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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

Respondents acknowledge that, prior to *Lane* v. *Franks*, 573 U.S. 228 (2014), the circuits were deeply divided over whether truthful testimony at a judicial hearing qualifies as speech on a matter of public concern. Opp. 2 (noting the "acknowledged conflict"). They also do not dispute that *Lane* has failed to resolve that split. To the contrary, Respondents admit that *Lane* has led to further division: They observe that the Sixth and Tenth Circuits have "held that *Lane precludes* * * * [a] categorical rule," while the Fifth Circuit has held that *Lane supports* "a categorical approach." Opp. 1-2.

Respondents nonetheless argue that certiorari is unwarranted because the Fifth Circuit—as well as the Third Circuit, which has long taken the same position—"may soon" reverse course. Opp. 14. That prediction, however, is self-refuting. The Fifth and Third Circuits have *already* considered the question presented since *Lane*, and both have reaffirmed their longstanding positions. Respondents offer no plausible way of distinguishing those decisions. And Respondents' assertion that their reading of *Lane* is so clearly correct that every circuit will inevitably join them, Opp. 7-11, is belied not only by two contrary appellate decisions and the views of four en banc dissenters, but by the language and reasoning of *Lane* itself.

This intractable disagreement is badly in need of the Court's intervention. The circuits are demonstrably unable to resolve their division on their own. The Tenth Circuit's rule would give governments a free hand to punish employees simply for fulfilling their "obligation, to the court and society at large, to tell the truth," *Lane*, 573 U.S. at 238, sapping both the judiciary and the public of information on which they vitally depend. *See* Amicus Br. of First Amendment Scholars 3-13; Amicus Br. of Gov't Accountability Project 5-10. And despite Respondents' attempt to gin up a vehicle problem—through the wholly improper maneuver of citing non-record documents, expressly rejected by the courts below, at the motion-to-dismiss stage, *see* Opp. 23-25—this case is a clean vehicle to resolve the issue. Certiorari should be granted.

ARGUMENT

I. THE CIRCUITS ARE INTRACTABLY SPLIT.

Respondents do not deny that the circuits are divided on the question presented. Opp. 2. Nor could they. The Tenth Circuit expressly "reject[ed] *** [t]he rule Butler suggests, and which several circuits have adopted," in favor of the approach taken by "a majority of other circuits." Pet. App. 3a, 24a. The en banc dissent noted the "existing circuit split." *Id.* at 53a. And numerous other courts have acknowledged the same division of authority, both before *Lane* and after. *See, e.g.*, *Rorrer* v. *City of Stow*, 743 F.3d 1025, 1048 (6th Cir. 2014); Pet. 9.

Lacking any plausible basis to dispute the split, Respondents rest their case against certiorari on the optimistic prediction that this intractable division "may soon" resolve itself. Opp. 14. According to Respondents, "the available indication" is that *Lane* will cause the Third and Fifth Circuits to revisit their positions. *Id.* at 2, 11-14. But just the opposite is true: Both courts have reaffirmed their positions in the years since *Lane*.

The panel below acknowledged as much: It observed that, "[a]fter *Lane*, the Fifth Circuit reaffirmed its per se rule." Pet. App. 14a n.4. In *Lumpkin* v. *Aransas County*, 712 F. App'x 350 (5th Cir. 2017) (per curiam), the Fifth Circuit repeated its longstanding position that "when a witness testifies before a 'fact finding body hearing an official matter' the form and context of the speech is 'sufficient to elevate the speech to the level of public concern.'" *Id.* at 358 (quoting *Johnston* v. *Harris Cty. Flood Control Dist.*, 869 F.2d 1565, 1577-78 (5th Cir. 1989)). It then held that *Lane* "has not 'unequivocally abrogat-

ed' this line of cases," *id.* (citation omitted)—the standard the Fifth Circuit applies to determine whether a Supreme Court decision has "'expressly or implicitly' overrule[d] one of [its] precedents." *United States* v. *Tanksley*, 848 F.3d 347, 350 (5th Cir. 2017). "*Rather*," the court explained, *Lane* made clear that "'the form and context'" of a plaintiff's sworn judicial testimony "elevate the testimony to a matter of public concern." *Lumpkin*, 712 F. App'x at 358-359 (emphasis added) (quoting *Lane*, 573 U.S. at 241).

Respondents critique this decision as lacking in "reasoning," and claim that, because it is unpublished, it is "uncertain" whether subsequent Fifth Circuit panels will follow suit. Opp. 13. But the decision is not unreasoned; it quotes and relies on language from *Lane* that supports the Fifth Circuit's longstanding approach. *See Lumpkin*, 712 F. App'x at 358-359. And *Lumpkin* simply applied the Fifth Circuit's settled rule that "one panel * * * may not overrule another" unless "the Supreme Court unequivocally abrogated" the earlier precedent. *Tanksley*, 848 F.3d at 350 (citation omitted). It then squarely (and correctly) held that *Lane* did not satisfy that standard, but "[r]ather" supported its established precedent. 712 F. App'x at 358. The binding rule of law in the Fifth Circuit thus remains that in-court testimony is "inherently of public concern." *Johnston*, 869 F.2d at 1577-78.

Respondents suggest that district courts in the Fifth Circuit have unilaterally abandoned circuit precedent. Opp. 12-13. That is incorrect. Since *Lane*, district courts in the Fifth Circuit have continued to hold that when an employee gives sworn

testimony, "he speaks in a context that is *inherently of public concern*." *Cantu* v. *City of Corpus Christi*, No. 2:15-CV-71, 2017 WL 841117, at *4 (S.D. Tex. Mar. 1, 2017) (emphasis added) (quoting *Johnston*, 869 F.2d at 1578). Respondents cherry-pick two cases to show otherwise, but those cases merely noted that certain testimony was clearly of public concern because of its topic, without questioning (let alone purporting to abandon) the Fifth Circuit's well-settled rule. *See Lott* v. *Forrest County*, No. 2:14-CV-131, 2015 WL 7015315, at *7-8 (S.D. Miss. Nov. 10, 2015); *Ybarra* v. *Tex. Health & Human Servs. Comm'n*, No. B-17-174, 2018 WL 3949972, at *12 (S.D. Tex. June 13, 2018).

The Third Circuit has also reaffirmed its position in the years since *Lane*. In *Falco* v. *Zimmer*, 767 F. App'x 288 (3d Cir. 2019), the Third Circuit discussed *Lane* at length before repeating its longstanding rule that "*[a]ll* court appearances are matters of public concern * * * because *all* court appearances implicate the public's interest in the integrity of the truth seeking process and the effective administration of justice." *Id.* at 307 (emphases added) (quoting *Green* v. *Philadelphia Hous. Auth.*, 105 F.3d 882, 888 (3d Cir. 1997)). The Third Circuit then applied that precedent to hold that filing a lawsuit is necessarily speech of public concern, without discussing or relying on the suit's content. *Id.* at 307-308.

Remarkably, Respondents ignore this directly on-point language, even going so far as to claim that the opinion "[n]owhere" applies "any per se rule." Opp. 11-12. But wishing away unfavorable language does not make it so. Instead, Respondents focus on a later section of the opinion, in which the court addressed a

different allegation of protected activity. All that the court said there, however, was that an employee's testimony "*clearly* involve[d] a matter of *significant* public concern" because it involved "alleged discrimination and retaliation." *Falco*, 767 F. App'x at 309 (emphases added). The court did not repudiate its statement, two pages earlier, that "[a]ll court appearances are matters of public concern." *Id.* at 307 (quoting *Green*, 105 F.3d at 888). Nor did it overturn its other post-*Lane* precedent invoking and relying on the same rule. *See Anderson* v. *Warden of Berks Cty. Prison*, 602 F. App'x 892, 894 (3d Cir. 2015) (per curiam) ("[W]e have held that an individual has a First Amendment right to respond to a subpoena and testify in a third party's case." (citing *Pro* v. *Donatucci*, 81 F.3d 1283, 1290 (3d Cir. 1996))).

Respondents again try to find some district court that has defied circuit precedent, but again they come up empty-handed. Since *Lane*, district courts in the Third Circuit have repeatedly invoked and applied the Third Circuit's rule that a "voluntary appearance before a court constitutes a matter of public concern." *Falco* v. *Zimmer*, No. 13-1648, 2015 WL 7069653, at *8 (D.N.J. Nov. 12, 2015), *aff'd in part*, 767 F. App'x 288; *see also Carlson* v. *Beemer*, 225 F. Supp. 3d 297, 303-308 (M.D. Pa. 2016); *Noonan* v. *Kane*, 305 F. Supp. 3d 587, 602-603 (E.D. Pa. 2018). Respondents cite *Morozin* v. *Philadelphia Housing Authority*, No. 18-2174, 2019 WL 3824228 (E.D. Pa. Aug. 13, 2019), but the court there did not reach the First Amendment question; it dismissed the plaintiff's complaint because of "pervasive deficienc[ies]" in pleading. *Id.* at *1, *4-5.

As a last-ditch effort, Respondents argue that the Third and Fifth Circuits are so "fundamentally mistaken" that they are bound to agree with Respondents before long. Opp. 7-14. Respondents' confidence is commendable, but as a case against certiorari, this argument is less than compelling. Not only have the Third and Fifth Circuits expressly declined to adopt Respondents' position, but four dissenters below emphatically rejected the panel's reading of *Lane*, Pet. App. 53a-58a; and multiple district courts have read *Lane* as supporting a per se rule, as well, *see, e.g. Montoya* v. *Morgan*, No. 3:16-cv-92, 2018 WL 4701795, at *14 (N.D. Fla. Sept. 30, 2018). There is simply no realistic prospect that "the lower courts will reach uniformity without the Court's intervention." Opp. 2.

II. THE TENTH CIRCUIT'S DECISION IS INCORRECT.

Respondents also fail to offer any plausible defense of the Tenth Circuit's decision on the merits.

This Court held in *Lane* that "*[a]nyone* who testifies in court bears an obligation, to the court and society at large, to tell the truth," and that "testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action." 573 U.S. at 238, 241 (emphasis added; citation omitted). The Court also held twice, and without qualification, that "the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities." *Id.* at 238; *see id.* at 231. These holdings leave no room for the Tenth Circuit's conclusion that a wide swathe of

sworn judicial testimony is of purely private concern. Pet. 19-21; *see* Amicus Br. of First Amendment Scholars 6-8.

Respondents answer these unfavorable holdings by disregarding them. They ignore entirely the Court's statements about the importance of testimony to "society at large" and "official governmental action." As for the Court's unqualified holding that "the First Amendment protects a public employee who provides truthful sworn testimony," Respondents speculate that the Court misspoke (twice), and really meant "simply" to "reject[] the Eleventh Circuit's rigid approach to the 'citizen' requirement." Opp. 10. That strains credulity. The relevant statements appear nowhere near the Court's brief discussion of the Eleventh Circuit's rule, *see Lane*, 573 U.S. at 239-240, and the opinion expressly addresses both the "citizen" and "public concern" prongs of *Pickering*, *id.* at 241.

Respondents also place dispositive weight (Opp. 9) on the Court's observation 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." *Id.* But the Court said only that the content of Lane's speech is what made it "obviously" of "significant" public concern. In the very next sentence, the Court went on to explain that the "form and context" of his testimony also rendered it of public concern, because any "testimony under oath * * * will be the basis for official governmental action." *Id.* (citation omitted). Respondents suggest that content is *always* necessary to render speech of public concern, but this Court's precedents say just the opposite: They hold

that "no factor is dispositive" in the public concern inquiry. *Snyder* v. *Phelps*, 562 U.S. 443, 454 (2011).

In any event, even if there were some rare circumstance in which judicial testimony is not of public concern, this case is not it. Pet. 22-25. As Respondents concede, Butler testified about whether a potential guardian could afford "adequate parenting time" to his son, Opp. 3, a matter of central importance to a child custody determination and in which Colorado law explicitly states there is a "public interest," Pet. App. 33a-36a (Lucero, J., dissenting). Respondents suggest that "matters of public concern" are limited to issues related to the performance or wrongdoing of public officials. Opp. 19-20. To the contrary, this Court has held that "the opening of a new play," *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967), the name of a crime victim, *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 492 (1975), and a "comment[ ] * * * on an item of political news," *City of San Diego* v. *Roe*, 543 U.S. 77, 84 (2004) (per curiam), are all matters of public concern. Testimony that will assist a court in placing a child in an appropriate home plainly ranks as comparably important. *See* Pet. 22-25; Amicus Br. of First Amendment Clinic at Duke Law School 11-14.

Respondents argue that the question whether Butler's testimony is of public concern is outside the question presented. Opp. 18-19. Not so. The question presented asks whether "a government employee's truthful testimony at a judicial hearing qualifies as speech on a matter of public concern." Pet. i. The Court could answer that question by adopting a categorical rule, as the Third and Fifth Circuits have done, or a "strong presumption," like the Second Circuit and the en banc dissenters below. Pet. 56a-

57a. Under either approach, however, it is clear that the Tenth Circuit was wrong in holding that Butler's speech is entitled to no First Amendment protection at all.

III. THIS QUESTION PRESENTED IS OF ENORMOUS IMPORTANCE, AND THIS CASE PRESENTS AN IDEAL VEHICLE.

The question presented is of surpassing importance. Permitting governments to penalize their employees for delivering truthful testimony poses a severe threat to the integrity of the judicial system, Amicus Br. of First Amendment Scholars 6-13, and to the ability of the public to learn truthful information through court proceedings, *see* Amicus Br. of Gov't Accountability Project 5-10.

Respondents speculate that the circuit split is "of limited practical significance." Opp. 14-15. Even a brief survey of the case law demonstrates otherwise. In circuits that apply a case-by-case approach, courts regularly hold that truthful testimony is not of public concern. For example, courts have denied protection to testimony concerning police misconduct, *Freelain* v. *Vill. of Oak Park*, No. 17 C 6592, 2018 WL 1635853, at *3-5 (N.D. Ill. Apr. 5, 2018), the truthfulness of a highway patrol officer, *Hathaway* v. *Cal. Dep't of Forestry & Fire Prot.*, No. 1:18-cv-01155, 2019 WL 132277, at *5-7 (E.D. Cal. Jan. 8, 2019), the termination of a criminal defendant's domestic violence treatment, *Clairmont* v. *Wilson*, No. C08-507Z, 2009 WL 2713918, at *5-7 (W.D. Wash. Aug. 27, 2009), and racial discrimination in a state prison, *Hatch* v. *Lee*, No. 93 C 4497, 1994 WL 604049, at *3 (N.D. Ill. Nov. 3, 1994). Every one of those cases

would have come out differently in the Third and Fifth Circuits.

Respondents also claim that some state laws might provide protection for truthful testimony even where courts deny First Amendment protection. Opp. 25-26. The very purpose of the Constitution, however, is to ensure that citizens receive uniform protection without needing to rely on the grace of state legislatures. And Respondents' support for their assurance is hardly comforting: They cite a grand total of two statutes from one state, both of them limited in scope and riddled with qualifications. *See* Colo. Rev. Stat. §§ 24-34-402.5(1)(a)-(b), 8-2.5-101(1)(a)-(b).

Finally, Respondents raise a series of meritless vehicle objections. They observe that Butler was not served with a subpoena before testifying. Opp. 22-23. *Lane*'s reasons for deeming sworn testimony of public concern, however, did not turn on the presence of a subpoena. *See* 573 U.S. at 241. The Third and Fifth Circuits, moreover, have held that their categorical rule applies even where testimony is "voluntary." *Green*, 105 F.3d at 887; *see Kinney* v. *Weaver*, 367 F.3d 337, 362 n.28 (5th Cir. 2004) (en banc). In any event, it is undisputed that Butler "would have been required to testify pursuant to a subpoena had he not agreed to testify," rendering his testimony voluntary in name only. Pet. App. 4a.

Respondents also claim that non-record documents submitted in a separate case call into question whether Butler testified "truthfully," as his complaint alleges. Opp. 3-4, 23-24. This case, however, was decided on Respondents' motion to dismiss, and so both lower courts were required to (and did) accept Butler's allegations as true. Pet. App. at 4a,

41a-42a. Furthermore, both lower courts expressly rejected Respondents' attempt to add documents to the record. *See id.* at 4a-5a & n.2, 43a-44a. It is wholly improper for Respondents to contest the allegations in Butler's complaint, and the findings of two courts below, by invoking the very documents that two lower courts refused to consider. *See Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (this Court does not "undertake to review concurrent findings of fact by two courts below" (citation omitted)). And the payoff of this gambit is decidedly underwhelming: Even Respondents do not contend that Butler's testimony was actually untruthful, but merely speculate—incorrectly—that Butler might have lacked sufficient knowledge to testify. *See* Opp. 4, 24.

Respondents are also wrong that Butler needed to plead "adequate factual content for a court to reasonably infer that his employer lacked an 'adequate justification'" for disciplining him. Opp. 25. It is "the *employer*," not the employee, that "bears the burden of justifying its regulation of the employee's speech." *Brammer-Hoelter* v. *Twin Peaks Charter Acad.*, 492 F.3d 1192, 1207 (10th Cir. 2007) (citing *Connick* v. *Myers*, 461 U.S. 138, 150 (1983)). Butler therefore had no obligation to include such allegations in his complaint. *See Trant* v. *Oklahoma*, 426 F. App'x 653, 661-662 (10th Cir. 2011). It suffices that he alleges that he testified truthfully and that the County punished him for exercising that First Amendment right.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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