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 OF AMICI CURIAE FIRST AMENDMENT SCHOLARS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici are legal scholars who teach and write about First Amendment rights, including the rights of public employees.[2] This brief argues that allowing the Tenth Circuit's decision to stand would jeopardize important First Amendment protections for truthful testimony by public employees. Amici file this brief to urge the Court to resolve the renewed split in the circuits, correct the Tenth Circuit's misreading of *Lane v. Franks*, 573 U.S. 228 (2014), and ensure the proper protection of both public employees' First Amendment rights and the truth-seeking function of the judicial system. Amici include: RonNell Andersen Jones, Associate Dean of Research & Teitelbaum Chair of Law, University of Utah S.J. Quinney College of Law; Cynthia Boyer, Associate Professor, Institut Maurice

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[1] No counsel for a party authored any part of this brief or made any monetary contribution to it. Pursuant to Rule 37.2(a), counsel for amici represents that all parties have consented to the filing of this brief by filing general consents with the clerk. Timely notice was provided to the parties.

[2] Amici writings related to the First Amendment rights of public employees include: Heidi Kitrosser, *On Public Employees and Judicial Buck-Passing: The Respective Roles of Statutory and Constitutional Protections for Government Whistleblowers*, 94 Notre Dame L. Rev. 1699 (2019); Heidi Kitrosser, *Public Employee Speech and Magarian's Dynamic Diversity*, 95 Wash. U. L. Rev. 1405 (2018); Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 Supreme Court Review 301 (2015); Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 Duke L.J. 1 (2009); Greg Magarian, *Managed Speech: The Roberts Court's First Amendment* 79–88 (2017).

Hauriou (Université Toulouse Capitole)/Institut National Universitaire Champollion; Alan K. Chen, Professor of Law, University of Denver Sturm College of Law; Eric B. Easton, Professor of Law Emeritus, University of Baltimore School of Law; Craig B. Futterman, Clinical Professor of Law, University of Chicago Law School; Heidi Kitrosser, Robins Kaplan Professor of Law, University of Minnesota Law School; Lyrissa Lidsky, Dean and Judge C.A. Leedy Professor of Law, University of Missouri School of Law; Gregory P. Magarian, Thomas and Karole Green Professor of Law, Washington University in St. Louis School of Law; Helen Norton, Rothgerber Chair in Constitutional Law, University of Colorado School of Law; Richard J. Peltz-Steele, Chancellor Professor, University of Massachusetts Law School; Tamara R. Piety, Professor of Law, University of Tulsa College of Law. Amici file this brief in their individual capacities.

SUMMARY OF ARGUMENT

This Court should grant certiorari because the Tenth Circuit's decision below misconstrues *Lane* and resurrects a circuit split that immediately threatens the First Amendment rights of 1.4 million public employees in the Tenth Circuit and risks chilling the speech of millions more. The decision undermines long-established case law recognizing that truthful sworn testimony is inherently a matter of public concern because it forms the basis for official government action. By eroding protection for testimony by public

employees, the decision also risks depriving courts of important evidence on which they rely in their search for truth. In addition, the Tenth Circuit's narrow view of the public employee speech that is protected by the First Amendment forces public employees to choose between their livelihood and their constitutional rights, deprives the public of valuable speech by public employees, and allows the government to leverage its position as an employer to engage in viewpoint discrimination that suppresses disfavored speech.

ARGUMENT

I. THIS COURT'S GUIDANCE IS REQUIRED TO AVOID RESURRECTING A CIRCUIT SPLIT THAT THREATENED THE RIGHTS OF MILLIONS OF PUBLIC EMPLOYEES TO OFFER TRUTHFUL TESTIMONY.

Before this Court's opinion in *Lane*, there was considerable disagreement among the circuits about whether and when the First Amendment protects public employees who offer truthful sworn testimony, resulting in a 4–3 circuit split. *See* Petition for Writ of Certiorari at 10–19. This Court granted certiorari in *Lane* expressly to "resolve discord among the Courts of Appeals" by deciding "whether 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 235, 238. The Court's answer to that question was clear: "it does." *Id*. Under a proper reading of *Lane*,

Petitioner's testimony is categorically protected by the First Amendment.

The Tenth Circuit's decision re-opens the circuit split that this Court closed in *Lane* and adopts a cramped interpretation of the "public concern" test that runs afoul of this Court's well-established protection of public employee speech. In doing so, the opinion revives the confusion that *Lane* should have put to rest. This Court should grant certiorari to avoid further division among lower courts and to reiterate *Lane*'s protection for truthful testimony by public employees speaking as citizens. Under the Tenth Circuit's decision, public employees who provide truthful testimony have no clear standard to assess whether their testimony is sufficiently of "public concern" to bring it within the protection of the First Amendment, or whether their statement leaves them without protection against retaliation or firing by their government employer. In short, they must "guess what conduct or utterance may lose [their] position." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967). And because public employees who take the stand have no way of knowing the diverse range of questions they may be required to answer and no right to refuse a question because the answer might trigger retribution from their superiors, this is exactly the sort of "uncertainty" that will "perniciously chill speech." *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 751 (1996) (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486–87 (1965)).

This chilling effect will touch a vast number of citizens. The Tenth Circuit's failure to follow *Lane*

immediately threatens the First Amendment rights of the 1.4 million public employees in states within the Tenth Circuit—approximately one out of every 13 people in those states.[3] And by undermining *Lane* and reopening the circuit split as to whether truthful testimony qualifies as speech on a matter of public concern, the Tenth Circuit's decision creates uncertainty about the First Amendment rights of more than 22 million public employees nationwide.[4]

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[3] The United States Census Bureau's annual survey of public employment indicates that the state and local governments within the Tenth Circuit employ 1,260,375 workers. United States Census Bureau, 2018 Annual Survey of Public Employment & Payroll Methodology, Individual Unit Files, https://www.census.gov/data/datasets/2018/econ/apes/annual-apes.html (as last visited Sept. 26, 2019). In addition, the Office of Personnel Management reports that as of September 2017, the executive branch of the federal government had 143,046 civilian employees in states within the Tenth Circuit. United States Office of Personnel Management, Federal Civilian Employment—September 2017, https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/federal-civilian-employment (as last visited Sept. 26, 2019). This data excludes postal workers, who number about 500,000 nationwide. United States Postal Service, Sizing it Up, https://facts.usps.com/size-and-scope (as last visited Sept. 26, 2019). The Tenth Circuit had an estimated 2018 population of approximately 18,384,000. United States Census Bureau, Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2018, https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2018/PEPANNRES (as last visited Sept. 26, 2019).

[4] Bureau of Labor Statistics, Data Retrieval: Employment, Hours, and Earnings (CES), Table B-1: Employees on Nonfarm Payrolls by Industry Sector and Selected Industry Detail, https://www.bls.gov/webapps/legacy/cesbtab1.htm (as last visited Sept. 26, 2019) (data available by selecting "government" from industry list).

II. TRUTHFUL TESTIMONY IN COURT INHERENTLY INVOLVES A PUBLIC CONCERN, AND THE FIRST AMENDMENT THEREFORE PROTECTS IT.

"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 (internal quotation marks omitted). As this Court concluded in *Lane*, truthful sworn testimony by a public employee that is outside of his or her ordinary job responsibilities categorically satisfies this standard. This holding in *Lane* reinforces the longstanding recognition of the public's interest in sworn witness testimony and the witness' duty to society at large to testify truthfully. Because such testimony may be the basis for official governmental action and because of the public's clear interest in the fair conduct of judicial proceedings, this Court has long treated what is said in court an inherent matter of public concern.

A. Centuries Of Precedent Recognize That The Public Has An Inherent Interest In Court Proceedings.

The public has a recognized interest in the conduct of court proceedings. "[H]istorically[,] both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) (plurality opinion); *see also Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983) ("Throughout our history, the open

courtroom has been a fundamental feature of the American judicial system."). This tradition recognizes that although "individual cases turn upon the controversies between parties, . . . court rulings impose official and practical consequences upon members of society at large." *Richmond Newspapers*, 448 U.S. at 595 (Brennan, J., concurring). For these reasons, this Court has made clear that not only is what "transpires in the court room" a matter of public concern, but it is also "public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947) (reversing a judgment holding journalists in criminal contempt for reporting on a civil trial involving a dispute between private parties about who had the right to lease a building); *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (prohibiting states from "impos[ing] sanctions on the publication of truthful information contained in official court records open to public inspection," in part because public court records "by their very nature are of interest to those concerned with the administration of government"). The public's confidence in the judiciary is inseparable from public access to judicial proceedings. *See Press-Enter. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 13 (1986) ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.") (quoting *Richmond Newspapers*, 448 U.S. at 572).

Witness testimony plays a fundamental role in the adjudicatory process. "Unlike speech in other contexts, 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, action that often affects the rights and liberties of others." *United States v. Alvarez*, 567 U.S. 709, 721 (2012) (plurality opinion). A witness' words can send someone to prison, compel a million-dollar judgment, or determine who gets custody of a child. As this Court noted in *Lane*, testifying witnesses "bear an obligation, to the court and to society at large, to tell the truth." *Lane*, 573 U.S. at 238. Truthful testimony safeguards "[t]he very integrity of the judicial system and public confidence in the system" by promoting "full disclosure of all the facts. . . ." *United States v. Nixon*, 418 U.S. 683, 709 (1974). Indeed, the judiciary's ability "to separate truth from falsity[ ] and the importance of accurately resolving factual disputes in criminal (and civil) cases" require that "those involved in judicial proceedings should be given every encouragement to make a full disclosure of all pertinent information within their knowledge." *Imbler v. Pachtman*, 424 U.S. 409, 439 (1976) (White, J., concurring) (internal quotation marks omitted).

B. Because Of The Immense Public Importance Of Court Testimony, Witnesses Have A Civic Duty To Testify.

It is precisely because of the public's interest in the administration of justice through the courts—and the key role testimony plays in that process—that this Court has consistently recognized that citizens have a civic duty to give testimony. In *Jaffee v. Redmond*, this Court explained that "there is a general duty to give

what testimony one is capable of giving. . . ." 518 U.S. 1, 9 (1996) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)); *see also Blackmer v. United States*, 284 U.S. 421, 438 (1932) ("[O]ne 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.") (citing *Blair v. United States*, 250 U.S. 273, 281 (1919)). Even though this duty may be "onerous at times," it is nonetheless "necessary to the administration of justice according to the forms and modes established in our system of government." *Blair*, 250 U.S. at 281. The civic obligation to testify is so firmly rooted in our jurisprudence that "[n]o one, not even the President of the United States, can automatically avoid testifying in a deposition, before a grand jury, or in a courtroom." *Barnett v. Norman*, 782 F.3d 417, 422 (9th Cir. 2015) (citing *Clinton v. Jones*, 520 U.S. 681, 704–05 (1997)).

The duty to testify is indeed so important that it is limited only by constitutional rights (such as the Fifth Amendment right against self-incrimination) and a few "distinctly exceptional" evidentiary privileges arising from "a substantial individual interest" that have been determined "through centuries of experience[] to outweigh the public interest in the search for truth." *Bryan*, 339 U.S. at 331. These "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." *Herbert v. Lando*, 441 U.S. 153, 175 (1979) (quoting *Nixon*, 418 U.S. at 710) (rejecting claim of First Amendment privilege in

defamation suit); *see also University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) ("Inasmuch as testimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence . . . any such privilege must be strictly construed.") (quotation marks and citations omitted). Even civically important private confidences, as between journalists and their sources, give way to the parties' right to demand evidence. *See*, *e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (declining to extend First Amendment protections to reporters resisting a grand jury subpoena for information they obtained in confidence).

C. The Vital Importance Of Witness Testimony To The Public Underlies This Court's Recognition Of Absolute Civil Immunity For Testifying Witnesses.

That the substance of witness testimony is a matter of public importance is also reflected in the special protection that immunizes witnesses from civil liability. The immunity of "witnesses from subsequent damages liability for testimony in judicial proceedings was well established" in common law. *Briscoe v. LaHue*, 460 U.S. 325, 330–31 (1983) (citing *Cutler v. Dixon*, 76 Eng. Rep. 886 (Q.B. 1585); *Anfield v. Feverhill*, 80 Eng. Rep. 1113 (K.B. 1614); *Henderson v. Broomhead*, 157 Eng. Rep. 964, 968 (Ex. 1859)). This special protection is rooted in the public policy of "insur[ing] freedom of speech where it is essential that freedom of speech should exist." *Imbler*, 424 U.S. at 440 (White, J.,

concurring) (internal quotation marks omitted). Justice requires that "all persons participating in judicial proceedings . . . should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences." *Id.* (internal quotation marks omitted); *see also Briscoe*, 460 U.S. at 332–33 (explaining that where a plaintiff wishes to sue a witness based on statements made in court, "the claims of the [plaintiff] must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible") (quoting *Calkins v. Sumner*, 13 Wis. 193, 197 (1860)). The case law reflects that it is society's interest in promoting the just resolution of legal disputes—and not simply the needs of individual parties in individual cases—that justifies protecting witnesses from liability.

D. The Tenth Circuit's Decision Deprives The Courts Of Information They Need To Carry Out Justice.

The Tenth Circuit departs from established law treating witness testimony as a matter of public concern, and its decision risks distorting speech that is crucial to the integrity of the judicial process. As this Court explained in *Briscoe*, even if a witness who fears retaliation does not lie on the stand, the witness may offer answers with less detail or "shade his testimony . . . to magnify uncertainties." 460 U.S. at 333 (discussing how the threat of damages liability may impact a

witness' testimony). This self-censorship threatens to "deprive the finder of fact of candid, objective, and undistorted evidence" that is required for the proper functioning of the judicial system. *Id.* This Court similarly recognized the importance of protecting statements that courts rely upon in *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001), which held that a grant funding restriction that prohibited legal assistance organizations from engaging in any representation involving a challenge to existing welfare law violated the First Amendment. The Court concluded that "[b]y seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the [statute] prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.* at 545. No less than attorney speech (and arguably much more so), the truthful testimony of witnesses is "expression upon which the courts must depend for the proper exercise of judicial power" and is protected by the First Amendment.

The Tenth Circuit's conclusion that Petitioner's truthful sworn testimony in a child custody proceeding cannot be "fairly considered as relating to any matter of political, social, or other concern to the community," *Lane*, 573 U.S. at 241, contradicts not only this Court's recent decision in *Lane*, but centuries of law recognizing that disputes in court are not private matters, but government proceedings in which the public has an interest. The tradition of open access to judicial proceedings, the nature of the duty to testify as one owed to the public at large, and the immunity extended to

witnesses all affirm that the substance of sworn witness testimony is a matter of community concern. The Tenth Circuit's failure to protect witnesses from retaliation by public employers threatens to deprive the public and courts of essential information and imperils courts' ability to fully and fairly adjudicate the rights of parties.

III. THE TENTH CIRCUIT'S FAILURE TO RECOGNIZE THAT SWORN TESTIMONY IS A MATTER OF PUBLIC CONCERN UNDERMINES CRUCIAL FIRST AMENDMENT PROTECTIONS.

This Court has recognized its "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Connick v. Myers*, 461 U.S. 138, 147 (1983). Yet the Tenth Circuit has authorized precisely such a deprivation. The decision below forces public employees to choose between their livelihood and their constitutional rights, allows the government to leverage its position as an employer to deprive the public of valuable speech by public employees, and risks licensing the government to engage in viewpoint discrimination.

A. The Tenth Circuit's Decision Impermissibly Forces Public Employees To Relinquish Their First Amendment Rights.

This Court's precedent establishes that "public employees do not renounce their citizenship when they

accept employment." *Lane*, 573 U.S. at 236. The government "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression," *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) (quoting *Connick*, 461 U.S. at 142), nor use a threat of adverse action to "produce a result which [it] could not command directly," *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (holding that a state's denial of a tax exemption to individuals who refused to take loyalty oaths violated the First Amendment); *see also*, *e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (testimony of a public college professor before the state legislature was protected by the First Amendment, and his subsequent dismissal was impermissible). The decision below, however, allows the government to do just that by forcing public employees to either relinquish their First Amendment rights or place their livelihood in jeopardy.

Protecting public employee speech vindicates the interest in speaking held by the individual speaker. *See Pickering v. Board of Ed. of Township High School Dist. 205*, 391 U.S. 563, 568 (1968). This Court has recognized that public employees, like other citizens, have a right to comment as citizens on matters of public interest, *id.*; contribute to the "marketplace of ideas," *United States v. Treasury Employees*, 513 U.S. 454, 464 (1995); and express disapproval of elected officials, *Rankin v. McPherson*, 483 U.S. 378, 387 (1987). Although the government may have a legitimate interest in restricting speech that has the potential to affect

the employer's operations, where "the fact of [public] employment is only tangentially and insubstantially involved in the subject matter of the public communication" made by the employee, "it is necessary to regard the [employee] as the member of the general public he seeks to be." *Pickering*, 391 U.S. at 574; *see also Garcetti*, 547 U.S. at 418 ("A government entity has broader discretion to restrict speech when it acts in its role as an employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."). "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.

Indeed, where an employee speaks as a citizen on a matter largely unrelated to the employee's duties in the workplace, this Court has broadly extended protection for employee speech. In *Rankin*, 483 U.S. at 381, for example, this Court considered an employee's workplace comment to a co-worker she was dating after hearing on the radio that there was an attempt to assassinate President Reagan. The Court held the employee's comment—"if they go for him again, I hope they get him"—was on a matter of public concern and protected by the First Amendment, and the employee's firing was improper. Similarly, in *Treasury Employees*, this Court held that a statute that broadly prohibited federal employees from accepting compensation for making speeches or writing articles violated the First Amendment. The plaintiffs in that case included a mail

handler who gave lectures on Quakerism and a microbiologist who reviewed dance performances. 513 U.S. at 461. The Court concluded that the speeches and articles at issue "fall within the protected category of citizen comment on matters of public concern" because they "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to [the plaintiffs'] government employment." *Id.* at 466. This broad interpretation of "public concern" is required by this Court's caution that "First Amendment freedoms need breathing space to survive." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 604 (1967) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 432–33 (1963)).

Robust protection is also required because "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Rankin*, 483 U.S. at 384 (quoting *Pickering*, 391 U.S. at 574). Indeed, it is a far more powerful deterrent than the simple denial of an "incentive toward more expression" that concerned this Court in concluding that the honoraria ban at issue in *Treasury Employees* violated the First Amendment. 513 U.S. at 469. As it applies to testimony in particular, this threat places public employees in an impossible position. Under the Tenth Circuit's narrow construction of public concern, public employee witnesses—who must tell the truth but have no advance knowledge of precisely what they'll be asked—cannot know whether the specifics of their testimony will bring their speech within the realm of protected expression. This is a powerful deterrent to public employees

exercising their First Amendment rights in court and hinders public employees from offering the type of uninhibited testimony on which courts depend.

B. The Tenth Circuit's Decision Deprives The Public Of Valuable Speech By Public Employees.

The First Amendment protection for public employee speech also implicates the rights and interests of the members of the public who are listening. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *see also Garcetti*, 547 U.S. at 419 ("[T]he First Amendment interests at stake extend beyond the individual speaker."); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (referring to the "First Amendment right to 'receive information and ideas'" and noting that "freedom of speech 'necessarily protects the right to receive'") (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972)). This Court has recognized not only the public's interest in hearing public employee speech that offers insight on government operations, but also the public's interest in expression that is unconnected to any official duties. In considering the honoraria ban in *Treasury Employees*, this Court noted that "[f]ederal employees who write for publication in their spare time have made significant contributions to the marketplace of ideas," 513 U.S. at 464, and concluded the statute's "large-scale disincentive to Government employees'

expression . . . imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said," *id.* at 470. While the Court noted it had "no way to measure the true cost of that burden," it could not "ignore the risk that it might deprive us of the work of a future Melville or Hawthorne." *Id.* at 470. The risk of depriving the public of speech that this Court has repeatedly recognized as civically important and crucial to the judiciary's truth-seeking function demands that no less First Amendment protection be extended to truthful testimony by public employees than has been provided to other expression by public employees as citizens.

C. Failure To Rigorously Protect The Speech Of Public Employees Enables The Government To Engage In Unconstitutional Viewpoint Discrimination.

Allowing the government broad discretion to punish public employees for speaking empowers the government as an employer to suppress speech it disfavors. In *Rankin*, this Court warned: "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." 483 U.S. at 384. The risks are not hypothetical. This Court has confronted, numerous times, efforts by the government to broadly punish those who associate with disfavored groups by using its authority as an employer. For example, in *Wieman v. Updegraff*, 344 U.S.

183 (1952); *Shelton v. Tucker*, 364 U.S. 479 (1960); and *Keyishian*, 385 U.S. at 589, the Court struck down government statutes or regulations that required employees or prospective employees to disclose their association (or affirm their lack thereof) with certain groups. If prospective employees associated with an organization the government viewed as subversive, they would be deprived of the opportunity of government employment. In each case, this Court rejected the government's attempts to use its position as an employer to punish those who associated with groups holding disfavored views or deter those who might seek government employment from associating with such groups.

The government's ability to use the employment relationship to punish speech "simply because superiors disagree," *Rankin*, 483 U.S. at 384, inhibits not only the speech of employees with disfavored views, but all employees. "When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone. . . .'" *Keyishian*, 385 U.S. at 604 (quoting *Speiser*, 357 U.S. at 526). For this reason, "the threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *Keyishian*, 385 U.S. at 604 (citing *Button*, 371 U.S. at 433). "The discharge of one [employee] tells the others that they engage in protected activity at their peril." *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1419 (2016) (holding that the First Amendment prohibits punishing an employee for protected expression, regardless of whether the expression actually

occurred). By refusing to follow this Court's holding that sworn testimony is speech on a matter of public concern, the Tenth Circuit's decision creates the risk that employees will censor themselves in the very context where uninhibited speech matters most.

CONCLUSION

The Tenth Circuit's decision misconstrues this Court's ruling in *Lane* and imperils both the proper functioning of the judicial system and the First Amendment rights of public employees. The First Amendment demands robust protection for the truthful testimony that the judicial system relies upon to determine the rights and liabilities of citizens. Such speech is crucial to the proper exercise of judicial power and is quintessentially speech on a matter of public concern. For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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