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## Failing to Protect Public Employees' First Amendment Rights: The Need for a Presumption of Public Concern for Truthful Testimony

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# Failing to Protect Public Employees' First Amendment Rights: The Need for a Presumption of Public Concern for Truthful Testimony

## I. Introduction

The law requires people to make difficult decisions from time to time, but public employees face a uniquely troubling choice regarding their First Amendment rights and their ability to testify truthfully in a court proceeding without fear of retaliation. Jerud Butler experienced this scenario firsthand when his sister-in-law called him to testify as a character witness in a child custody hearing.<sup>1</sup> When confronted with the predicament, Butler chose what should be the correct option for the health of the justice system—he testified truthfully.<sup>2</sup> Unfortunately, this choice resulted in Butler's employer demoting him, highlighting the serious concerns with a system that creates an unwinnable scenario for many public employees who are subpoenaed to testify in a court proceeding.<sup>3</sup> If called to testify, public employees like Butler have three options, none of which are void of serious problems.<sup>4</sup> Public employees can testify truthfully and risk employer retaliation, refuse to testify by ignoring a subpoena and be in contempt of court, or commit perjury by lying on the stand to avoid adverse employment action.<sup>5</sup>

This Note examines the Tenth Circuit's recent decision in *Butler v. Board of County Commissioners* and the implications of its rejection of a per se rule for truthful testimony, as well as its failure to adequately protect such speech. Part II explores important Court decisions on First Amendment rights for public employees, including *Pickering v. Board of Education*, *Connick v. Myers*, and *Garcetti v. Ceballos*. Specifically, this section analyzes how these opinions created the modern balancing test for public employee speech. Part III discusses the circuit split in how courts have applied the *Garcetti/Pickering* test regarding truthful testimony as a matter of public concern. Part IV provides an overview of *Butler* and explains the Tenth Circuit's ruling in this case. Part V discusses the implications of the *Butler* decision and its impact on First Amendment

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1. See *Butler v. Bd. of Cnty. Comm'rs*, 920 F.3d 651, 653 (10th Cir. 2019).

2. *Id.*

3. *Id.*

4. See Adelaida Jasperse, Note, *Constitutional Law—Damned If You Do, Damned If You Don't: A Public Employee's Trilemma Regarding Truthful Testimony*, 33 W. NEW ENG. L. REV. 623, 623 (2011).

5. *Id.*

jurisprudence. This section also argues that due to the importance of truthful testimony for the justice system, circuit courts that reject a per se rule should recognize a rebuttable presumption that truthful testimony is a matter of public concern. Along with this presumption, courts should implement a broader interpretation of public concern to include topics such as testimony in child custody cases, in which child welfare is a public concern.

## II. Law Before Butler

### A. First Amendment Protection for Public Employees: Pickering/Connick Test

The Supreme Court has “uniformly rejected” the notion that public employees relinquish all First Amendment rights and may be “subject to any conditions, regardless of how unreasonable” simply because public employment is a choice.<sup>6</sup> However, before the 1960s, there existed a pervasive “unchallenged dogma” that public employees “had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.”<sup>7</sup> Justice Holmes exemplified this widespread belief in a Massachusetts Supreme Court case, commenting, “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”<sup>8</sup>

In 1968 the Supreme Court shifted away from the notion that public employees had virtually no First Amendment protections against employer retaliation and restrictions on free speech.<sup>9</sup> With this evolution of thought around First Amendment rights for public employees, the Court continued to recognize a state’s unique and important interest in regulating its employees’ speech as distinct from its interest in the speech of the general citizenry.<sup>10</sup> However, the Court also acknowledged that public employees retain some First Amendment rights, notwithstanding their employment choices.<sup>11</sup> Thus, the Court aimed to balance the citizen employee’s interests

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6. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605–06 (1967)).

7. *Connick v. Myers*, 461 U.S. 138, 143 (1983); *see also* *Adler v. Bd. of Educ.*, 342 U.S. 485, 492 (1952) (holding that public employees may have a right to free speech, but they have “no right to work for the State in the school system on their own terms”).

8. *McAuliffe v. City of New Bedford*, 29 N.E. 517, 518 (Mass. 1892).

9. *See Pickering*, 391 U.S. at 568.

10. *Connick*, 461 U.S. at 140.

11. *Pickering*, 391 U.S. at 568.

“in commenting upon matters of public concern” with the state employer’s interests “in promoting the efficiency of the public services it performs through its employees.”<sup>12</sup>

The Supreme Court’s landmark opinion in *Pickering* significantly reshaped and expanded the historical understanding of public employees’ First Amendment rights to free speech.<sup>13</sup> In that case, Marvin L. Pickering claimed his employer violated his First Amendment rights by firing him from his position as a high school teacher after he sent a letter to a local newspaper.<sup>14</sup> In this letter, he criticized a “recently proposed tax increase” and how the Board of Education and district superintendent had “handled past proposals to raise new revenue for the schools.”<sup>15</sup>

To afford public employees some First Amendment protection, the Court rejected the Board of Education’s position that truthful comments on matters of public concern “may furnish grounds for dismissal if they are sufficiently critical in tone.”<sup>16</sup> According to the Court, Pickering’s letter was about a matter of public concern because it addressed the issue of “whether a school system require[d] additional funds.”<sup>17</sup> Moreover, this type of question is such that “free and open debate is vital,” and teachers are “the members of a community most likely to have informed and definite opinions” about the allocation of school funds.<sup>18</sup> In balancing the interests of both parties, the Court concluded that Pickering’s letter neither interfered with his daily job duties nor impeded the “operation of the schools generally.”<sup>19</sup> The school board, therefore, did not have a greater interest in limiting its employee’s “opportunities to contribute to public debate” than it did regarding any member of the public.<sup>20</sup> Thus, the Court held the First Amendment protected Pickering’s letter.<sup>21</sup>

Years later, the Court in *Connick v. Myers* elaborated on how to apply the *Pickering* decision, adding another consideration in the balancing test for public employees’ First Amendment rights.<sup>22</sup> Accordingly, the Court held that First Amendment protection for public employees only extends to

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12. *Id.*

13. Jasperse, *supra* note 4, at 627.

14. *Pickering*, 391 U.S. at 564.

15. *Id.*

16. *Id.* at 570.

17. *Id.* at 571.

18. *Id.* at 571–72.

19. *Id.* at 572–73.

20. *Id.* at 573.

21. *Id.* at 574.

22. *See Connick v. Myers*, 461 U.S. 138, 146 (1983).

“speech on a matter of public concern.”<sup>23</sup> In *Connick*, Sheila Myers, a New Orleans assistant district attorney, responded to an unwanted department transfer by distributing a questionnaire to her colleagues concerning office policies about transfers, employee morale, and the confidence levels that employees had in their supervisors.<sup>24</sup> Myers’s supervisor, Connick, then fired her because her distribution of the questionnaire was an “act of insubordination.”<sup>25</sup>

The Court held that Myers’s questionnaire, with the exception of one question, was not on a matter of public concern, but rather about a “single employee . . . upset with the status quo.”<sup>26</sup> In coming to this conclusion, the Court provided some guidance for analyzing what falls under the realm of public concern.<sup>27</sup> When employee speech does not relate to a “matter of political, social, or other concern to the community,” public employers should have broad discretion in “managing their offices[] without intrusive oversight by the judiciary.”<sup>28</sup> Specifically, courts must consider the “content, form, and context of a given statement” to determine whether speech is of public concern.<sup>29</sup> In 2014, the Court once again mandated this case-by-case approach originally introduced in *Connick*.<sup>30</sup>

#### B. *Garcetti v. Ceballos* and the Pursuant to Official Duties Standard

The Supreme Court expanded the *Pickering/Connick* analysis when it revisited First Amendment protections for public employees in *Garcetti v. Ceballos* in 2006.<sup>31</sup> In this case, Richard Ceballos, a Los Angeles County deputy district attorney, faced “a series of retaliatory employment actions”<sup>32</sup> after he wrote a memo and testified that an affidavit for a search warrant “contained serious misrepresentations.”<sup>33</sup> Ceballos argued that the First Amendment protected his speech in the memo.<sup>34</sup> The Ninth Circuit agreed,

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23. *Id.*

24. *Id.* at 140–41.

25. *Id.* at 141.

26. *Id.* at 148.

27. *See id.* at 146.

28. *Id.*

29. *Id.* at 147–48.

30. *See Lane v. Franks*, 573 U.S. 228, 241 (2014) (holding that the public concern inquiry “turns on the ‘content, form, and context’ of the speech”).

31. Ashley M. Cross, Law Summary, *The Right to Remain Silent? Garcetti v. Ceballos and a Public Employee’s Refusal to Speak Falsely*, 77 MO. L. REV. 805, 808 (2012).

32. *Garcetti v. Ceballos*, 547 U.S. 410, 415 (2006).

33. *Id.* at 414.

34. *Id.* at 415.

holding that his memo about perceived “governmental misconduct” was a matter of public concern.<sup>35</sup>

The Supreme Court reversed the Ninth Circuit’s ruling and created another step in the analysis. In addition to determining whether the speech at issue is of public concern, courts must also consider whether the employee’s speech “was uttered as an employee or as a citizen,” with the First Amendment protecting only citizen speech.<sup>36</sup> The Court explained that “when public employees make statements pursuant to their official duties,” they are speaking as employees rather than citizens, so the “Constitution does not insulate their communications from employer discipline.”<sup>37</sup> This distinction is important because restraining employee speech created in the context of one’s professional duties does not limit the employee’s First Amendment rights as a private citizen.<sup>38</sup> Therefore, because Ceballos wrote the memo as a part of his employment responsibilities, the First Amendment did not safeguard his speech or protect him from adverse employment action.<sup>39</sup>

### C. *The Garcetti/Pickering Test*

Following the Supreme Court’s opinions in *Pickering*, *Connick*, and *Garcetti*, courts now apply a five-part inquiry—often referred to as the *Garcetti/Pickering* balancing test—for First Amendment issues relating to public employee speech.<sup>40</sup> When analyzing whether the First Amendment protects a public employee’s speech, courts consider:

- (1) whether the speech was made pursuant to an employee’s official duties;
- (2) whether the speech was on a matter of public concern;
- (3) whether the government’s interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff’s free speech interests;
- (4) whether the protected speech was a motivating factor in the adverse employment action; and
- (5) whether the defendant would have

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35. *Id.* at 416.

36. Erin Daly, *Garcetti in Delaware: New Limits on Public Employees’ Speech*, 11 DEL. L. REV. 23, 26 (2009).

37. *Garcetti*, 547 U.S. at 421.

38. *Id.* at 421–22.

39. *Id.* at 422.

40. See *Butler v. Bd. of Cnty. Comm’rs*, 920 F.3d 651, 655 (10th Cir. 2019); *Bailey v. Indep. Sch. Dist. No. 69*, 896 F.3d 1176, 1179 (10th Cir. 2018).

reached the same employment decision in the absence of the protected conduct.<sup>41</sup>

Courts have taken different approaches in applying the *Garcetti/Pickering* balancing test, specifically regarding which speech rises to the level of public concern and whether courtroom testimony deserves a per se rule automatically designating it a matter of public concern.<sup>42</sup> In circuits that have adopted such a rule, the second factor is always satisfied for sworn testimony, and thus, the analysis turns on whether the other factors are met.<sup>43</sup>

### III. Circuit Split

#### A. Circuits Adopting a Per Se Rule: Fifth and Third

Two circuits have adopted a per se rule that public employees' truthful testimony is a matter of public concern.<sup>44</sup> The Fifth Circuit was the first to adopt such a rule in *Johnston v. Harris County Flood Control District*.<sup>45</sup> In that case, Carl Johnston worked for the Harris County Flood Control District ("HCFD") as a supervisor for many years before he testified at an Equal Employment Opportunity Commission hearing on behalf of a fellow employee.<sup>46</sup> Following his testimony, which was "not favorable to HCFD and its directors," Johnston faced a "series of retaliatory employment actions."<sup>47</sup> His employer ultimately fired him for refusing to accept a demotion, prompting him to bring suit against HCFD.<sup>48</sup>

In addressing whether Johnston's testimony at the hearing was on a matter of public concern, the court held that "[w]hen an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern."<sup>49</sup> The court attributed its decision to adopt a per se rule for truthful testimony to the importance of

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41. *Butler*, 920 F.3d at 655.

42. Compare *Latessa v. N.J. Racing Comm'n*, 113 F.3d 1313, 1319 (3d Cir. 1997) (holding that truthful testimony in a court proceeding is a matter of public concern deserving First Amendment protection); with *Butler*, 920 F.3d at 660 (declining to adopt a per se rule that sworn testimony is always a matter of public concern).

43. See *Pro v. Donatucci*, 81 F.3d 1283, 1288 (3d Cir. 1996).

44. See, e.g., *Green v. Phila. Hous. Auth.*, 105 F.3d 882, 887 (3d Cir. 1997); *Johnston v. Harris Cnty. Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989).

45. See *Johnston*, 869 F.2d at 1578.

46. *Id.* at 1568.

47. *Id.*

48. *Id.*

49. *Id.* at 1578.

uninhibited, honest testimony in bolstering the fact-finding function of the judicial system.<sup>50</sup>

The Third Circuit joined the Fifth Circuit in adopting a per se rule for truthful testimony seven years later in *Pro v. Donatucci*.<sup>51</sup> Pro, a public employee, filed suit against her supervisor, Donatucci, after he fired her for complying with a subpoena and appearing to testify on behalf of Donatucci's wife in a divorce proceeding.<sup>52</sup> Even though Pro was never actually called to testify as a witness, she alleged that Donatucci fired her for simply appearing in court as a potential witness.<sup>53</sup> The court held that Pro's speech (appearing in court to testify) was inherently a matter of public concern in its "form and context—that is, potential 'sworn testimony before an adjudicatory body'" despite its content being about a private matter.<sup>54</sup> Furthermore, the Third Circuit held that the per se rule for subpoenaed testimony established in *Pro* also applies to voluntary courtroom testimony because the same policy rationale behind adopting a per se rule for compelled testimony is present in both circumstances.<sup>55</sup>

*B. Circuits Rejecting a Per Se Rule: Fourth, Seventh, Eighth, and Eleventh*

Four circuits have rejected a per se rule that truthful testimony automatically qualifies as a matter of public concern.<sup>56</sup> The Fourth Circuit was the first to reject such a rule in *Arvinger v. Mayor & City Council of Baltimore*.<sup>57</sup> In that case, Stephen Arvinger, a school police officer, sued the Department of Education after his employer fired him for speaking to investigators about a sex-discrimination suit filed by a female co-worker (Diane Diggs).<sup>58</sup> When analyzing whether the First Amendment protected Arvinger's statements to investigators, the court clarified that a statement

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50. *Id.*

51. *See* 81 F.3d 1283, 1290–91 (3d Cir. 1996); *see also* *Green v. Phila. Hous. Auth.*, 105 F.3d 882, 887 (3d Cir. 1997) ("In *Pro*, we held the context of a courtroom appearance raises speech to a level of public concern, regardless of its content.").

52. *Pro*, 81 F.3d at 1285.

53. *Id.*

54. *Id.* at 1288 (quoting *Freeman v. McKellar*, 795 F. Supp. 733, 739 (E.D. Pa. 1992)).

55. *Green*, 105 F.3d at 886 (holding that both compelled and voluntary testimony deserve First Amendment protection to promote the "integrity of the truth-seeking process").

56. *See* *Arvinger v. Mayor & City Council of Balt.*, 862 F.2d 75, 79 (4th Cir. 1988); *Wright v. Ill. Dep't of Children & Family Servs.*, 40 F.3d 1492, 1505 (7th Cir. 1994); *Padilla v. S. Harrison R-II Sch. Dist.*, 181 F.3d 992, 996–97 (8th Cir. 1999); *Maggio v. Sipple*, 211 F.3d 1346, 1352–54 (11th Cir. 2000).

57. 862 F.2d at 79.

58. *Id.* at 76–77.



about private interests which is “otherwise devoid of public concern,” does not satisfy the *Pickering* test.<sup>59</sup> The court vehemently rejected a per se rule by holding that it is “irrelevant for [F]irst [A]mendment purposes that the statement was made in the course of an official hearing.”<sup>60</sup> Because Arvinger’s statement “was made solely to further the interests of Mr. Arvinger and Ms. Diggs” and not to “further the public debate on employment discrimination” or another topic of public concern, the statement was not protected despite being part of an official hearing.<sup>61</sup> The Eighth and Eleventh Circuits similarly rejected a blanket rule that truthful testimony is always a matter of public concern.<sup>62</sup>

The Seventh Circuit similarly rejected a per se rule “according absolute First Amendment protection” to sworn testimony in *Wright v. Illinois Department of Children & Family Services*.<sup>63</sup> But unlike the Fourth Circuit, the Seventh Circuit did acknowledge the unique importance of protecting such testimony.<sup>64</sup> Thus, the court sought to safeguard this type of employee speech using the third prong of the *Garcetti/Pickering* test,<sup>65</sup> which considers “whether the government’s interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff’s free speech interests.”<sup>66</sup> Despite not adopting a per se rule for courtroom testimony, the *Wright* court explained that an employee called to testify in a court proceeding has a “compelling interest in testifying *truthfully*,” such that an “employer can have an offsetting interest in preventing her from doing so only in the rarest of cases.”<sup>67</sup>

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59. *Id.* at 79.

60. *Id.*

61. *Id.*

62. *See Padilla v. S. Harrison R-II Sch. Dist.*, 181 F.3d 992, 997 (8th Cir. 1999) (holding that a teacher’s testimony about the propriety of a hypothetical sexual relationship between a student and a teacher was not on a matter of public concern); *Maggio v. Sipple*, 211 F.3d 1346, 1353 (11th Cir. 2000) (holding that an employee’s testimony in an administrative grievance hearing for a fellow employee was not of public concern because the purpose of her testimony was not to “raise issues of public concern,” but rather “to support the grievance of her supervisor” and “curry the favor” of her supervisor for her own benefit).

63. 40 F.3d 1492, 1505 (7th Cir. 1994).

64. *See id.* (explaining that the Court “share[s] [its] colleagues’ concern for the integrity of the judicial process”). *But see Arvinger v. Mayor & City Council of Balt.*, 862 F.2d 75, 79 (4th Cir. 1988) (holding that the fact that a statement was made during an official hearing is “irrelevant for [F]irst [A]mendment purposes”).

65. *See Wright*, 40 F.3d at 1505.

66. *Butler v. Bd. of Cnty. Comm’rs*, 920 F.3d 651, 655 (10th Cir. 2019).

67. *Wright*, 40 F.3d at 1505.

#### IV. Statement of the Case

##### A. The Tenth Circuit Joins the Circuit Split in *Butler*

In *Butler*, the Tenth Circuit weighed in on the debate surrounding First Amendment rights for public employees and whether truthful testimony is per se a matter of public concern.<sup>68</sup> The court considered how other circuits have ruled on this issue and the various arguments that led to the current circuit split.<sup>69</sup> In deciding the *Butler* case, the Tenth Circuit declined to adopt a per se rule designating truthful testimony as a matter of public concern, joining the four other circuit courts that have also rejected such a rule.<sup>70</sup>

##### B. Facts

*Butler* arose after Jerud Butler's employer disciplined him for testifying in court.<sup>71</sup> Butler worked for the San Miguel County Road and Bridge Department.<sup>72</sup> His employer offered to promote him to a district supervisor position on September 1, 2016.<sup>73</sup> Six days after he accepted the promotion, however, "Butler testified in a child custody hearing in Montrose County . . . involving his sister-in-law and her ex-husband, who [was] also an employee of the San Miguel County, Road and Bridge Department."<sup>74</sup> Though Butler voluntarily testified as a character witness at his sister-in-law's request, the court would have subpoenaed his testimony had he refused to testify.<sup>75</sup>

During his testimony, Butler truthfully answered questions about "the hours of operation for the San Miguel County Road and Bridge Department . . . based upon his own personal knowledge."<sup>76</sup> Following this testimony, two County Directors "conducted an investigation into Butler's testimony" at the custody hearing and subsequently issued Butler a "Written Reprimand and demotion."<sup>77</sup>

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68. See *Butler*, 920 F.3d at 657.

69. *Id.* at 658–61.

70. *Id.* at 663.

71. *Id.* at 653.

72. *Id.*

73. *Id.* at 654.

74. *Id.* (quoting Complaint ¶ 15, *Butler*, 920 F.3d 651 (No. 17-cv-00577)).

75. *Id.*

76. *Id.* (quoting Complaint, *supra* note 74, ¶¶ 18–19).

77. *Id.* (quoting Complaint, *supra* note 74, ¶ 23).

### C. Procedural History and Issue

After his employers retaliated against him because of his testimony at the custody hearing, Butler filed suit under 42 U.S.C. § 1983 against the County Directors who conducted the investigation and demoted him.<sup>78</sup> In his lawsuit, Butler alleged the County Directors violated his “right to free speech under the First and Fourteenth Amendments by demoting him for testifying truthfully at the custody hearing.”<sup>79</sup> The district court granted the County Directors’ 12(b)(6) motion to dismiss, reasoning that “Butler had failed to allege a First Amendment violation because his triggering speech was not on a matter of public concern.”<sup>80</sup>

Butler challenged that decision by filing an appeal to the Tenth Circuit.<sup>81</sup> On appeal, the court reviewed the issue of whether truthful testimony is per se a matter of public concern, and if not, whether Butler’s testimony was on a matter of public concern.<sup>82</sup>

### D. Decision

In *Butler*, the Tenth Circuit joined the circuits that have rejected a per se rule for truthful testimony as a matter of public concern.<sup>83</sup> In doing so, the court applied the *Garcetti/Pickering* balancing test to determine whether Butler’s testimony in the custody hearing was protected First Amendment speech.<sup>84</sup> Because the County Directors conceded Butler testified as a private citizen, not pursuant to his official employment duties, Butler’s testimony satisfied the first prong of the balancing test.<sup>85</sup> As a result, the court primarily focused on the second inquiry—“whether the speech was on a matter of public concern.”<sup>86</sup> After concluding that Butler’s testimony was not of public concern, the Tenth Circuit affirmed the district court’s dismissal of the case without addressing the remaining three prongs of the test.<sup>87</sup>

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 655.

82. *Id.* at 656–57.

83. *Id.* at 657.

84. *Id.* at 655.

85. *Id.*

86. *See id.* (quoting *Bailey v. Indep. Sch. Dist. No. 69*, 896 F.3d 1176, 1181 (10th Cir. 2018)).

87. *See id.* at 664–65.

*1. Rejecting a Per Se Rule of Public Concern for Sworn Testimony*

The court rejected Butler’s argument that courts should always designate sworn testimony as a matter of public concern, stating that the Supreme Court has “mandated a case-by-case approach.”<sup>88</sup> Thus, the court opted to follow the Supreme Court’s analysis in *Connick* and *Lane v. Franks*, considering the “content, form and context” of public employee speech or testimony to determine if it is of public concern.<sup>89</sup>

The court supported its decision to follow a case-by-case approach in lieu of a per se rule for truthful testimony by relying on the Supreme Court’s discussion of public employee speech in the form of sworn testimony in *Lane*.<sup>90</sup> Following a circuit split in how courts determine whether testimonial speech is of public concern, the *Lane* Court provided guidance. Specifically, it acknowledged that when considering the form and context of a public employee’s speech, whether the speech is sworn testimony is “a factor to consider” that often fortifies a finding that the speech is of public concern, but is not dispositive, rendering a per se rule “inappropriate.”<sup>91</sup> According to Tenth Circuit, *Lane* indicates that content remains a relevant inquiry for determining whether public employee speech is of public concern, even when the form of the speech is sworn testimony in a judicial proceeding.<sup>92</sup>

The court cited previous Tenth Circuit cases which used a case-by-case approach for analyzing courtroom testimony.<sup>93</sup> In *Bailey v. Independent School District Number 69*, the court performed a content, form, and context analysis to determine whether a public employee’s letter “seeking a reduced sentence for his relative” was of public concern.<sup>94</sup> Though the Tenth Circuit had never “expressly considered” adopting a per se rule rendering all sworn testimony by public employees a matter of public concern, its application of a case-by-case approach in past cases provided yet another basis for the official rejection of a per se rule in *Butler*.<sup>95</sup>

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88. *Id.* at 657.

89. *Id.* at 658 (first citing *Connick v. Myers*, 461 U.S. 138 (1983); and then citing *Lane v. Franks*, 573 U.S. 228 (2014)).

90. *See id.* at 657–58.

91. *Id.*

92. *Id.* at 658.

93. *See, e.g., id.* (discussing *Bailey v. Indep. Sch. Dist. No. 69*, 896 F.3d 1176, 1179 (10th Cir. 2018)); *see also id.* at 662 (citing *Melton v. City of Okla. City*, 879 F.2d 706, 713–14 (10th Cir. 1989)).

94. *Bailey*, 896 F.3d at 1179.

95. *See Butler*, 920 F.3d at 662–63.

The *Butler* court acknowledged the circuit split about sworn testimony before the Supreme Court issued the *Lane* opinion and maintained that the conflicting circuit opinions strengthened its decision to reject a per se rule for courtroom testimony.<sup>96</sup> In doing so, the court appreciated the Fifth and Third Circuit's reasoning in adopting a per se rule for truthful testimony and the desire to protect the "integrity of the truth-seeking functions of courts."<sup>97</sup> However, it maintained that the purpose of the *Garcetti/Pickering* test is not to "protect[] the integrity" of the justice system, but rather to determine if "the First Amendment protects a public employee's speech."<sup>98</sup> The court insisted that there are other sufficient processes in place designed to uphold the "truth-seeking function" of the court system, such as "subpoena and contempt powers, cross-examination, and criminal sanctions for perjury."<sup>99</sup>

## 2. Holding That *Butler's* Testimony Was Not of Public Concern

After rejecting a per se rule for sworn testimony, the Tenth Circuit also held that *Butler's* testimony in the custody hearing was not on a matter of public concern.<sup>100</sup> In reaching this conclusion, the court considered the purpose of the speech and whether it simply dealt with "personal disputes and grievances unrelated to the public's interest."<sup>101</sup> The court determined that *Butler's* motive for testifying was for personal reasons rather than for reasons "involving impropriety or malfeasance of government officials" or any other reason that would bring the testimony into the "realm of public concern."<sup>102</sup> Because *Butler's* testimony centered on a personal matter, which is typically not of interest to the community at large, the court did not view his speech as a matter of public concern.<sup>103</sup>

By determining *Butler's* testimony was not of public concern, the Tenth Circuit rejected *Butler's* argument that the state's interest in child welfare and the fair adjudication of child custody disputes rendered his speech of public interest.<sup>104</sup> Accordingly, the court stated that Colorado's general interest in child welfare and custody matters did not automatically make

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96. *Id.* at 660.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 663.

101. *Id.* (internal quotation marks omitted) (quoting *Bailey v. Indep. Sch. Dist. No. 69*, 896 F.3d 1176, 1181 (10th Cir. 2018)).

102. *Id.* at 664.

103. *Id.* at 663–64.

104. *Id.* at 664.

speech on such topics matters of public concern worthy of First Amendment protections.<sup>105</sup> Even if the topic of the speech is of interest to the general public, “what is *actually said* must meet the public concern threshold” as well.<sup>106</sup> The specific content of Butler’s testimony largely pertained to his sister-in-law’s character and the County Road and Bridge Department’s operating hours, which the court said failed to meet the public concern threshold for protected First Amendment speech.<sup>107</sup>

The court distinguished Butler’s testimony from the speech at issue in *Wright*, a case in which the Seventh Circuit determined that a social worker’s testimony about the state’s “methods of investigating an allegation of child abuse” was of public concern because it “address[ed] serious systematic deficiencies in the operation of a public department” and was therefore of great interest to the community at large.<sup>108</sup> Thus, the speech in *Wright* did not reach the level of public concern simply because it was testimony in a child custody proceeding.<sup>109</sup> Rather, its content about the “procedural and substantive shortcomings” in the public department’s operation rendered the speech of public interest, unlike Butler’s testimony, which the court considered largely personal in nature.<sup>110</sup>

#### V. Implications and Shortcomings of Butler

While the *Butler* court correctly rejected a per se rule for sworn testimony in light of Supreme Court precedent,<sup>111</sup> the Tenth Circuit’s analysis of the content, form, and context of Butler’s speech at the custody hearing negatively impacts the health of the justice system and places public employees in an unfair position.<sup>112</sup> Although it acknowledged that the form and context of public employee speech in courtroom testimony

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105. *Id.*

106. *Id.* (quoting *Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1368 (10th Cir. 2015)).

107. *Id.*

108. *Id.* (internal quotation marks omitted) (quoting *Wright v. Ill. Dep’t of Children & Family Servs.*, 40 F.3d 1492, 1505–06 (7th Cir. 1994)).

109. *Id.*

110. *Id.* (quoting *Wright*, 40 F.3d at 1502).

111. See *Lane v. Franks*, 573 U.S. 228, 241 (2014) (“The inquiry turns on the ‘content, form, and context’ of the speech.” (quoting *Connick v. Myers*, 461 U.S. 138, 147–48) (1983)); *Snyder v. Phelps*, 562 U.S. 443, 454 (2011) (“[N]o factor is dispositive, and it is necessary to evaluate all the circumstances of the speech.”).

112. See *Green v. Phila. Hous. Auth.*, 105 F.3d 882, 887 (3d Cir. 1997) (“[T]he integrity of the judicial process would be damaged if we were to permit unchecked retaliation for . . . truthful testimony.”).

“weigh in favor of treating it as a matter of public concern,”<sup>113</sup> the court largely considered content alone in deciding Butler’s testimony was not of public concern.<sup>114</sup> By not properly weighing the importance of form and context, but primarily—if not solely—considering the content of Butler’s speech, the court “violate[d] the very Supreme Court mandate [it] claim[ed] to honor in rejecting a per se rule.”<sup>115</sup> Courts can and should place a high value on truthful testimony and seek to protect this speech in ways that are consistent with First Amendment precedent. Accordingly, courts should adopt a rebuttable presumption that sworn testimony in a judicial proceeding is of public concern.

*A. A Rebuttable Presumption of Public Concern for Sworn Testimony*

A presumption of public concern for sworn testimony is consistent with the Supreme Court’s assertion that the context and form of in-court testimony “fortif[ies]” the conclusion that such speech is a matter of public concern.<sup>116</sup> Courtroom testimony is unique in its formality, gravity, and ability to impress upon a witness that “his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others.”<sup>117</sup> These Supreme Court statements clearly support a significant presumption that testimony under oath is not solely a private matter.<sup>118</sup> A public concern presumption for sworn testimony encapsulates the value of witness testimony in the judicial process and the public’s inherent interest in such testimony.<sup>119</sup>

Because the fear of employer discipline or retaliation “undermines a witness’ willingness to testify,” it is vital to analyze truthful testimony under the rebuttable presumption that it is of public concern.<sup>120</sup> Insufficient protection of public employee testimony hinders the accuracy and effectiveness of the judicial system by fostering an environment in which witnesses may not feel safe to testify wholly and truthfully.<sup>121</sup> Moreover,

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113. *Butler*, 920 F.3d at 663.

114. *See id.* at 665 (Lucero, J., dissenting).

115. *Id.*

116. *See Lane*, 573 U.S. at 241.

117. *United States v. Alvarez*, 567 U.S. 709, 721 (2012).

118. *See Butler*, 920 F.3d at 669 (Lucero, J., dissenting).

119. *See Johnston v. Harris Cnty. Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989) (concluding that the importance of testimony for the judicial system is sufficient to render speech in that context of public concern).

120. *Butler*, 920 F.3d at 666 (Lucero, J., dissenting).

121. Joseph Deloney, Note, *Protecting Public Employee Trial Testimony*, 91 CHI.-KENT L. REV. 709, 711 (2016).

the consequences for refusing to testify or testifying untruthfully to avoid employer retaliation are far too grave to unnecessarily impose upon employees.<sup>122</sup> It is unfair for courts to put public employees in the “impossible position” of either risking “substantial penalties, including incarceration” if they neglect the duty to testify truthfully, or risking significant adverse employment consequences if they comply with the duty.<sup>123</sup> Therefore, courts should make a serious effort to afford First Amendment protection to sworn testimony for public employees to the extent that Supreme Court precedent allows. Implementing a rebuttable presumption of public concern for truthful testimony is the best way to adequately protect public employees’ First Amendment rights without ignoring the Court’s mandate for a case-by-case approach.<sup>124</sup>

A rebuttable presumption that sworn testimony is of public concern would not preclude public employers from successfully arguing that employee testimony is wholly on a private matter if it is one of the few situations in which that may be the case. Furthermore, even with a presumption that would treat most truthful testimony as a matter of public concern, the government could still prevail on the third prong of the *Garcetti/Pickering* balancing test by showing that its interests “in promoting the efficiency of the public service are sufficient to outweigh the plaintiff’s free speech interests.”<sup>125</sup> In balancing these interests, employers must show a more substantial governmental interest for regulating employee speech with a high degree of public concern.<sup>126</sup> Thus, even if an employee’s speech satisfies the public concern requirement under the presumption for truthful testimony, employers will have to meet a lower

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122. See Lemay Diaz, Comment, *Truthful Testimony as the “Quintessential Example of Speech as a Citizen”*: Why *Lane v. Franks* Lays the Groundwork for Protecting Public Employee Truthful Testimony, 46 SETON HALL L. REV. 565, 591 (2016) (explaining that an employee called to testify is in an “impossible position, torn between” retaliation from his employer and legal consequences for failing to testify truthfully).

123. *Id.*

124. See *Connick v. Myers*, 461 U.S. 138, 147–48 (1983) (concluding that courts must look at the “content, form, and context” of public employee speech).

125. *Butler*, 920 F.3d at 655 (quoting *Bailey v. Indep. Sch. Dist. No. 69*, 896 F.3d 1176, 1181 (10th Cir. 2018)).

126. See *Lane v. Franks*, 573 U.S. 228, 242 (2014) (“We have also cautioned, however, that ‘a stronger showing [of government interests] may be necessary if the employee’s speech more substantially involve[s] matters of public concern.’” (quoting *Connick*, 461 U.S. at 152)).



burden to justify disciplining an employee for speech that only minimally relates to a matter of public concern.<sup>127</sup>

Despite correctly rejecting a per se rule for truthful testimony, the *Butler* court failed to consider the Supreme Court's emphasis on the necessity for truthful testimony and the weight it should carry in deciding whether employee speech is of public concern.<sup>128</sup> If the Tenth Circuit had properly considered a presumption that truthful testimony is of public concern and weighed the context, form, and content of Butler's speech in the manner the Supreme Court dictated in *Lane*, it would have determined that his testimony met the public concern requirement.<sup>129</sup>

### *B. Implementing a Broader Interpretation of Public Concern*

If there is a reasonable basis for holding that a public employee's sworn testimony relates to a matter of public concern, courts should do so because of the unique importance of this type of speech.<sup>130</sup> Public employee speech can have personal significance and still be of public interest. This was the case in *Butler*, where the welfare of children—an obvious topic of public interest—was involved.<sup>131</sup> Therefore, while the court was right in asserting that Butler's testimony was partly a personal matter, it failed to recognize that it was also of interest to the public and “at its root a societal and public issue.”<sup>132</sup> Child custody hearings are publicly funded and part of the public record, similar to sentencing hearings, which the Tenth Circuit has held to be of public concern.<sup>133</sup> The commonality between these two types of hearings lends further support to a finding that Butler's testimony was on a matter of public concern.

In an effort to protect the interests of the judicial system and those whom the court compels to participate in the judicial process, courts should set a high bar for employers who want to take adverse employment action

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127. *See id.*

128. *See Butler*, 920 F.3d at 666 (Lucero, J., dissenting).

129. *See id.* at 666–67 (“The majority does not cite a single case from this circuit in which sworn testimony in judicial proceedings is *so personal* in nature as to overwhelm the strong presumption . . . towards treating such speech as involving matters of public concern.”).

130. *See United States v. Alvarez*, 567 U.S. 709, 721 (2012) (discussing the unique nature of courtroom testimony compared to other forms of speech).

131. *See Bailey v. Indep. Sch. Dist. No. 69*, 896 F.3d 1176, 1182 (10th Cir. 2018) (“Merely because speech concerns an issue of personal importance does not preclude its treatment as a public matter.”).

132. *Butler*, 920 F.3d at 665 (Lucero, J., dissenting).

133. *Id.* at 666 (citing *Bailey*, 896 F.3d at 1181).

against an employee on the basis of that employee's sworn testimony. All citizens bear the legal duty to testify truthfully in court proceedings, regardless of employment status, and protecting the right to do so without fear of retaliation whenever possible reflects the importance of this civic duty.<sup>134</sup> Courts should always consider the context and form of speech—especially when testimony is compelled—unless the content of the speech has no plausible relation to the public interest.<sup>135</sup>

Implementing a broader interpretation of speech that meets the public concern requirement and adopting a rebuttable presumption that truthful testimony is of public interest would sufficiently protect public employees without ignoring the government's interest in regulating its employees' speech. Under the *Garcetti/Pickering* balancing test, public employers have to meet a lesser burden to justify disciplining an employee for speech that has a lower degree of public concern.<sup>136</sup> Thus, even with a more expansive idea of what qualifies as a matter of public concern, courts can still fairly balance the interests between a government employer and a public employee.

#### VI. Conclusion

Sworn testimony in a judicial proceeding is a unique form of speech, such that it deserves substantial First Amendment protections for public employees. The special importance of this type of speech has created a circuit split as to whether courts should adopt a per se rule that courtroom testimony is automatically a matter of public concern. The Fifth and Third Circuits, in adopting a per se rule, are not in line with the Supreme Court's mandate in *Connick* and *Lane* that courts should use a case-by-case approach, considering the content, form, and context of employee speech to determine if it is of public concern. However, circuits that have rejected a per se rule, as the Tenth Circuit did in *Butler*, have not afforded enough protection to public employee speech in the form of truthful testimony. For courts to strike a proper balance between a public employee's right to free speech, they must consider both the importance of witness testimony for the health of the justice system and a government employer's interest in regulating its employees' speech.

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134. Deloney, *supra* note 121, at 711 (citing *Blackmer v. United States*, 284 U.S. 421, 438 (1932)).

135. See *Lane v. Franks*, 573 U.S. 228, 241 (2014).

136. See *Connick v. Myers*, 461 U.S. 138, 152 (1983).

As this Note proposes, the most effective way to balance these competing interests and safeguard public employees' First Amendment rights in a manner consistent with Supreme Court precedent is to adopt a rebuttable presumption that courtroom testimony is of public concern. Moreover, courts should expand the interpretation of what qualifies as a matter of public concern to include, among other topics, speech like Butler's testimony because child welfare is of public concern. With the approach advocated herein, courts can afford First Amendment protection to sworn testimony whenever its content has some plausible relation to a matter of public interest, while still allowing public employers to overcome the rebuttable presumption by successfully arguing that the speech at issue is wholly on a private matter.

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