotion] subject to a one year probationary period," and that the County had previously "made very clear . . . that the family issue" between petitioner and his sister-in-law's husband must "be kept completely out of County business." Def.'s Mot. for Summ. J., Ex. F, *Butler v. Bd. of Cty. Comm'rs*, No. 2018CV30004 (Colo. Dist. Ct., San Miguel Cty., July 8, 2019) ("SJ Mot."). In the Department's view, petitioner violated this instruction and "improperly represented San Miguel County during his testimony," when he commented on the ex-husband's work schedule even though he was not his direct "supervisor" and thus was "not . . . in a position to comment on his work schedule." *Id.* Petitioner was accordingly demoted to his previous position. Pet. App. 4a.

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[2] Petitioner's complaint conspicuously omits any details regarding the content of his in-court statements, but the events at issue are discussed in more detail in publicly available documents filed in petitioner's separate state court action.

[3] In addition to omitting discussion of the content of his testimony, petitioner neither attached the Department's Written Reprimand to his Complaint nor discussed the Department's reasons for his demotion. The courts below accordingly did not consider this evidence. Pet. App. 4a n.2.

2. In March 2017, petitioner filed this suit against respondents, alleging that they violated his First Amendment rights by demoting him on the basis of his testimony at the custody hearing, and seeking damages under 42 U.S.C. § 1983. Pet. App. 5a.

The district court dismissed the complaint. The court explained that petitioner delivered "highly personal" testimony "in support of a family member . . . in a private, domestic relations case," and nowhere alleged that his testimony related to "any matter of political, social or other concern to the community." *Id.* at 47a. Accordingly, the district court concluded, petitioner failed to allege that his testimony addressed a matter of public concern, and thus failed to state a First Amendment retaliation claim under the *Connick* framework. *Id.* at 48a.

3. The Tenth Circuit affirmed. The court began by noting that, in order to state a First Amendment retaliation claim, a public sector employee must show that his speech was "(1) made as a citizen (2) on a matter of public concern, [and] (3) [that his] right to speak outweighs the government's interest as an employer in an efficient workplace." *Id.* at 2a.

The court further explained that, "[i]n order to determine whether speech is on a matter of public concern, the Supreme Court has directed that we consider the content, form and context of the particular speech at issue in a given case." *Id.* "Generally," the court added, "a matter of public concern relates to any matter of political, social, or other concern to the community." *Id.*

The court acknowledged that the "form and context" of petitioner's speech—sworn testimony in a judicial proceeding—weighed in favor of treating it as

a matter of public concern. *Id.* at 25a (citing *Lane*, 573 U.S. at 241). But in light of the "purely personal" nature of the custody proceeding, the "uncontroversial" subject of petitioner's speech, and petitioner's "personal" motive for testifying, the Tenth Circuit concluded that the "content" of the speech was too remote from any "interest to the community as a whole" to qualify as a matter of public concern. *Id.* at 25a-27a.

In so holding, the court rejected petitioner's argument that truthful judicial testimony *categorically* raises a matter of public concern, regardless of its content. The court explained that any such categorical rule would be inconsistent with this Court's precedent, which requires a case-specific inquiry into the "content," as well as the "form and context," of the speech at issue. *Id.* at 10a (citing *Connick*, 461 U.S. at 147-48). In particular, such a rule cannot be reconciled with this Court's decision in *Lane*, which addressed speech made in a judicial proceeding but nonetheless considered "all the underlying facts"—including the "content" of the testimony—in a "familiar" application of the *Connick* framework. *Id.* at 12a. Accordingly, the court concluded petitioner's "specific testimony as a character witness for his sister-in-law during a child custody hearing was not a matter of public concern." *Id.* at 28a.

Judge Lucero dissented, but he likewise eschewed a categorical rule. Instead, Judge Lucero would have found that applying a fact-sensitive assessment of content, context and form, petitioner's speech addressed a matter of public concern because it concerned "a child's welfare." *Id.* at 30a-31a.

The Tenth Circuit denied rehearing, over the dissent of four judges. *Id.* at 51a-52a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT WARRANTING THIS COURT'S REVIEW

Petitioner asserts a circuit conflict regarding whether truthful judicial testimony automatically raises a matter of public concern "regardless of its content." Pet. 10. That claim is unfounded.

A. Petitioner Ultimately Bases His Assertion Of A Circuit Conflict On An Untenable Reading Of *Lane*

Because petitioner cannot point to any post-*Lane* conflict among published court of appeals decisions, petitioner's claim of a circuit conflict depends entirely on reading *Lane v. Franks*, 573 U.S. 228 (2014), to mean the opposite of what it actually holds—*i.e.*, as somehow mandating that courts *ignore* the content of judicial testimony because "[a] public employee's truthful testimony as a citizen in a judicial proceeding is *inherently* a matter of public concern." Pet. 10 (emphasis added).

Based on that reading, petitioner then reaches back to rely on pre-*Lane* case law from the Third and Fifth Circuits in order to claim a conflict among published decisions. The problem for petitioner, however, is that his reading of *Lane* is fundamentally mistaken. Moreover, no matter the best reading of *Lane,* the only conflict that would warrant certiorari today is one that has developed in the wake of *Lane*. That conflict does not exist now, and likely never will.

In *Lane*, this Court considered how the Court's framework for determining whether a public

employee may state a First Amendment retaliation claim applied to a public employee who was allegedly terminated based on testimony he gave at a judicial proceeding. 573 U.S. at 232-34. Under the framework established by this Court, a reviewing court must first decide whether the statements in question constitute speech "as a citizen," or whether they were made pursuant to an employee's "official duties," *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); next, the court must assess whether the speech raises a "matter of public concern," *Lane*, 573 U.S. at 241; and, finally, the court must ask whether "the government had 'an adequate justification for treating the employee differently from any other member of the public' based on the government's needs as an employer." *Id.* at 242 (quoting *Garcetti*, 547 U.S. at 418).

In *Lane,* the Eleventh Circuit had concluded that the employee's speech was not made "as a citizen"—and thus failed at the first step of the inquiry—because it involved information "learned in the course of [his] employment." *Id.* at 235, 238-41. This Court held, however, that "sworn testimony is the quintessential example of speech as a citizen." *Id.* at 238. A subpoenaed witness, the Court explained, speaks as a citizen "even when the testimony relates to his public employment or concerns information learned during that employment." *Id.*[4]

But while this Court in *Lane* recognized that sworn testimony in a judicial proceeding is generally speech "as a citizen," it did not hold that the *separate*

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[4] The court noted that to qualify as speech "as a citizen" the employee cannot have engaged in the judicial testimony as part "of his ordinary job responsibilities." *Lane*, 573 U.S. at 238-40.

requirement that the speech relate to a "matter of public concern" is also *automatically* satisfied when an employee's statements were made under oath in a judicial proceeding. Instead, the Court in *Lane* considered whether the particular statements at issue raised a matter of public concern by engaging in the fact-sensitive analysis mandated by *Connick*. The Court explained that this part of the "inquiry turns on 'the *content*,'" as well as the "'form, and context,'" of the relevant speech. *Id.* at 241 (emphasis added) (citation omitted). And, applying this approach, the Court noted that the "content" of the employee's speech in *Lane* addressed "corruption in a public program and misuse of state funds," which "obviously involve[d] . . . matter[s] of significant public concern." *Id.* The "form and context" of the speech—testimony at a judicial proceeding—"fortif[ied] that conclusion," *id.*, but did not alone dictate it.

Far from establishing a *per se* rule that testimony in a judicial proceeding automatically satisfies the "public concern" requirement, *Lane* thus confirms that when assessing whether judicial testimony qualifies as a matter of public concern, a court must apply the ordinary, fact-sensitive *Connick* inquiry—including an assessment of a statement's "content." If *Lane* had embraced a categorical rule whereby all truthful testimony in a judicial proceeding automatically qualified as a matter of public concern, the Court would have had no reason to apply the *Connick* test at all, or to assess the "content" of the relevant speech. Indeed, the entirety of Part III.A.2 of the opinion, 573 U.S. at 241, would have been superfluous.

In advancing his alternative rule, petitioner asks this Court to read isolated sentences in the opinion

out of context. For example, petitioner asserts (at 15) that *Lane* "specifically stated that a public employee's truthful testimony in court is 'speech as a citizen on a matter of public concern.'" But that is not what the opinion says. Rather, the cited quote in full states: "The first inquiry is whether the *speech in question— Lane's testimony at Schmitz' trials*—is speech as a citizen on a matter of public concern. It clearly is." *Lane*, 573 U.S. at 238 (emphasis added). By substituting the phrase "a public employee's truthful testimony" for "Lane's testimony at Schmitz' trials," petitioner creates the misimpression that the Court was adopting a categorical rule, when in fact it was applying a fact-specific analysis to the speech at issue.

Similarly, petitioner states that "[t]he 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.'" Pet. 15 (quoting *Lane*, 573 U.S. at 238). But that quote must be understood in the context of the Eleventh Circuit's holding that such speech is categorically *un*protected because an employee does not speak "as a citizen" when he "learn[s] of the subject matter of his testimony in the course of his employment." *Lane*, 573 U.S. at 239. In context, the quoted language simply rejects the Eleventh Circuit's rigid approach to the "citizen" requirement; it does not impose a categorical rule that *all* truthful judicial testimony is a matter of public concern "regardless of content." As noted above, such a categorical rule cannot be reconciled with *Lane*'s own approach to the statements at issue in that case. And, tellingly, petitioner fails to identify a single case which has held that *Lane* mandates a categorical rule and requires

courts to ignore entirely the content of the relevant speech.

B. There Is No Circuit Conflict Warranting This Court's Review

Petitioner does not dispute that the decision below is the only published, *post-Lane* decision addressing the question presented. Petitioner relies instead on a combination of pre-*Lane* cases and unpublished post-*Lane* decisions. But because *Lane* dictates that the ordinary, fact-sensitive *Connick* approach applies equally to judicial proceedings, pre-*Lane* precedent is no longer relevant. And even petitioner's unpublished opinions are of no help because, if anything, they undercut his asserted conflict—and suggest that the courts of appeals will soon reach conformity without this Court's intervention.

1. Petitioner asserts (at 10) that the Third Circuit "reaffirmed" a categorical approach in its decision in *Falco v. Zimmer*, 767 F. App'x 288 (3d Cir. 2019). To the contrary, *Falco* stressed that courts must "determine whether an employee's speech involves public concern by reference to the speech's '*content*, form, and context.'" 767 F. App'x at 302 (emphasis added) (quoting *Lane*, 573 U.S. at 241). The Third Circuit noted that the "content" of Falco's testimony—alleged discrimination and retaliation by a public official—involved a matter of public concern. *Id.* at 309. The court then explained that the "form" and "context" of the speech—sworn judicial testimony—cut in the same direction. *Id.* Only after marching through this fact-specific analysis of the speech did the court conclude that Falco's testimony raised a matter of public concern. Nowhere did the Third Circuit invoke *Lane* to justify any per se rule

protecting Falco's testimony. In fact, the "public concern" discussion in *Falco* closely resembles the Tenth Circuit's analysis in the present case. The courts only reached contrasting outcomes due to the differing "content" of the relevant speech at issue in each case. *Compare Falco*, 767 F. App'x at 309, *with* Pet. App. 26a-28a.[5]

Similarly, district courts within the Third Circuit have declined to apply any categorical rule after *Lane*. For instance, one court held that a plaintiff's sworn, truthful deposition testimony did *not* qualify as speech on a matter of public concern. *See Morozin v. Phila. Hous. Auth.*, No. 18-2174, 2019 WL 3824228, at *5 (E.D. Pa. Aug. 13, 2019). This was so, the court explained, because of the content of the particular testimony at issue in the case. *Id.* If the Third Circuit had truly adopted or "reaffirmed" a categorical rule that "truthful testimony is *always* speech 'on a matter of public concern,'" Pet. 16 (emphasis added), then the plaintiff in *Morozin* would have prevailed.

2. Likewise, after *Lane*, district courts within the Fifth Circuit have analyzed judicial testimony using a case-specific analysis. In *Lott v. Forrest County*, for

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[5] The only other post-*Lane* Third Circuit case petitioner cites—*Dougherty v. School District of Philadelphia*, 772 F.3d 979 (3d Cir. 2014)—likewise does not support any categorical rule. *Dougherty* did not even involve judicial testimony, but rather a public employee's statement to a newspaper and law enforcement agencies. *Id.* at 983-85. *Dougherty*'s discussion of *Lane* was limited to the wholly separate issue of whether the plaintiff spoke "as a citizen." *See id.* at 988-90. The court did not analyze whether the speech at issue—which disclosed government corruption, fraud, and illegality—involved a matter of public concern because neither party disputed that it did. *See id.* at 987 & n.5.

example, the court determined that a plaintiff's judicial testimony was on a matter of public concern. No. 2:14-CV131-KS-MTP, 2015 WL 7015315, at *7-8 (S.D. Miss. Nov. 10, 2015). But the court only reached that conclusion after analyzing the particularities of the in-court statements—which implicated serious issues of official misconduct—and accordingly noting that such misconduct was of public concern. *Id.* at *7. Nowhere did *Lott* state that the plaintiff's truthful testimony was *automatically* speech on a matter of public concern.

Petitioner relies on the Fifth Circuit's unpublished decision in *Lumpkin v. Aransas County*, but that case held only that *Lane* did "not 'unequivocally abrogate[]'" prior Fifth Circuit precedent establishing a categorical rule. 712 F. App'x 350, 358 (5th Cir. 2017) (citation omitted). *Lumpkin* contained almost no reasoning on this point, and it is doubtful (and in the very least highly uncertain) that the Fifth Circuit would reach the same result in a published opinion. In the meantime, even after *Lumpkin*, district courts in the Fifth Circuit have followed this Court's decision in *Lane*, rather than the Fifth Circuit's own pre-*Lane* precedent. *See Ybarra v. Tex. Health & Human Servs. Comm'n*, No. B-17-174, 2018 WL 3949972, at *12 (S.D. Tex. June 13, 2018) (classifying testimony as of public concern because it brought official misconduct to light, and citing *Branton v. City of Dallas*, 272 F.3d 730, 740 (5th Cir. 2001), a case that applied the content, form, and context inquiry to the speech at issue).

In short, despite petitioner's best efforts to resuscitate the pre-*Lane* circuit conflict, in the wake of *Lane* there is no longer any split in authority warranting this Court's review. The rule in the Third

and Fifth Circuits is, at most, unclear in the wake of *Lane*, and the available evidence in the district courts is that both circuits may soon adopt the fact-specific inquiry required by *Connick* and endorsed by *Lane*. It is not yet known after *Lane* whether courts of appeals faced with substantially similar facts would decide the cases differently in a published opinion with reasoning that explains the different result.

3. The only other post-*Lane* court of appeals decision is from the Sixth Circuit. *Jones v. Wilson Cty.*, 723 F. App'x 289 (6th Cir. 2018). That decision, too, is unpublished, and therefore non-precedential. However, like the Tenth Circuit's decision in this case, it rejects the kind of categorical approach advanced by petitioner here. *See id.* at 292 ("If testimony in open court was 'always a matter of public concern,' . . . the *Lane* Court would have so indicated . . . ." (citation omitted)).

C. The Asserted Conflict Is Of Limited Practical Importance In Any Event

Because the *Connick* test already gives significant weight to the "context" and "form" of a person's speech, the circuits that have never applied a categorical rule nonetheless recognize that testimony at a judicial proceeding will frequently satisfy the public concern requirement. *See, e.g.*, *Catletti ex rel. Estate of Catletti v. Rampe*, 334 F.3d 225, 230 (2d Cir. 2003) (declining to hold that truthful judicial testimony is of public concern "regardless of its content," but noting that such speech "is almost always of public concern"); *Wright v. Ill. Dep't of Children & Family Servs.*, 40 F.3d 1492, 1505 (7th Cir. 1994) (rejecting a categorical rule, but noting that "truthful testimony on matters of public concern

normally is protected speech" (emphasis added)); *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1069-70 (9th Cir. 2012) (classifying plaintiff's truthful testimony as of public concern and concluding that it "is not a 'close case'" (citation omitted)).

Likewise, the Tenth Circuit below observed that "[w]e do not doubt that *often* a government employee's court testimony . . . will involve matters of public concern." Pet. App. 12a (emphasis added). To be sure, consistent with *Lane,* the Tenth Circuit declined to adopt petitioner's *per se* rule that *all* testimony is *automatically* a matter of public concern—which would have jettisoned the "content" requirement entirely. But the Tenth Circuit's recognition that the content of the speech *can* make a difference in individual cases, like this one, in which the testimony does not bear on matters of public concern does not change the fact that in the typical case a government employee's truthful judicial testimony will qualify as speech on a matter of public concern. Any alleged split is therefore of limited practical significance.

II. THE DECISION BELOW IS CORRECT

Review is also unwarranted because the Tenth Circuit's carefully reasoned decision in this case is faithful to this Court's precedent.

A. The Tenth Circuit Correctly Rejected Petitioner's Proposed Categorical Rule

In *Connick v. Myers*, this Court clearly instructed that "[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." 461 U.S. 138, 147-48 (1983) (emphasis added); *see also Rankin v. McPherson*, 483 U.S. 378, 385-87 (1987) (applying this

analysis). Petitioner claims that the Tenth Circuit somehow contravened that precedent when it rejected his proposed categorical rule that *any* truthful testimony in a judicial proceeding is of public concern "regardless of its content." Pet. 10. But he has it backwards.

1. *Connick*'s case-specific approach reflects the longstanding First Amendment distinction between purely private speech and speech of legitimate interest to the public at large. As this Court has explained, "speech concerning public affairs . . . is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *see also Pickering v. Bd. of Educ.*, 391 U.S. 563, 571-72 (1968) (protecting speech when "free and open debate" upon its subject was "vital to informed decision-making by the electorate"). By contrast, speech the content of which is entirely private—such as an employee's personal "displeasure" over a routine transfer, *see Connick*, 461 U.S. at 148, or an employee's thoughts on his sister-in-law's character in a family proceeding, *see* Pet. App. 4a—implicates none of these First Amendment imperatives. Thus, speech on private matters cannot support a First Amendment retaliation claim. *Connick*, 461 U.S. at 144-47. Yet, petitioner's proffered categorical rule elevates speech that could not remotely implicate the public interest to the level of core protected speech. That is irreconcilable with *Connick* and its progeny.

Moreover, petitioner's rigid approach renounces, without cause, the very flexibility that originally motivated this Court's framework for addressing First Amendment retaliation claims. Recognizing the "enormous variety of fact situations" that might give rise to such claims, this Court "d[id] not deem it either

appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." *Pickering*, 391 U.S. at 569. The flexibility inherent in the case-specific approach remains critical in preserving the important balance that underlies First Amendment retaliation doctrine: the possibility for public employees to obtain constitutional protection when they are punished for "commenting upon matters of public concern" as a citizen, *see id.* at 568, coupled with the ability for public employers to "enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary" when matters of public concern are not implicated, *see Connick*, 461 U.S. at 146.

2. This flexible, case-specific approach remains vitally important for governments—as employers—to function effectively. As this Court has recognized, public employees often speak not "to evaluate the performance of the [public] office but rather to gather ammunition for another round of controversy with [their] superiors." *Connick*, 461 U.S. at 148; *see also, e.g.*, *Graziosi v. City of Greenville*, 775 F.3d 731, 738-39 (5th Cir. 2015) (holding that a police officer's speech was not of public concern because it was motivated by personal "displeasure" and "quickly devolved into a rant attacking" the police chief's leadership). Municipal governments are frequent targets of lawsuits, many of which result in employees testifying in court. Making *any* statement made in such proceedings presumptively immune from workplace discipline would severely impair municipal governments in their ability to manage disruptive or opportunistic employees who "foster disharmony" and "impair the efficiency of an office or agency." *Cf. Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell,

J., concurring in part and concurring in the result in part). For example, consider an employee who needlessly (or maliciously) discloses sensitive private information, like a disciplinary action or medical condition, from an employee's file.

Furthermore, such a categorical rule could vastly proliferate the number of retaliation suits local governments may face. Municipalities already often spend hundreds of thousands of dollars a year litigating claims arising from workplace grievances—and, as this Court has recognized, First Amendment retaliation claims are especially burdensome because they are "easy to allege and hard to disprove." *Crawford-El v. Britton*, 523 U.S. 574, 584-85 (1998) (citation omitted). Yet, under petitioner's approach, "virtually every remark" a public employee utters in court would "plant the seed of a constitutional case." *See Connick*, 461 U.S. at 149. That is untenable—and wholly unnecessary when the existing *Connick* framework already effectively balances competing interests in a flexible and fact-sensitive manner.

B. The Tenth Circuit Correctly Determined That The Testimony At Issue Here Was Not A Matter Of Public Concern

Petitioner also argues that, "[e]ven 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" because speech at a child custody hearing involves "content" that satisfies the *Connick* test "under any reasonable standard." Pet. 22. That is incorrect.

1. As an initial matter, this argument is outside the scope of the question presented. The petition presents only a single question: "Whether a

government employee's truthful testimony at a judicial hearing qualifies as speech on a matter of public concern . . . ." Pet. i. Although he might have, petitioner declined to present a *separate* question of whether sworn testimony in a child custody proceeding constitutes a matter of public concern. But it is not surprising that he declined to do so. Petitioner identifies only a single other circuit case that has ever addressed a First Amendment retaliation claim in that context—*Wright v. Illinois Department of Children & Family Services*, 40 F.3d 1492 (7th Cir. 1994). And, unlike this case, the testimony in *Wright* concerned a whistleblower's claims about a state agency's handling of child abuse cases, *see* 40 F.3d at 1502-05—a matter fundamentally different than the testimony here.

In any event, the Tenth Circuit correctly determined that no such categorical rule for "child custody proceedings" is warranted and that the testimony in this case did not raise a matter of public concern. "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," 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."'" *Lane*, 573 U.S. at 241 (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). Applying that framework, *Connick* held that a government employee's speech was not of public concern when it neither enabled the public to "evaluat[e] the performance" of a public official nor "br[ought] to light actual or potential wrongdoing or breach of public trust" on the part of those officials. *Connick*, 461 U.S. at 148. That is the case here.

Petitioner testified as a character witness for his sister-in-law in a child custody proceeding—a "purely personal dispute" with significance for the immediate, private parties involved, but "ordinarily not of general interest to the community as a whole." Pet. App. 25a. Moreover, petitioner's testimony regarding the hours of operation for the County Road and Bridge Department is uncontroversial (if not mundane) and already a matter of public knowledge. As the Tenth Circuit explained, testimony implicating whether an employee's work duties rendered that employee fit to care for a child—delivered with the personal motivation of helping one's family member resolve an intra-family custody dispute—does not remotely touch on a matter of concern for the public at large. Pet. App. 25a-27a. The content of petitioner's testimony, therefore, is plainly outside matters of "political, social, or other concern *to the community*," *Lane*, 573 U.S. at 241 (emphasis added) (citation omitted), and does not concern either the performance of or wrongdoing committed by a government office or official, *Connick*, 461 U.S. at 148. Under *Connick*, such purely private speech does not meet the "public concern" test.

2. Petitioner asserts that the State of Colorado's concern for the welfare of children transforms the unremarkable testimony at issue into speech implicating a matter of public concern. Pet. 24-25. Petitioner emphasizes, for example, that his testimony regarded the "best interests of the child," which is a matter of importance to the community. Pet. 22 (quoting Pet. App. 34a). But virtually any speech can be transformed into a question of public concern if defined at a sufficiently high level of generality. A dispute between neighbors over a tree

encroaching on a yard could be defined as speech regarding "zoning" or "land use policy"; or, a conversation between inmates on the quality of food served at dinner that day could be defined as a discussion of "prison conditions." *Connick* explained, however, that the public concern inquiry must be carefully trained on the *particular* speech at issue.

Communication "not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." *Connick*, 461 U.S. at 148 n.8. While "child custody," writ large, may be of public concern, the *particular* speech at issue here—petitioner's opinion of his sister-in-law and his view (accurate or not) on how her ex-husband's hours might impact his ability to care for the child—does not implicate any issue of community significance.

Finally, petitioner chides the Tenth Circuit for "brush[ing] aside petitioner's invocation of *Wright v. Illinois Department of Children & Family Services*, 40 F.3d 1492 (7th Cir. 1994)." Pet. 7. But that case offers petitioner no support. *Wright* did not hold that *any* testimony in a child custody hearing is of public concern, Pet. 22. And, the court rejected the kind of categorical rule that petitioner advances here. *See* 40 F.3d at 1505 ("[A]iring private gripes in the form of a complaint or testimony cannot alter their status as private gripes."). Instead, *Wright* simply held that the *specific* testimony at issue was of public concern, after reviewing its content and finding that it highlighted "procedural and substantive shortcomings" of a state agency's investigations into allegations of child abuse. *Id.* at 1502, 1505; *see also* Pet. App. 27a. *Wright* therefore provides an example

of the type of testimony in a child custody proceeding that *would* raise a matter of public concern, and reveals why petitioner's testimony does not.

Indeed, it is telling that petitioner fails to identify a single court of appeals case finding that testimony similar in content to the alleged testimony here raised a matter of public concern. To the contrary, the substance of petitioner's testimony is far afield from the types of testimony courts normally classify as raising matters of public concern. *See, e.g.*, *Salas v. Wis. Dep't of Corr.*, 493 F.3d 913, 925 (7th Cir. 2007) (testimony that sought to "expose widespread discrimination" was of public concern); *Karl*, 678 F.3d at 1069-70 (testimony that implicated the "exposure of 'significant government misconduct'" was of public concern (citation omitted)).

That is all the more reason to deny review.

III. THIS CASE IS A POOR CANDIDATE FOR THIS COURT'S REVIEW

Even if the question presented were otherwise certworthy, this case also represents an especially poor vehicle to address the question presented.

First, while petitioner asks this Court to grant review to clarify the scope of *Lane*, he glosses over a fundamental difference between this case and *Lane*: Unlike the plaintiff in *Lane*, petitioner here was not compelled to testify by subpoena, but rather did so voluntarily. That difference may have important implications for petitioner's theory and makes this case a particularly unsuitable candidate for addressing the contours of *Lane*.

A subpoenaed witness must comply, or risk a finding of contempt. *See* 18 U.S.C. § 401(3). By contrast, in the absence of a subpoena, a witness can

always decline to attend, or refrain from speaking on certain matters. Indeed, a voluntary witness—like petitioner in this case—makes an active decision to inject himself into the adversarial process. The fact that a witness's voluntary testimony on private matters may expose him to certain consequences, such as demotion or termination, raises a fundamentally different question to whether such penalties are appropriate for testimony that is *compelled* by a subpoena.

Nor is there any reason to assume that a witness *would* have been subpoenaed if he chose not to appear, especially when it comes to private disputes. The decision to issue a subpoena is informed by numerous considerations, including the possibility that a witness who is *compelled* to appear (after declining to do so voluntarily) may testify in a less cooperative or helpful manner than a witness who voluntarily appears.

Second, any determination by this Court of whether petitioner's testimony raises a matter of public concern would be premised on a murky and largely incomplete set of allegations, and would not alter the inevitable result in this case.

Petitioner repeatedly grounds his proposed rule on the assumption that the judicial testimony at issue is truthful. *See, e.g.*, Pet. 2-3; *see also Lane*, 573 U.S. at 238. Yet petitioner's complaint is striking in that it provides almost no detail whatsoever on the content of his speech or any foundation for why it was truthful, beyond the bare, conclusory allegation that he was retaliated against for "truthful testimony." Compl. ¶ 24; *see also id.* ¶ 19 (alleging that petitioner "responded truthfully" to questions, with no mention of the content of his responses). Therefore, even if the

Court were to accept petitioner's proffered categorical rule, petitioner's claim would likely be dismissed because he failed to adequately "plead[] factual content that allows the court to draw the reasonable inference that" his testimony was truthful. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Morozin*, 2019 WL 3824228, at *5 (concluding plaintiff's allegations were "too vague" to establish his testimony implicated a matter of public concern).

Moreover, the collateral state court litigation brought by petitioner casts serious doubt on petitioner's claim that his testimony was truthful. Although unclear from petitioner's complaint, petitioner testified at the child custody hearing that the work schedule at the San Miguel County Road and Bridge Department—where the ex-husband of petitioner's sister-in-law was employed—would not be conducive for the ex-husband to have parenting time with his son. SJ Order 3. But petitioner did not work in the same district as his sister-in-law's ex-husband, did not oversee the ex-husband, and did not know that the ex-husband had obtained accommodations from his supervisors which took into account his parental responsibilities. SJ Mot. 7. Petitioner's testimony regarding the ex-husband's work schedule was therefore suspect at best. This undermines a key premise on which the question presented is based.

Third, petitioner's claim is almost certain to fail regardless of whether the Court adopts his categorical rule. As just discussed, it is unlikely that petitioner would be able to establish on summary judgment or at a trial that his testimony was truthful. In addition, even if petitioner could meet the "public concern" requirement, his claim would almost certainly fail under the second step of the *Connick* framework.

Even accepting the allegations as true, petitioner has failed to plead adequate factual content for a court to reasonably infer that his employer lacked an "adequate justification" for taking the adverse employment action. *See Garcetti*, 547 U.S. at 418; *Iqbal*, 556 U.S. at 678. The fact that any holding in this case would not be outcome-determinative provides yet another reason to deny the petition.

IV. THE PETITION VASTLY OVERSTATES THE IMPORTANCE OF THIS CASE

Petitioner proclaims that the Tenth Circuit's opinion will "dramatically curtail" the First Amendment rights of public employees and "threatens the very foundations of the judiciary." Pet. 26. Petitioner's fears are unfounded.

Far from undermining free speech within the Tenth Circuit, the decision below simply reaffirms the standard by which First Amendment retaliation claims have been analyzed for decades. *See Connick*, 461 U.S. at 147-48. Even petitioner admits that the decision below has long reflected the majority rule in the courts of appeals. Pet. 3. And the Tenth Circuit itself stressed that even absent a categorical rule, a public employee's judicial testimony routinely "will involve matters of public concern," and thus be protected. Pet. App. 12a. There is nothing to support petitioner's sweeping and overwrought assertion that the decision below will stifle employee speech.

The availability of alternative avenues of relief further undercuts petitioner's contention that the decision below will have far-reaching consequences. As this case illustrates, even where the First Amendment does not afford a right to relief, government employees will be able to pursue

remedies under various federal and state statutes. *See, e.g.*, 42 U.S.C. § 2000e-3(a). Thus, after the Tenth Circuit rejected petitioner's First Amendment claim, petitioner proceeded with a separate lawsuit in state court raising two claims under Colorado law. *See* Colo. Rev. Stat. § 24-34-402.5 (Lawful Activities Statute); *id.* § 8-2.5-101 (Freedom of Legislative and Judicial Access Act). Many of these statutes—like the Colorado laws—go even further than the First Amendment by protecting employees from adverse employment action in retaliation for speech on matters of *private* concern. Such additional protections undercut petitioner's overheated claims about the supposed "chilling effect" of a rule that considers the *content* of speech in deciding whether it is a matter of public or private concern.

Petitioner's assertion that there will be devastating consequences if this Court denies review is therefore dramatically overstated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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