A WARD OF THE STATE: THE FIRST AMENDMENT AS PROTECTING THE BEST INTEREST OF THE CHILD IN CUSTODY DISPUTES

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INTRODUCTION

One of the most challenging First Amendment questions facing the courts is whether a public employee's speech should be classified as a public concern or a private interest.[2] This distinction affects whether the speech will be treated the same as speech from ordinary citizens working in the private sector and be protected by the First Amendment, or whether the public employee will be subject to retaliation and possible termination by the public employer for their speech.[3] While the courts have dispelled the idea that public employees may be subjected to exorbitant restraints by the state due to their employment status, today the question has shifted to finding the appropriate balance between protecting both the right of the employer to control its public message and the right of the employee as a citizen to speak one's mind, as granted by the Constitution.[4]

The law on public employee freedom of speech has expanded into a five-step analysis, often referred to as the *Pickering/Garcetti* test (hereinafter *Pickering* test), adapted from leading First Amendment public employee Supreme Court cases, which is described as follows:

> (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 reached the same employment decision in the absence of the protected conduct.[5]

Steps one through three are classified as issues of law to be analyzed and resolved by the court, while steps four and five are left to the trier of fact, typically a jury.[6] This step-by-step analysis allows courts a clear path to rule on freedom of speech issues for public employees, but the ambiguity of some of these categories leaves the court with ample discretion to determine what exactly is within the scope of official duties or on a matter of public concern. Since there is ambiguity within these categories, courts have rendered opposing decisions on what speech qualifies for protection for decades.

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[2] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968).

[3] *Id.*

[4] *Id.* at 568.

[5] Butler v. Bd. of Cty. Comm'rs., 920 F.3d 651, 655 (10th Cir. 2019) (internal citations omitted).

[6] *Id.*

In 2014, the Supreme Court of the United States decided in *Lane v. Franks* that a public employee giving truthful, sworn testimony outside the scope of his or her employment is protected by the First Amendment.[7] Edward Lane was hired by Central Alabama Community College (hereinafter CACC) to be the Director of Community Intensive Training for Youth.[8] Lane fired Suzanne Schmitz for lack of appropriate reporting, which he discovered by conducting an audit, but then Lane was fired by the President of CACC, Steve Franks, for his testimony in the Schmitz trial.[9] Lane brought suit against Franks, arguing that he was improperly retaliated against for testifying in the Schmitz trial for mail fraud and improper use of federal funds.[10] The Court held that Lane had a right to First Amendment protection for his truthful testimony, prompted by subpoena, because "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth."[11] From the *Lane* ruling it appeared as though a point of clarity had been reached for public employees testifying in court, a small degree of clarification for the complex *Pickering* test.

However, only a few years later, in the 2019 case of *Butler v. Board of County Commissioners for San Miguel County*, the Tenth Circuit held that the truthful, sworn testimony of a public employee in a child custody hearing was not protected by the First Amendment.[12] This case centered on the testimony of Jerud Butler, a public employee, working as a newly-appointed supervisor in the Road and Bridge Department for San Miguel County.[13] Butler testified on behalf of his sister-in-law in a custody dispute for her children and was predominately asked to relay information about his working hours and job requirements since the child's father also worked for the Department.[14] Two weeks later, Butler was demoted and reprimanded for his testimony in the proceeding, and he subsequently brought suit against his employer for violation of his First Amendment rights.[15] In *Butler*, the Tenth Circuit ruled that the issue of child custody is a private, domestic interest, "not of general interest to the community as a whole," and, thus, is not subject to First Amendment protections because it fails the "public concern" prong.[16] Not only is this holding in direct conflict with *Lane*, it also contradicts the long-held family law standard that it is the duty of the state to consider the best interest of the child as a public concern in child custody hearings.[17]

The law presumes parents will make decisions in the best interests of their children because "parents possess what a child lacks in maturity, experience, and

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[7] Lane v. Franks, 573 U.S. 228, 231 (2014).
[8] *Id.* at 231–32.
[9] *Id.* at 232–33.
[10] *Id.* at 234.
[11] *Id.* at 238.
[12] Butler v. Bd. of Cty. Comm'rs., 920 F.3d 651, 653–54 (10th Cir. 2019).
[13] *Id.* at 653.
[14] *Id.* at 654.
[15] *Id.*
[16] *Id.* at 663.
[17] *Id.* at 667 (Lucero, J., dissenting).

capacity for judgment required for making life's difficult decisions."[18] Under the Fourteenth Amendment's Due Process Clause, parents have a constitutionally protected right to "the custody, care, and nurtur[ing] of the child," to which the state cannot interfere "without some showing of unfitness."[19] The best interest of the child is a burden-shifting responsibility that requires the state to provide protection for minors when the fitness of the parents is called into question.[20] The *Butler* holding is contrary to the standard set forth in family law, which promotes the best interest of the child as a state protected interest through the doctrine of *parens patriae*—the idea that the state steps in as protector to prevent "injury to those who cannot protect themselves."[21] The holding in *Lane* is more consistent with the promotion of the best interest of the child standard. Testimony in a custody dispute is a public concern that should per se qualify under the second prong of the *Pickering* test because the state has a duty to take an active role in protecting minors under the standards of *parens patriae* and the best interest of the child.

Part I of this Note will offer a review of First Amendment rights for public employees, looking at the development of the *Pickering* test. Part II will discuss the importance of the best interest of the child standard in custody disputes and how it is used by courts today. Part III will analyze the holding in *Butler* against that of *Lane* and Part IV will argue that it is necessary to include public employee testimony in child custody disputes as a per se public concern under the *Pickering* test, due to the best interest of the child standard.

I. HISTORY OF PUBLIC EMPLOYEE PROTECTIONS AND THE FIRST AMENDMENT

The First Amendment to the United States Constitution protects, among other freedoms, the freedom of speech for people within the United States.[22] This protection prohibits the government from punishing, altering, or restricting verbal or written statements made by persons in the United States, in order to promote trust and self-governance among the people.[23] Through the Due Process Clause of the Fourteenth Amendment, these First Amendment protections from government regulation of speech are applied to the states.[24]

However, because public employees are "in a special relationship to the government," their speech is not protected under the First Amendment when it is considered to be detrimental to the public employer, as determined by the test first established in the 1968 Supreme Court case, *Pickering v. Board of Education*.[25]

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[18] Parham v. J.R., 442 U.S. 584, 602 (1979).

[19] Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

[20] *See id.*

[21] Alfred L. Snapp & Son, Inc., v. Puerto Rico, 458 U.S. 592, 600 (1982); *see also* McDermott v. Dougherty, 869 A.2d 751, 803 (Md. 2005) (discussing the role of the judge to consider a father's fitness when making a custody ruling under the doctrine of *parens patriae*).

[22] U.S. CONST. amend. I.

[23] *See* Geoffrey R. Stone & Eugene Volokh, *Freedom of Speech and the Press*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/266 [https://perma.cc/6F8F-DRED] (last visited Feb. 22, 2021).

[24] U.S. CONST. amend. XIV, §1.

[25] Stone & Volokh, *supra* note 23; Pickering v. Bd. of Educ., 391 U.S. 563, 565 (1968).

Pickering held that public employees do not give up First Amendment protection by accepting a job with the government or another public institution.[26] In this case, a public school teacher was fired for publishing a letter in response to recent actions taken by the School Board related to funding.[27] The school alleged that the teacher's remarks were both false and damaging to the reputation of the school.[28] The Court held that Pickering's letter was protected by the First Amendment because it represented a difference of opinion on a general public interest topic, taken up in the public sphere, and did not warrant his dismissal.[29] The Court emphasized the importance of a balancing test in this arena of free speech because the employer's interest in limiting an employee's "contribut[ion] to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[30] Furthermore, this case defined the public employee First Amendment protection exception as a fact-specific balancing test.[31] The Court held that teachers should be able to express opinions freely on the topics which they are the "most likely to have informed and definite opinions" on, and that the topic of school system funding was a "matter of legitimate public concern" for which "free and open debate is vital to informed decision-making."[32] *Pickering* established itself as a foundational case for discerning the role of governmental protections for public employees' speech.

The next case that helped build First Amendment precedent in regard to public employees is *Connick v. Meyers*, which held that a state Assistant District Attorney's termination for publishing a questionnaire related to office protocol after refusing to accept a transfer did not involve matters of public concern.[33] The Court set another standard of analyzing the content, form, and context of the public employee's speech to determine whether it should be classified as a public concern.[34] It determined that the internal questionnaire meant for employees focused on internal opinion of internal action and did not seek the public's opinion, nor attempt to show any wrongful action by any of the attorney's superiors to the public.[35] Based on this analysis, the termination was not in violation of the attorney's First Amendment right because the issue was a matter of private concern which can be subject to retaliation and, therefore, does not require analysis under the *Pickering* balancing test.[36] *Connick* will be further addressed later in this Note to determine if a child custody dispute and sworn testimony meet the requisite form, context, and content to be classified as interests of public concern.

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[26] *Pickering*, 391 U.S. at 573.
[27] *Id.* at 566–67.
[28] *Id.*
[29] *Id.* at 571–73.
[30] *Id.* at 573.
[31] *Id.* at 568.
[32] *Id.* at 571–72.
[33] Connick v. Meyers, 461 U.S. 138, 148 (1983).
[34] *Id.* at 147–48.
[35] *Id.* at 148.
[36] *Id.* at 154 (citing Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)) (throughout the *Connick* opinion, the *Pickering* balancing test was applied to reach this conclusion).

The final foundational case for First Amendment public employee protections is *Garcetti v. Ceballos*.[37] The Court held that Ceballos was acting in his capacity as a calendar deputy when he wrote a memorandum regarding government misconduct in a particular case to his supervisor.[38] Thus, his speech was not protected by the First Amendment, and his internal punishments of reassignment and denial of promotion were appropriate.[39] This case takes a more detailed look at the first step in the analysis outlined in *Butler*: whether the employee is acting pursuant to his or her official duties.[40] Through the outlining of these cases, it is clear that public employee First Amendment protections are a fact-specific, case-by-case decision for courts, and because of the discrepancies in this form of analysis, they often lead to circuit splits.

The three cases discussed above help to build a foundation for the tests applied in *Butler* and *Lane*. It appeared as though the Supreme Court had issued the final say in *Lane* in holding that the First Amendment protects the truthful, sworn testimony of a public employee, prompted by subpoena, and not acting in his or her capacity as an employee.[41] However, five years later, the Tenth Circuit held in *Butler* that this standard was not directly applicable to public employees testifying in child custody cases.[42] When looking at the elements discussed in *Connick*, the apparent per se rule created by *Lane*, that public employees' sworn testimony is protected by the First Amendment, places too much emphasis on the form and context of the speech and not the content.[43] The Tenth Circuit ultimately ruled that while the form and context of Butler's speech for his sister-in-law's custody hearing met the public concern standard, the content was simply too personal and only "of great significance to the private parties involved in the proceeding," and because the hearing related to an individual parent's custody right to her own child, it was not a "political, social, or other concern of the larger community."[44] This is where *Butler* and the precedent of family law do not coincide.

II. HISTORY OF THE BEST INTEREST OF THE CHILD AND THE STATE AS *PARENS PATRIAE*

The doctrine of *parens patriae* directly translates to "parent of the county," and represents the idea that the state can step into a protector role when citizens, who have the initial right of protector status, fail to do so.[45] While historically the common-law doctrine applied to situations of mental incapacity, more recently it has

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[37] Garcetti v. Ceballos, 547 U.S. 410 (2006).
[38] *Id.* at 421.
[39] *Id.*
[40] *Id.*; Butler v. Bd. of Cty. Comm'rs., 920 F.3d 651, 655 (10th Cir. 2019).
[41] Lane v. Franks, 573 U.S. 228, 238 (2014).
[42] *Butler*, 920 F.3d at 653–54.
[43] *Id.*
[44] *Id.* at 654.
[45] *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982).

been legislatively applied to states' control of certain areas, including:[46] natural resources,[47] and, most significantly for this Note, the welfare of a child.[48]

The Supreme Court of the United States held that "[t]he State has an urgent interest in the welfare of the child . . . . As *parens patriae*, the State's goal is to provide the child with a permanent home."[49] Additionally, the Tenth Circuit has emphasized that "[s]tates have a *parens patriae* interest in preserving and promoting children's welfare."[50] Specifically in Colorado, the state of origin of the *Butler* case, the court recognized that the state, as *parens patriae*, has a continuing responsibility for the protection of children in its territory under § 19-1-104(1)(c) of the Colorado Children's Code.[51] These jurisdiction-specific holdings demonstrate the state has a universally understood interest to protect children within its borders under the doctrine of *parens patriae*.

During a child custody hearing, as occurred in *Butler*, the universally applied standard is known as the best interest of the child standard.[52] This standard is represented in section 402 of the Uniform Marriage and Divorce Act (hereinafter UMDA).[53] It was born out of a century of gender-based presumptions controlling custody decisions post-divorce.[54] First, children were considered property; therefore, custody favored fathers, as women could not own property.[55] This view then shifted to the since-abolished "tender years doctrine" in the early 1800s, which preferred maternal custody if the child was young.[56] Finally the courts arrived at a more gender neutral, child-centered approach in the mid-1800s, known as the best interest of the child doctrine.[57] As defined in the UMDA, the doctrine is comprised of five factors.[58] The court analyzes a custody decision based on: (1) the desires of parents, (2) the wishes of the child, (3) the child's interactions with each parent and other related parties, (4) the concerns related to the child's home or school environment, and (5) the mental and physical well-being of all involved parties.[59]

While all of the above factors are significant in determining custody, for *Butler*, it is important to distinguish that there may be expert witnesses such as social workers, psychologists, and doctors who testify related to their expert knowledge in order for the court to determine custody.[60] However, Butler was a character witness

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[46] *Id.*

[47] *See generally* New Mexico v. GE, 467 F.3d 1223 (10th Cir. 2006) (explaining *parens patriae* interests of states protecting the public's beneficial use of groundwater).

[48] Santosky v. Kramer, 455 U.S. 745, 766 (1982).

[49] *Id.*

[50] Gomes v. Wood, 451 F.3d 1122, 1128 (10th Cir. 2006).

[51] E.P. v. District Court, 696 P.2d 254, 258 (Colo. 1985).

[52] *Ex rel* E.L.M.C., 100 P.3d 546, 558 (Colo. App. 2004).

[53] Erin Bajackson, *Best Interests of the Child—A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIMONIAL L. 311, 311 (2013).

[54] *Id.* at 312–14.

[55] Id.

[56] *Id.*

[57] *Id.* at 314.

[58] *Id.* at 315.

[59] *Id.*

[60] *See generally* Reginald A. Hirsch, *Expert Witnesses in Child Custody Cases*, 19 FAMILY L. Q. 207 (1985) (outlining the use of expert witnesses in child custody cases).

who also happened to be a public employee.[61] He was not providing testimony because of his employment, but rather because of his personal connections to the parents and the insights he could offer about the father's work.[62]

Butler worked for the Road and Bridge Department in San Miguel County, Colorado, alongside his sister-in-law's ex-husband.[63] While on the stand, Butler was asked about the hours of operation for the Department and other operational questions because the child's father also worked for the Road and Bridge Department.[64] In response to this testimony, his employer demoted him.[65] This employer retaliation is not in line with the protections afforded to public employees under the First Amendment and *Lane v. Franks*.[66]

Butler was in a unique position to offer knowledge as to the father's work schedule for purposes of the custody arrangement, just as the teacher in *Pickering* had unique knowledge of the way money should be spent in schools.[67] As "members of a community most likely to have informed and definite opinions"[68] related to the issue at hand, both should feel equally safe to be able to speak freely on these important public issues—education and child custody—without fear of retaliatory dismissal due to the issue's classification as a private concern.

The foundational case for the best interest standard is *Troxel v. Granville*, which limits the state's ability to interfere with a parent's rearing of their child due to the parent's constitutionally guaranteed right to make decisions on behalf of the child, pursuant to the Fourteenth Amendment.[69] In *Troxel*, the Court improperly superseded the mother's fundamental right to decide what is in the child's best interest and granted the paternal grandparents visitation rights.[70] Therefore, unless the custody of the child is put into question, triggering an analysis by the court using the five-factors discussed above, the parents retain decision making power for the child.

Another often cited best interest case is *McDermott v. Dougherty*, which discusses more directly the best interest standard as applied to parental custody disputes.[71] The best interest standard is particularly important in custody disputes between parents, and is significant to the *Butler* case, because it shows the court's need for accurate information from character witnesses in making custody determinations. While each parent may appear biased based on their personal interests, third parties—like Butler—who have a familial relationship with the parties, may be of particular use in the courts in determining the best interest of the child.

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[61] Butler v. Bd. of Cty. Comm'rs., 920 F.3d 651, 653 (10th Cir. 2019).
[62] *Id.*
[63] *Id.*
[64] *Id.* at 654.
[65] *Id.*
[66] *Id.* at 668–69 (Lucero, J., dissenting).
[67] Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968).
[68] *Id.*
[69] Troxel v. Granville, 530 U.S. 57, 65 (2000).
[70] *Id.* at 68–69.
[71] McDermott v. Dougherty, 869 A.2d 751, 770 (Md. 2005).

Thus, the best interest of the child is a paramount legal standard in the U.S..[72] Arguably, one of the most useful pieces of evidence in a custody dispute is third-party testimony that puts the statements or actions of one parent in question. For example, in *OCBSS v. Manuel*, the court dismissed a mother's petition after third-party testimony contradicted her own testimony by countering the mother's statements related to financial stability and disputing the child's happiness in the mother's home.[73] Contrary to this, arguments have been made that the best interest standard is not in conformity with the fundamental right of parents to parent their children.[74] In states that lack a joint custody standard, the best interest determination may appear to grant the judge too much power in independently determining the best interest of the child in the role of *parens patriae*.[75] However, most states, including Colorado,[76] follow a joint custody standard,[77] where the best interest factors are a more productive and fairer analysis for the court to use.

III. *BUTLER*'S SILENCE ON THE BEST INTEREST STANDARD: IS THIS A PROBLEM?

By connecting these two doctrines, *parens patriae* and the best interest of the child, the state's role in child custody proceedings is clear: protect the child without overstepping the constitutional interests of the parent. The *Butler* majority opinion begins by citing to the first three steps of the *Pickering/Garcetti* test: public employee speech is protected only when that speech is "(1) made as a citizen (2) on a matter of public concern (3) if the employee's right to speak outweighs the government's interest as an employer in an efficient workplace."[78] The case specifically deals with whether child custody cases should be classified as issues of public concern.[79]

The majority held that "[a]lthough Butler's testimony involved a matter of great significance to the private parties involved in the proceeding, it did not relate to any matter of political, social or other concern of the larger community," thus the testimony was not on a public concern.[80] However, based on the holdings in both *Lane* and *Troxel*, because this case arose from post-divorce proceedings, it is one in which the courts must intervene with a parent's constitutional right to raise and make decisions for their children. Contrary to *Troxel*, where the mother was the sole surviving parent,[81] and therefore had the only say in parenting decisions, in *Butler*, the parents are in a custody dispute following their separation.[82] Because of this, the

[72] Troxel v. Granville, 530 U.S. 57, 86, 91 (2000).

[73] George L. Blum, Annotation, *Sufficiency of Evidence to Modify Existing Joint Legal Custody of Children Pursuant to Consent Order and/or Divorce Judgment—General Principles, Jurisdictional Issues, and General Issues Related to "Best Interest of Child,"* 99 A.L.R.6th 203 § 28 (2014).

[74] *See* Nicole Lapatis, *In the Best Interest of No One: How New York's "Best Interest of the Child" Law Violates Parents' Fundamental Right to the Care, Custody, and Control of their Children*, 86 ST. JOHN'S L. REV. 673, 678 (2012).

[75] *Id.* at 688.

[76] COLO. REV. STAT. § 14-10-124(1) (2014).

[77] Lapatis, *supra* note 74, at 678.

[78] Butler v. Bd. of Cty. Comm'rs., 920 F.3d 651, 653 (10th Cir. 2019).

[79] *Id.* at 653–54.

[80] *Id.* at 654.

[81] Troxel v. Granville, 530 U.S. 57, 60 (2000).

[82] *Butler*, 920 F.3d at 653.

court should use the best interest of the child standard to determine what the best custody arrangement is for this situation.

Butler argued that he was speaking on a matter of public concern because "the state's general interest in child welfare and fair custody proceedings," classifies a child custody hearing as such.[83] The Tenth Circuit disagreed, providing case-based examples of what would classify as public concern, including "evidence of corruption, impropriety, or other malfeasance within the government entity," but not usually "internal personnel disputes and working conditions."[84] In the *Connick* test, as discussed above, there are three main criteria for deciding if speech should be classified as relating to public concern: form, context, and content.[85] Here, too much emphasis is placed on the content of the speech, meaning the questions that Butler was asked while testifying in the child custody proceeding.[86]

When looking at the form and context of the speech, the court also rejects the significance of First Amendment protection for public employees testifying in child custody cases. The court reasons that because the community at large did not have an interest in the hours of operation of the Department or the sister-in-law's character, the testimony was on a private concern and could be subject to retaliation because Butler spoke of something which was readily accessible to the public (namely the hours of operation).[87] While it is reasonable to argue that the information Butler provided in his testimony was likely readily accessible in another format to be presented to the court, this does not mean that it should have been against the employer's interest for Butler to testify as he did.

As Cynthia Estlund argues, the classifications of specific practices as being within public concern for purposes of the First Amendment under *Connick* is a limiting practice on what our society is told to value.[88] If a subject is not considered to be within the realm of public concern, then the possibility increases that it will no longer be viewed as a "legitimate subject[] of public discussion."[89] If more courts refuse to classify child custody hearings as matters of public concern, the integrity and safety of the process of determining custody through the courts will be delegitimized and countless children disenfranchised.[90] Ultimately, the stringent classifications in the public concerns test, "discounts the importance, and undermines the claim to constitutional status, of speech grounded in the real, everyday experience of ordinary people."[91]

Estlund further points out that the public concerns test, as it is presently applied, also prohibits "women in particular" from these public employee protections because women are often less able to "participate in public life" due to "pregnancy, childbirth

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[83] *Id.* at 656–57.
[84] *Id.* at 656.
[85] *Id.* at 657.
[86] *Id.* at 665 (Lucero, J., dissenting).
[87] *Id.* at 664.
[88] Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 3 (1990).
[89] *Id.*
[90] *See Butler*, 920 F.3d at 665–68 (Lucero, J., dissenting).
[91] Estlund, *supra* note 88, at 37.

and childrearing responsibilities."[92] The limitations of the public concern test keep women from having the opportunity to participate in public discourse without fear of retaliation by public employers because the issues that are frequently expected to be at the forefront of their minds have not been classified as "public" enough to warrant free speech privileges.

The dissent in *Butler*, written by Judge Lucero, advocates for the use of the best interest standard in this case.[93] Colorado declared that the placement of children was a matter of public concern through its statutes,[94] which should have provided a basis for an argument that the majority did not address. Furthermore, the dissent correctly points out that while custody "is partly personal in nature, it is at its root a societal and public issue."[95] Before incorporating analysis of the best interest of the child, the dissent makes multiple astute arguments that *Lane* intended for the form and the context of testimony in a public court case to be enough to raise the speech to a realm of public concern.[96] Moreover, a connection is drawn between sentencing proceedings, which were held to invoke public concern in *Bailey v. Indep. Sch. Dis. No. 69*,[97] and child custody cases.[98] Both proceedings are paid for by the public, become public record, and are able to be viewed by the public.[99] The court is at the forefront of public discourse in America, and all proceedings before it should be viewed as relating to public concern.

The dissent draws connections the majority failed to see. First, Colorado clearly supports and enforces the *parens patriae* doctrine, requiring the state to care for "children who cannot care for themselves."[100] This protection is achieved when the court, again following Colorado's instruction, "make[s] an independent examination of the best interest of the child in custody matters."[101] The majority appears to ignore Colorado precedent which promotes custody disputes as related to the state's public interest, and even more that child support has a public function as well.[102] The dissent makes the same conclusion as this Note: *Lane* creates the Supreme Court precedent for testimony to be classified as public concern, Colorado further promotes child custody and welfare as a public concern, and nowhere is child custody classified as a private interest.[103] Butler's testimony is quintessential public concern for child custody cases and yet he is punished for acting in conformity with two widely accepted and applied legal standards.

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[92] *Id.* at 39.
[93] *Butler*, 920 F.3d at 667 (Lucero, J., dissenting).
[94] COLO. REV. STAT. § 19-3-100.5(1) (2018).
[95] *Butler*, 920 F.3d at 665 (Lucero, J., dissenting).
[96] *Id.* at 666 (Lucero, J., dissenting).
[97] Bailey v. Indep. Sch. Dist. No. 69, 896 F.3d 1176, 1181 (10th Cir. 2018).
[98] *Butler*, 920 F.3d at 666 (Lucero, J., dissenting).
[99] *Id.*
[100] *Id.* at 667.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 666–67.

IV. WHAT IS THE SOLUTION?

The Tenth Circuit was incorrect to rule against Butler and the best interest standard. While the court did not have to go so far as to say that there is a per se First Amendment protection for public employees testifying in court, the court should have recognized the significance of child welfare in Colorado and the public concern given to this topic. The United States Supreme Court should take up this case on appeal in order to more clearly classify all proceedings in a public courtroom as related to public concern, especially those dealing with the welfare of children.

When *Lane* was decided, there was a massive circuit split on what to do about public employee testimony in court cases, not just in child custody decisions.[104] The nuances of the *Garcetti* and *Pickering* tests were interpreted differently by the circuits, each placing emphasis on different aspects.[105] The Supreme Court needs to create a streamlined approach, which more clearly includes room for child custody proceedings as a public concern. While the *Lane* decision created a clearer, more standardized approach to dealing with public employee testimony, more could have been said. As Sara Robertson argues, altering the standard to first determine "whether the speech is on a matter of public concern as the sole threshold question," before applying the *Pickering* test would better balance all parties interests.[106] If this standard were adopted, then the Tenth Circuit would have had to first consider that Butler was testifying in a child custody case, which under Colorado law is a public concern.[107] With such an approach implemented, the court would then be able to tell the employer that because Butler was testifying in a case which was related to public concern, namely the welfare of a child, his speech was protected from employer retaliation.

An alternative, which is slightly counter-intuitive, requires restraint on the state's *parens patriae* power to remove child custody disputes from the courts and resolve them instead through arbitration.[108] According to Aaron Zurek, the current system in many states does not allow for "arbitration of custody disputes or subject[s] the award to de novo judicial review."[109] This allows for significant control of child custody cases in the court system and in turn makes public employees vulnerable to retaliation for their testimony in such cases. Arbitration of child custody decisions also promotes the best interest of the child by "allowing parents to choose the values that shall govern the decisionmaker's resolution of their custody dispute."[110]

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[104] Sara J. Robertson, Note, *Lane v. Franks: The Supreme Court Frankly Fails to Go Far Enough*, 60 ST. LOUIS U. L.J. 293, 300–01 (2016).

[105] *Id.*

[106] *Id.* at 314.

[107] *See generally Butler*, 920 F.3d at 665–67 (Lucero, J., dissenting) (citing Colorado laws pertaining to the public interest in child custody).

[108] Aaron E. Zurek, Note, *All the King's Horses and All the King's Men: The American Family After Troxel, the Parens Patriae Power of the State, a Mere Eggshell Against the Fundamental Right of Parents to Arbitrate Custody Disputes*, 27 HAMLINE J. PUB. L. & POL'Y 357, 364 (2006).

[109] *Id.*

[110] E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1144 (2000).

Allowing parents to arbitrate their child custody decisions is a practical alternative to relieve stress on the court system and honor the best interest of the child standard.

CONCLUSION

One's position as a public employee should not hinder nor suppress the truth when something as significant as a child's well-being and safety is on the line. The Tenth Circuit, in *Butler*, threatened this idea by holding that public employee testimony is not related to a public concern in child custody cases. With clear evidence from Colorado, the state of origin of the case, that the state has an interest in protecting the welfare of children coupled with a storied history of traditions of *parens patriae* and the best interest of the child standard across the nation, the Tenth Circuit ignored precedent and deemed child custody to be a domestic, private matter.

Private negotiations and mediations are not in the realm of public concern; divorce and custody battles that happen outside the courtroom are not public concern. But when the welfare of a child is put into the hands of the court, a public institution, the state must protect the interests of the child. Courts have taken advantage of their unique role in child custody proceedings, too often usurping the parents' desires in the name of the best interest standard. The ability of parents to provide testimony of witnesses, whether they be employed publicly or privately, is a right that no court should try to abridge. The sanctity, procedure, and classification of the court as dealing with matters of public concern should be appreciated and adhered to across all disciplines of the law, even when the case relates to matters of the family.