

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 Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

—◆—
**BRIEF OF THE NATIONAL WHISTLEBLOWER
CENTER AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

—◆—
STEPHEN M. KOHN
(Counsel of Record)
MICHAEL D. KOHN
DAVID K. COLAPINTO
KOHN, KOHN AND COLAPINTO, LLP
1710 N Street, N.W.
Washington, D.C. 20007
(202) 342-6980
(202) 342-6984 (fax)
sk@kkc.com

Counsel for the National Whistleblower Center

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INTEREST OF *AMICUS CURIAE*

The National Whistleblower Center is a nonprofit, non-partisan, tax-exempt organization dedicated to the protection of employees who lawfully report fraud, illegal conduct or who testify on matters of public concern.¹ *See* www.whistleblowers.org. Since 1984, the Center's directors have represented whistleblowers, taught law school courses on whistleblowing, and authored numerous books and articles on this subject—including the first-ever published legal treatise on whistleblower law.

As part of its core mission, the Center attempts to ensure that individuals who engage in lawful disclosures are not subject to retaliation. Testimony in courts of law are among the most important forms of speech that need full and complete protection. Any retaliation based on truthful court testimony, whether it is in a civil or criminal case, not only undermines the rule of law and the legitimacy of the court system, but also interferes with the right of individuals to provide truthful testimony in matters for which society has opened its judicial system to public use. Just as courts have recognized the importance of keeping the

¹ Pursuant to Rule 37.6, the Center affirms that no counsel for a party authored this brief in whole or in part and that no person other than the Center as *amicus*, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties have filed letters granting blanket consent to the filing of *amicus* briefs with the clerk. Notice was provided on September 30, 2019, and counsel for the parties responded by stating that they consent to this filing.

courthouse door open to indigent persons, so this Court must recognize that protecting persons who provide truthful testimony in courts of law are entitled to the strongest protections under our constitutional system of government.

To support witnesses in judicial proceedings from retaliation, the National Whistleblower Center filed two prior *amicus* briefs in cases concerning court testimony. See *Haddle v. Garrison*, 525 U.S. 121 (1999) and *Lane v. Franks*, 573 U.S. 228 (2014).²



INTRODUCTION AND SUMMARY OF THE ARGUMENT

The question in this case concerns one of the most fundamental rights protected under law: the right to provide truthful testimony in courts of law. Any interference with this fundamental right would undermine the rule of law, as well as public respect and the integrity of the judicial system. It would also harm the

² In addition to these two cases the Center has participated as an *amicus* in other cases decided by the Court concerning whistleblower rights cases. See, e.g., *English v. Gen. Elec.*, 496 U.S. 72 (1990); *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Doe v. Chao*, 540 U.S. 614 (2004); *Lawson v. FMR LLC*, 571 U.S. 429 (2014); *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015); *Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016); *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018); *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019).

public's right to adjudicate claims under any civil or criminal law through access to the judicial system.

Ultimately, it should not be up to a judge or anyone else to question the importance of any legal right society has determined can be resolved in the courts. Duly elected governments (including the Founding Fathers when they drafted the Constitution and passed the Bill of Rights) decide what rights can be adjudicated in courts of law. U.S. CONST. art. III; amend. VII.³ Thereafter, it is the responsibility of the government to ensure the right of witnesses to provide truthful testimony in court. Strict protection of these rights is absolutely necessary in order to ensure just verdicts in any case. Any other outcome would radically undermine the rule of law, which is the foundation for all republican forms of government. *See* U.S. CONST. art. IV, § 4.

In this case, the petitioner brought an action under 42 U.S.C. § 1983 ("Section 1983"), alleging violation of the right to free speech under the First and Fourteenth Amendment by demoting him for testifying truthfully at his sister-in-law's child custody hearing. The very law under which petitioner has sued was originally passed by Congress as the Civil Rights Act of 1871, H.R. 320.

³ The importance of ensuring fair and impartial verdicts in courts of the United States is reinforced by the constitutional protections afforded all federal judges, ensuring that their salary may not be reduced and that their appointments are for life. *See* U.S. CONST. art. III, § 1.

The Civil Rights Act of 1871 (“the Act”) was designed, in part, to protect witnesses in judicial proceedings. That law recognizes the essential role that access to civil courts plays to ensure the rule of law. At the time, this was especially important in former slave states where access to a fair and impartial judicial system was essential in protecting all common law, statutory, or other civil rights of the newly freed slaves. The original 1871 Act, H.R. 320, did not differentiate between civil or criminal court proceedings. This Act purposefully did not enumerate the types of “rights” protected under that statute; rather, it was enacted to protect *all* rights associated with citizenship for newly freed slaves. These rights include and are not limited to property, contract, and family rights, as well as the right to access the courts to realize these rights without fear as either a litigant or a witness.

Section 1 of the original 1871 Act stated that “any person who, under the color of any law, statute, ordinance, regulation, or usage of any State, shall be subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of **any rights, privileges, or immunities secured by the Constitution of the United States**, shall . . . be held liable.” Ch. 22, § 1, 17 Stat. 13 (1871) (emphasis added), codified at 42 U.S.C. § 1983.

Section 2 of the Act forbids persons from using “intimidation, or threat to deter any party or witness in **any court** of the United States from attending such court, or from **testifying in any matter pending in such court fully, freely, and truthfully, or to**

injure such party or witness in his person or property on account of having so attended or testified, or by force or intimidation, or threat to influence the verdict, presentment, or indictment of any grand or petit juror in any such court.” *Id.* § 2 (emphasis added), codified at 42 U.S.C. § 1985.

Section 3 of the Act stated that, should insurrections “deprive any portion or class of the people . . . of any of the rights, privileges, or immunities, or protection, named in the Constitution, and secured by this act, or obstruct the equal and impartial course of justice, . . . it shall be lawful for the President, and it shall be his duty, to take such measures[] . . . as he may deem necessary for the suppression of such insurrection . . . and any person who shall be arrested under the provisions of this and the preceding section shall be delivered to the marshal for the proper district, to be dealt with according to law.” *Id.* § 3.

One of the core purposes of the Civil Rights Act of 1871 was to ensure that civil laws could be enforced in federal courts. It hardly mattered if the subject of the law was property, wages, family, contract, criminal, or otherwise. The rule of law was necessary to ensure that the newly freed slaves could protect all of their rights through access to the federal judicial system.

At its core, the Act protected the ability of all citizens to testify in any court without fear of retaliation as a matter of basic civil rights which goes to the core of our judicial system. Retaliation against witnesses in courts of law has ramifications far beyond any single

civil case. Such retaliation, if permitted, would have a chilling effect on all witnesses and on the fair administration of justice in all cases. It is imperative that this Court fully vindicate the right of a witness in any judicial proceeding to give testimony, freely and without fear of retaliation.

The right to testify is a matter of contention within circuit courts. In *Lane v. Franks*, this Court granted certiorari “to resolve discord among the Courts of Appeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities.” 573 U.S. 228, 235 (2014). Since that decision, lower courts have split regarding the extent to which the right to testify is protected.

In *Lane*, the Court ruled in favor of a state employee’s right to testify in criminal court. *Id.* at 238. The Court should grant certiorari in this case to determine whether this protection extends to civil proceedings because truthful court testimony by public employees outside of the scope of their job duties is First Amendment speech in their role as citizens. As noted in *Lane* and other cases, anyone who testifies in court bears an obligation, to the court, and to society at large, to tell the truth and that testimony will be the basis for official government action affecting the rights and liberties of others. *Lane*, 573 U.S. at 238-239.



ARGUMENT

I. Under the Common Law and Supreme Court Precedent, Truthful Testimony in Judicial Proceedings Must be Protected.

Unlike speech in other contexts, testimony under oath in courts of law “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). In *Lane*, the Court made it clear that “public employees do not renounce their citizenship when they accept employment.” *Id.* at 236. Citizenship, and the rights that constitute citizenship, were at the heart of the Civil Rights Act of 1871, which strove to ensure that the successful abolition of slavery was not followed by the disparate treatment of formerly enslaved people.

The right to testify has long been protected, and witnesses are customarily immune from suits for damages for statements made during testimony. See *Briscoe v. LaHue*, 460 U.S. 325, 330-333 (1983). The principles underlying the need to protect government employees from retaliation should they offer testimony in any judicial proceeding are identical to those for non-government employee witnesses: to encourage witnesses to come forward, and to ensure truthful testimony is not “distorted by the fear of subsequent liability.” *Id.* at 333.

The Court should grant certiorari not to debate the value of truthful witness testimony, but rather to clarify to lower courts that “the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible,” even when that truth is coming from a government employee. *Id.* (quoting *Calkins v. Sumner*, 13 Wis. 193, 197 (1860)).

In *Snyder v. Phelps*, the Court highlighted the issue of restricting the speech of public employees by stating that: “[T]he boundaries of the public concern test are not well defined. Although that remains true today, we have articulated some guiding principles, principles that accord broad protection to speech to ensure that **courts themselves do not become inadvertent censors.**” 562 U.S. 443, 452 (2011) (emphasis added) (internal quotations and citations omitted). The Court exercised measured restraint, noting that “[s]peech is powerful” and that “[i]t can . . . inflict great pain,” but that the Court “cannot react to that pain by punishing the speaker.” *Id.* at 460-461. The Court must apply this restraint to protect the right of a government employee to testify even when the outcome may be adverse to the interests of a supervisor or manager.

It is vital that the Court clarify that the boundaries of public concern encompass those areas that are justiciable in public courts, whether civil or criminal. This Court must avoid the massive chilling effect on speech by preventing government employers from retaliating against employees for testifying under oath in judicial proceedings.

II. The Civil Rights Act of 1871 Requires that Testimony in Civil Court Proceedings are Fully Protected.

The drafters of the Civil Rights Act of 1871 were aware that full realization of citizenship, by means of civil rights, involved the ability to testify in courts—as illustrated by the below vignette from the *Congressional Globe*:

[Senator] Thurman: I will ask my friend if they were denied any rights except political rights. All the rights of citizenship were allowed.

[Senator] Trumbull: Oh yes; they were denied civil rights. They were not allowed to be a witness in court.

Cong. Globe, 42d Cong., 1st Sess. 236, 576 (1871). Further, the text of the Act specifically prohibits:

force, intimidation, or threat to deter **any party or witness in any court** of the United States from attending such court, or from **testifying in any matter** pending in such court fully, freely, and truthfully, or to injure such party or witness in his person or property **on account of having so attended or testified**, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States[.]

Ch. 22, § 2, 17 Stat. 13 (1871) (emphasis added), codified at 42 U.S.C. § 1985(2).

“Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.” *Lane*, 573 U.S. at 238. Congress has already decided that protecting truthful testimony is a matter of public concern that is at the heart of the Civil Rights Act of 1871.

Once Congress has opened the courthouse doors to various causes of action, Congress has balanced competing interests of potentially affected individuals or entities, and determined which laws can be subject to judicial enforcement. It is inappropriate for any court to thereafter rank laws, and engage in some form of analysis as to which causes of action allow a public employer to lawfully censure a witness for providing truthful testimony, and which laws are somehow shielded from witness intimidation. There should be no judicial rebalancing of these carefully considered interests for which Congress (or the U.S. Constitution itself) has determined should be adjudicated in court. *Milner v. Dep’t of Navy*, 562 U.S. 562, 571 n.5 (2011); see also Pet’r’s Br. at 36 (quoting *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 29 (1989) (“Giving full effect to the words of the statute preserves the compromise struck by Congress.”)). Two statutory provisions in the Civil Rights Act of 1871 expressly protect the right of persons to give testimony in all court proceedings, and create a cause of action should this right be abrogated. Ch. 22,

§§ 1, 2, 17 Stat. 13 (1871); codified at 42 U.S.C. §§ 1983, 1985.

Unlike some anti-retaliation laws, the Civil Rights Act of 1871 was intentionally drafted broadly, and provides specific statutory protections related to testimony in courts of law. The act specifically refers to the right to serve as a witness and to testify in any court, including civil courts. The Congressional history supporting ratification of the Act point to the legislative intent to ensure no persons are excluded from the right to testify in civil trials.

These deliberate inclusions demonstrate that Congress directly considered the conditions necessary to ensure the vindication of the rule of law (which is the foundation of all democratic governments).

Statutes are interpreted “as a whole.” *Heydenfeldt v. Daney Gold*, 93 U.S. 634, 639 (1876); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000). This settled rule of statutory construction was set out in *New Lamp Chimney v. Ansonia Brass & Copper Co.*, which held that a particular provision in a statute “does not stand alone,” and thus “must be read and applied in connection with” the entire regulatory scheme “so that each and every section of the act may . . . have their due and conjoint effect without repugnancy or inconsistency.” 91 U.S. 656, 662 (1875); *see also Davis v. Mich. Dep’t of Treas.*, 489 U.S. 803, 809 (1989).

Recently, in *Digital Realty Trust, Inc. v. Somers*, this Court stated that “[w]hen a statute includes an

explicit definition, we must follow that definition,” and that a “definition operates in conjunction” with the other portions of the statute. 138 S. Ct. 767, 776-777 (2018) (internal quotations and citations omitted). Further, the Court understands the statute in a manner consistent with its “purpose and design.” *Id.* at 777.

The well-established purpose and design of the Civil Rights Act of 1871 was to ensure that all people had access to all courts without fear. The protection of the right to testify, as a civil right, was specifically discussed in Congress in debates leading to the ratification of the Act. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 236, 576 (1871). On its face, the Act specifically names the right to “witness in any court” and “testify in any manner” and states that no person shall be injured “on account of” such testimony. This definition is explicit, and operates in conjunction with the statute’s other parts by providing blanket protection, and is consistent with the purpose and design of protecting the rights of all people to ensure the stability of our democracy and the rule of law. By creating a civil right of action, the Act also recognizes the importance of the civil courts as venues for realizing civil rights.

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CONCLUSION

The rule of law is threatened whenever witnesses are subject to retaliation. Such retaliation *will* create a massive chilling effect, regardless of the cause of action underlying the testimony. Truthful testimony in

court is not simply a public duty for which witnesses should be thanked. Protecting witnesses who provide truthful testimony in court is a predicate for public respect of the entire judicial system. This Court should grant certiorari in this matter.

Respectfully submitted,

STEPHEN M. KOHN
(Counsel of Record)
MICHAEL D. KOHN
DAVID K. COLAPINTO
KOHN, KOHN AND COLAPINTO, LLP
1710 N Street, N.W.
Washington, D.C. 20007
(202) 342-6980
(202) 342-6984 (fax)
sk@kkc.com

*Counsel for the National
Whistleblower Center*