No. 20-804

IN THE

Supreme Court of the United States

HOUSTON COMMUNITY COLLEGE SYSTEM,

Petitioner,

v.

DAVID BUREN WILSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MEREDITH PRYKRYL WALKER
Counsel of Record
WALSH GALLEGOS TREVIÑO RUSSO & KYLE P.C.
105 Decker Court, Suite 700
Irving, Texas 75062
(214) 574-8800
mwalker@wabsa.com

Counsel for Amicus Curiae

301176

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICUS CURIAE*[*]

Over 750 public school districts and community colleges in Texas are members of *amicus*, the Texas Association of School Boards Legal Assistance Fund (TASB LAF), which advocates the interests of school districts and community colleges in litigation with potential state-wide impact. The TASB LAF is governed by members from three organizations: the Texas Association of School Boards, Inc. (TASB), the Texas Association of School Administrators (TASA), and the Texas Council of School Attorneys (CSA).

TASB is a Texas non-profit corporation whose members include approximately 1,025 public school boards in Texas, along with 50 Texas community colleges. As locally elected boards of trustees, TASB's members are responsible for the governance of Texas public schools and community colleges throughout the state. TASB's mission is to promote educational excellence for Texas school children and community college students through advocacy, leadership, and high quality services to TASB's members.

TASA represents the State's school superintendents and other administrators responsible for implementing the education policies adopted by their local school boards and for following state and federal law. CSA is comprised

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* Pursuant to Rule 37.2(a), *amicus* provided timely notice of its intention to file this brief to all counsel of record. All parties consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, made a monetary contribution toward the preparation or submission of this brief.

of attorneys who represent more than 90 percent of Texas independent school districts, as well as Texas community colleges.

The TASB LAF has a strong interest in ensuring that TASB's members—locally elected boards—preserve their right to self-govern. School boards operate as bodies corporate with independent authority to establish local policies and operating procedures. School boards should be able to maintain these standards without fear that individual members will cry foul when reprimanded or censured for violating them by seeking intervention from the federal district courts under the guise of a First Amendment violation. Unfortunately, this is exactly what the Fifth Circuit's decision provides. The TASB LAF submits this *amicus* brief accordingly to address its interests in these issues and, more specifically, the impact the Fifth Circuit's decision has on school districts and community colleges across Texas, Louisiana, and Mississippi.

SUMMARY OF ARGUMENT

Members of the Board of Trustees of Petitioner Houston Community College System (HCC) are elected by the public to serve six-year terms. Once elected, however, a Board member cannot be recalled by the electorate or removed by his fellow Board members.[1] This leaves

1. Various Texas statutes provide a cumbersome avenue for the removal of Board members, which requires either intervention by the attorney general or the county or district attorney or a petition and trial in a district court. *See* Tex. Civ. Prac. & Rem. Code §§ 66.001-66.003; Tex. Educ. Code § 130.0845; Tex. Gov't Code §§ 87.011-87.019.

HCC's Board, as well as other locally elected school and community college boards across Texas, with very few tools to address Board members whose conduct does not fall within the expected norms of professionalism. While few in number, those tools—including censure and reprimand—ensure locally elected school and community college boards can effectively govern and focus on their mission of educating students without being undermined by one of their own members.

To that end, if John Q. Board Member goes on a social media rant espousing hateful and racist comments, HCC could issue a censure or a reprimand to address his conduct.[2] If, despite warnings, John Q. Board Member repeatedly violates the Board's bylaws, thereby disrupting meetings and attacking fellow Board members, HCC could issue a censure or a reprimand to address his conduct. If John Q. Board Member releases confidential information obtained during a closed session meeting of the Board, HCC could reprimand or censure him accordingly. Indeed, censure—a long held power utilized by elected governmental bodies—allows the HCC Board to not only self-govern but also to speak for itself by addressing and denouncing John Q. Board Member's conduct in order to continue its important work of serving HCC's students.

In reality, these "John Q. Board Member" scenarios are far too common. School boards across Texas have been challenged with individual board member misbehavior including posting discriminatory social media rants,

2. While John Q. Board Member is fictitious, the scenarios described herein are derived from news stories across Texas and other states reflecting conduct similar in nature to that engaged in by John Q. Board Member.

seeking special treatment because of the board member's elected office, independently investigating employees, publicly releasing confidential information, demanding district administrators forbid employees from speaking Spanish in schools, openly criticizing fellow board members, interfering in matters outside the scope of the board member's statutory duties as a trustee, violating state election law, leaving board meetings early, yelling at fellow trustees, and inappropriately criticizing a school district's teachers. This type of conduct undermines the trust the public places in school and community college boards through operational disruptions that prevent boards from fulfilling the mission of educating students.

Under authority from the Third, Fourth, Sixth, Ninth, and Tenth Circuit, HCC could censure the improper conduct of John Q. Board Member without running afoul of his First Amendment rights, as those courts recognize HCC's authority to self-govern and speak for itself.[3] Indeed, those circuits have clarified what constitutes protected speech subject to redress under the First Amendment and what conduct is insulated from challenge.

The same cannot be said in the circuit where HCC resides, as the Fifth Circuit's decision in favor of Respondent David Wilson allows John Q. Board Member to lay every petty internal squabble leading to a reprimand against him at the feet of the federal district courts,

3. *See Werkheiser v. Pocono Township Bd. of Supervisors*, 704 Fed. App'x 156 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 1001 (2018); *Whitener v. McWatters*, 112 F.3d 740 (4th Cir. 1997); *Zilich v. Longo*, 34 F.3d 359 (6th Cir. 1994); *Blair v. Bethel Sch. Dist.*, 608 F.3d 540 (9th Cir. 2010); *Phelan v. Laramie County Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243 (10th Cir. 2000), *cert. denied*, 532 U.S. 1020 (2001).

thereby leaving HCC to choose between allowing John Q. Board Member to run roughshod over the Board or potentially facing his First Amendment claim.

But a choice between two equally unappealing options is no choice at all; it is a dilemma. Under the Fifth Circuit's decision, the HCC Board faces either a First Amendment lawsuit or an impermissible roadblock to self-governance and expression of its own views. School districts and community colleges outside of the Fifth Circuit do not face this dilemma.

The Fifth Circuit's decision is inconsistent with existing jurisprudence in other circuits, intrudes on a local authority's ability to properly manage its own internal affairs, and creates entirely new and judicially groundless avenues for liability against public school districts, community colleges, and any other entities governed by elected boards of trustees across Texas, Louisiana, and Mississippi. The Fifth Circuit's decision cannot stand.

ARGUMENT FOR GRANTING THE PETITION

On January 18, 2018, HCC issued a Resolution of Censure following Respondent David Wilson's conduct "demonstrat[ing] a lack of respect for the [HCC] Board's collective decision-making process," "fail[ing] to interact with fellow Board members in a way that creates and sustains mutual respect," and violating Board policy. (Pet. App. 42a-45a). Instead of accepting responsibility for his actions that led to the Resolution of Censure, Wilson ran to the courthouse steps alleging a First Amendment right to sow discord among a duly elected governmental body, and an accredited educational institution, by accusing his fellow Board members of unethical and illegal conduct,

retaining private investigators to conduct surveillance of a fellow Board member and to personally investigate the Board and HCC as a whole, and filing suit against HCC complaining of the Board's interpretation of its own bylaws. (Pet. App. 42a-45a).

The district court dismissed Wilson's claims, recognizing that the political consequences for Wilson's political actions—the Resolution of Censure—did not create an injury-in-fact redressable under the First Amendment since it neither prevented him from performing his official duties nor prohibited him from speaking publicly. The Fifth Circuit inexplicably disagreed, thereby wrapping Wilson's bad acts in the protective blanket of the Constitution, disregarding the well-established practice of censure within elected bodies, and creating a split in the circuits.

Courts have long recognized that public reprimands and even censures come with the territory when an individual chooses to engage in the rough and tumble nature of politics by holding public office. More importantly, as Judge Ho aptly stated in the dissent from the rehearing *en banc* order, "Leaders don't fear being booed. And they certainly don't sue when they are." (Pet. App. 41a). The Fifth Circuit's decision, however, is an open invitation for political office holders to do just that.

I. The purpose behind censures and reprimands is self-governance—not the curtailing of free speech rights.

Merriam-Webster defines "censure" as "1. a judgment involving condemnation; 2. the act of blaming or condemning sternly; 3. an official reprimand." *See* https://

www.merriam-webster.com/dictionary/censure. This definition accurately reflects that a public censure is not an attempt to deprive any board member of his or her First Amendment rights; instead, it is a simple attempt at self-governance through an expression of disapproval by a body of one's elected peers.

A censure does not prevent a board member from speaking out. A censure does not punish a board member for using his or her voice. A censure does not prevent a board member from continuing to engage in the same conduct that resulted in the censure in the first instance. A censure does not impede a board member's ability to act as an elected official. Rather, a censure acts as an attempted check on board member conduct in an effort to curtail future unprofessional acts and ensure compliance with board bylaws, rules, and codes of conduct.

Take, for example, John Q. Board Member who runs to social media following school board meetings to post information about the board's closed session discussions. His inability to keep such information in confidence violates the board of trustees' code of ethics. The other board members have no recourse for his actions, particularly given that disclosing information discussed in closed session does not violate the Texas Open Meetings Act or carry any civil or criminal penalties.[4] This leaves a public censure as the only method available to address, and attempt to correct, John Q. Board Member's misbehavior. Indeed, "an organization or assembly has the ultimate

4. While the Texas Open Meetings Act provides civil and criminal penalties for disclosing a certified agenda or recording from a closed session board meeting, there are no similar penalties outlined for word-of-mouth disclosure. *See* Tex. Gov't Code § 551.146.

right to make and enforce its own rules, and to require that its members refrain from conduct injurious to the organization or its purposes." Henry M. Robert, *Robert's Rules of Order* § 61 p.643.

What could be more injurious to a school board or community college board than disseminating the very information the Texas Open Meetings Act protects as confidential—consultations with its attorneys, purchases of real property, personnel matters, student matters, and security? *See* Tex. Gov't Code §§ 551.071, .072, .074, .076, .082, .0821, .089. Ensuring that John Q. Board Member understands such information needs to remain confidential and ensuring that he follows the board's bylaws are the fundamental purpose behind censure—not to silence his point of view.

II. The Fifth Circuit's exercise in semantics leaves duly elected boards without any guidance as to when they allegedly run afoul of the First Amendment.

The Fifth Circuit held Wilson had a cognizable First Amendment claim against HCC because the speech he alleged that resulted in the Reprimand of Censure addressed a matter of public concern. (Pet. App. 14a). In so holding, and in explaining the rationale for its decision, the Fifth Circuit left school and community college boards across Texas, Louisiana, and Mississippi without any clear guideposts of how an elected governmental body could self-govern its members and express its own views through reprimand or censure without running afoul of a board member's First Amendment rights.

The Fifth Circuit failed to recognize that every matter taken up by an elected school or community college

board, and addressed by its members, could conceivably address a matter of public concern. While it is feasible to separate speech addressing a matter of public concern from private speech when it comes to public employees, the same simply cannot be said for the speech of board members who are elected by the public to manage and oversee a governmental entity. Indeed, the very nature of a board member's position involves speaking on matters of public concern.

The other circuits that have addressed this issue rejected such an inapposite and nebulous First Amendment analysis to claims from elected officials. In *Phelan*, the Tenth Circuit rejected the *Pickering*[5] approach applicable to public employees, but declined to adopt another approach because the censure in question did "not trigger First Amendment scrutiny," which requires "consequences that infringe protected speech." *Phelan*, 235 F.3d at 1247. Given that the censure "did not prevent [the plaintiff] from performing her official duties or restrict her opportunities to speak," there were no actual consequences that stemmed from the censure. *Id.* at 1248.

The Third Circuit, likewise, focuses on whether a politically motivated act such as a reprimand or censure impedes an elected official's "ability to carry out his basic duties." *Werkheiser*, 704 Fed. App'x at 158. Absent actions by an elected body that interfere with a member's ability to carry out his duties as an elected official, a First Amendment claim will not attach. *Id.* at 158-60.

The Ninth Circuit in *Blair* observed the plaintiff was not "prototypical" given his status as an elected official.

5. *See Pickering v. Bd. of Educ. of Township High Sch. Dist.*, 391 U.S. 563 (1968).

Blair, 608 F.3d at 543-44. Indeed, the plaintiff's removal from a leadership position on the school board did not trigger his First Amendment rights because "his authority as a member of the [b]oard" remained unaffected in that "he retained the full range of rights and prerogatives that came with having been publicly elected." *Id.* at 544. It followed that the plaintiff's removal from leadership simply did not chill his free speech. *Id.*

In departing from other circuits, the only standard supplied by the Fifth Circuit to help elected boards in determining whether a censure runs afoul of the First Amendment is to merely ask whether the speech in question related to a matter of public concern. Under such an untenable analysis, every scolding, reprimand, or censure of an elected official's misdeeds, by a body of his peers, will necessarily relate to a matter of public concern.

Further confounding the line between an acceptable censure and a censure violating the First Amendment is the Fifth Circuit's resort to semantics. Indeed, in its decision, the Fifth Circuit dismissed as distinct from censure the removal of a board member from the position of officer (*Blair*) and the adoption of a disciplinary resolution (*Zilich*). *See Blair*, 608 F.3d at 543-46; *Zilich*, 34 F.3d at 363-64. But these analogous decisions provide very concrete examples of a governmental body's constitutionally sound chastising—censure in all but name—of an elected peer.

While other circuits have set forth the limits on First Amendment claims such as Wilson's, the Fifth Circuit's exercise in semantics leaves school and community college boards in Texas, Louisiana, and Mississippi grappling with what exactly constitutes a matter of public concern

and what form an acceptable disciplinary action can take. In other words, elected boards are flying blind in the Fifth Circuit when it comes to the contours of self-governance and the expression of their views.

III. The ability to censure a board member is an act of self-governance free of scrutiny under the First Amendment.

In accordance with the Texas Education Code, the board of trustees for a local school district or community college acts as a body corporate responsible for managing the educational entity the board oversees. *See* Tex. Educ. Code §§ 11.051, 130.082(d), 130.084. No governing body directly oversees school and community college boards and, as such, it falls to the board as a whole to self-govern its members. *See e.g., Whitener*, 112 F.3d at 744 ("[B]ecause citizens may not sue legislators for their legislative acts, legislative bodies are left to police their own members.").

This self-governance includes ensuring board members comply with the board's internal rules, operating procedures, and bylaws. Absent such oversight and lacking a mechanism allowing the electorate to recall board members, the boards of trustees for community colleges and school districts across Texas may take action to reprimand or censure a board member. This is a particularly important part of self-governance for entities such as HCC, which only subjects its members to the ultimate arbiter of their conduct—the ballot box—every six years.[6]

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6. This term is not unique to HCC. *See* Tex. Educ. Code § 130.082(e) ("The basic term of office of a member of the board

Take, for example, John Q. Board Member who, six months into his six-year term at a community college or school district somewhere in the Fifth Circuit, finds himself unable to follow the rules allowing for professional and orderly board meetings. In fact, his constant disruptions at the board meetings and attacks on his fellow trustees are running afoul of the board of trustees' code of ethics, which provides that board members are to respect the board's collective decision-making process and to interact with fellow board members in a manner that sustains mutual respect. The other members of the board, who are the target of John Q. Board Member's constant profanity, name-calling, and unfounded allegations of misconduct during open board meetings, have had enough of the complete disorder accompanying his rule violations and unprofessionalism.

John Q. Board Member, though fictitious, represents the tip of the iceberg of real-world examples of harmful conduct public school boards have had to address in order to remain effective in their mission of educating students. For example, the Menomonie School Board in Wisconsin

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shall be six years."). Board members for local school districts serve a term of three or four years. *See id.* at § 11.059(a). In Mississippi, board members of the county board of education are elected for terms of six years. *See* MISS. CODE. ANN. § 37-5-7; *School Board Elections*, Kim Turner, Assistant Secretary of State, Elections Division, at https://www.sos.ms.gov/Elections-Voting/TrainingDocs/SchoolBoardPowerpoint.pdf, slide 3. And board members in Louisiana serve four year terms. *Handbook for Louisiana Sch. Bd. Members*, Louisiana Sch. Bds. Ass'n, Feb. 2019, https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/340634/LSBA_Manual_-_FINAL_document_42219.pdf, pp.2-3.

moved to censure a board member for behavior that did not meet the board's expectations after "pound[ing] on the desk while shouting profanities" at the board president.[7] The Saugus Union School Board in California voted to censure a board member for "public statements in the form of online postings expressing support for Nazism, slavery and segregation."[8] In Kentucky, the Great Clark County School Board censured a member recently for "personal attacks on the superintendent's staff's intelligence and competence."[9]

Under the Fifth Circuit's decision, all those very real John Q. Board Members must do to get beyond the federal courthouse steps is merely claim their speech—like name-calling and unfounded allegations of misconduct—addressed a matter of public concern. (Pet. App. 14a). A John Q. Board Member's mere suggestion that—regardless of the time, manner, impact, or even legality of his speech—he was speaking on a matter of public concern will insulate him from any consequence (*i.e.*, a censure or a reprimand) for his conduct and even

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7. *See Menomonie School Board votes to censure member behind outburst*, at https://wqow.com/2020/08/14/menomonie-school-board-votes-to-censure-member-behind-outburst/.

8. *See Saugus Union school board member in hot water over alleged racist comments*, at https://www.scpr.org/blogs/education/2013/06/14/13993/saugus-union-school-board-member-in-hot-water-over/.

9. *See GCCS board censures school board member for 'unethical and unprofessional' conduct*, at https://www.wdrb.com/news/gccs-board-censures-school-board-member-for-unethical-and-unprofessional-conduct/article_1324f416-39c4-11eb-9cc1-ff8f111fb055.html.

subject the board to potential liability. Thus, the board is faced with a practical and legal quandary—reign in John Q. Board Member with a censure or reprimand and face a First Amendment lawsuit or do nothing.

Such a result stands in direct contradiction to the other circuits that have considered this issue. *See Blair*, 608 F.3d at 542 ("To be sure, the First Amendment protects Blair's discordant speech as a general matter; it does not, however, immunize him from the political fallout of what he says."); *Whitener*, 112 F.3d at 745 (noting the ability to discipline a member for "lack of decorum" without running afoul of the First Amendment as "uncivil behavior . . . can threaten the deliberative process").

More importantly, the Fifth Circuit's decision turns the only avenue a school board or community college board has to check a board member's unprofessional conduct into a constitutional landmine. Simply put, a public school or community college board should not have to choose between ensuring it is adhering to its duty to serve its students by conducting its business in an efficient and professional manner and a First Amendment lawsuit.

IV. The established ability of a board to express its views through the censuring of a board member does not implicate the First Amendment.

Part and parcel with a school board's or community college board's right to self-governance is the right to "speak for itself" and to "select the views it wants to express." *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-68 (2009) (collecting cases). Indeed, as Judge Jones stated in her dissent from the denial of

the request for rehearing *en banc*, "[a]xiomatic to the First Amendment is the principle that government 'may interject its own voice into public discourse.'" (Pet. App. 31a) (citing *Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1247 (10th Cir. 2000)).

This important principle leads directly to John Q. Board Member, his racist social media rant, and the response by a community college or school district somewhere in the Fifth Circuit, which again finds itself at a crossroads—provide John Q. Board Member a consequence for his comments that directly contradict the school district's or community college's mission and policy, while staring down the risk of a First Amendment claim, or leave his racist comments unchecked.

This time, however, choosing the latter path also exposes school boards to potential liability relating to race discrimination under Title VI or 42 U.S.C. § 1983. Indeed, it is easy to imagine the difficulties a school board could have defending against deliberate indifference claims under Title VI[10] if a board cannot use a censure or a reprimand to "interject its own voice into public discourse" to condemn John Q. Board Member's racist and discriminatory comments. Likewise, at the heart of a constitutional violation against a governmental entity is municipal liability, which hinges on the adoption of a custom or a policy.[11] This places a board in the untenable

10. *See, e.g., Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 272-73 (3d Cir. 2014) (applying deliberate indifference to claims of intentional discrimination under Title VI); *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 583-87 (5th Cir. 2020) (same).

11. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978).

position of either risking a § 1983 claim by exercising its right to speak with the reprimand or censure of John Q. Board Member or risking a § 1983 claim by failing to condemn John Q. Board Member's comments. But this is exactly where the Fifth Circuit has left the elected boards within its jurisdiction.

Finally, the Fifth Circuit's decision fails to acknowledge that condemning John Q. Board Member's tirade through a censure or a reprimand in no way "compel[s] others to espouse or to suppress certain ideas and beliefs;" instead, it is a school board's or community college's expression of its own views. *See Phelan*, 235 F.3d at 1247-48. And it logically follows that a board's ability to speak for itself should not be squelched due to the threat of a potential lawsuit. More to the point, as Judge Ho commented, "[t]he First Amendment guarantees freedom *of* speech, not freedom *from* speech. It secures the right to criticize, not the right *not* to be criticized." (Pet. App. 40a) (emphasis in original).

CONCLUSION

For the foregoing reasons, the Fifth Circuit erred in finding Wilson has a cognizable claim under the First Amendment stemming from the HCC Board of Trustee's censure. And in so finding, the Fifth Circuit issued a decision in contravention to the other circuits that have considered the issue, failed to provide any real guidance to the school districts and community colleges in Texas, Louisiana, and Mississippi, and intruded on the ability of elected boards to self-govern and express their own views in the public sphere. The Court should grant review and reverse the decision below accordingly.

Respectfully submitted,

Meredith Prykryl Walker
Counsel of Record
Walsh Gallegos Treviño Russo
& Kyle P.C.
105 Decker Court, Suite 700
Irving, Texas 75062
(214) 574-8800
mwalker@wabsa.com

Counsel for Amicus Curiae