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 IN OPPOSITION

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INTRODUCTION

This case is not about an elected body's general authority to set standards of conduct for its members or to enforce those standards using its censure power. The censure power is well settled, and its scope is broad. Under the Speech or Debate Clause and its state analogs, the deliberations of an elected body's members within the "legislative sphere" are immune from judicial scrutiny (*Gravel* v. *United States*, 408 U.S. 606, 624-625 (1972)) and may be "questioned" only by the lawmaking body itself (U.S. Const. Art I, § 6, cl. 1). Thus, an elected body's power to censure for speech or conduct "integral" to lawmaking "processes" (*Gravel*, 408 U.S. at 625) is virtually without limit.

Elected bodies also have authority to censure members for their behavior outside the legislative sphere. But because official censures bear the imprimatur of a governmental body itself, they are constrained in that context by the First Amendment. Thus, outside the legislative process, censures would be a proper response for such offenses as slander, true threats, incitements to insurrection, and non-expressive conduct. But they are not a proper response for core political speech. Indeed, there could be no clearer violation of the First Amendment than a government body's official punishment of a speaker for merely expressing disagreement with a political majority. And that is this case.

The Board of Trustees of the Houston Community College System has been the subject of multiple internal and criminal investigations over the past decade. About ten years ago, an internal investigation uncovered rampant political graft. More recently, a federal public corruption investigation culminated in a former Board member's conviction for bribery.

Respondent David Wilson was elected to the Board after a controversial political campaign that resulted in his unseating a 24-year incumbent. As a member of the Board, Wilson committed himself to helping root out what he saw as the unwise, unethical, and often unlawful conduct of fellow Board members.

Wilson's colleagues on the Board were not pleased to have their behavior questioned so publicly. Determined to bring Wilson's public criticisms to an end, they voted to censure him. But as support for this censure, the Board did not accuse Wilson of improper behavior in the conduct of official business. Nor did it accuse him of engaging in wrongful conduct outside the lawmaking process. Rather, the Board cited their disapproval of Wilson's core political speech and petitioning of government:

- his use of "public media to criticize other Board members for taking positions that differ from his own" (Pet. App. 42a);
- his giving an "interview with a local radio station in which he identified Board members who voted in favor of a transaction that he opposed" (*ibid.*);
- his filing non-frivolous lawsuits against the Board for violations of its own bylaws and the federal Constitution (Pet. App. 43a).

The censure rendered Wilson ineligible to serve as an officer of the Board, to access his discretionary bank account, and to receive reimbursements for college-related travel. Pet. App. 44a-45a. It also received significant public attention, and Wilson was not reelected to the Board in the next election. Pet. App. 5a.

The Fifth Circuit held that Wilson suffered an injury-in-fact from the censure, adequate to confer Article III standing to challenge the Board's action. It held

further that he had stated a valid claim sounding in First Amendment retaliation. Those holdings are plainly correct and do not warrant further review.

First, the petition is deeply wrong to suggest that political majorities—acting officially on behalf of a governmental body itself—may censure a member of a political minority for publicly expressing views not shared by the majority. When a majority of lawmakers (or board members) disagree with the views of a colleague, they are free to express their disagreement using speech of their own. Such exchanges are the lifeblood of democratic discourse. What the majority may *not* do, however, is adopt an official resolution—purporting to speak for the government itself—that censures members of the minority simply for expressing minority views. To do *that* is to establish political orthodoxy, backed by threat of official sanction. Resolutions of that sort are not the lifeblood of political discourse; they are the death of it.

Second, the petition vastly overstates any conflict among the lower courts. If there is any disagreement at all, it is with a single decision of the Tenth Circuit. But as we explain below, the Tenth Circuit's reasoning is incomplete and may be revisited by that court.

Finally, even if the question presented were worthy of this Court's attention, this case would not be a suitable vehicle for review because it lacks a developed record. The petition accordingly should be denied.

STATEMENT

A. Legal background

1. The First Amendment generally "prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech." *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quotation marks omitted) (quoting *Hartman* v. *Moore*, 547 U.S.

250, 256 (2006)). To make out a claim for First Amendment retaliation, a plaintiff must show that: (1) she engaged in activity protected under the First Amendment, (2) she suffered an "adverse action," and (3) there was "a 'causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury.'" *Ibid*.[1]

2. A censure is "[a]n official reprimand or condemnation" or "an authoritative expression of disapproval or blame." *Censure*, Black's Law Dictionary (11th ed. 2019). Censures are a mechanism for enforcing an elected body's rules and standards and, as such, are inherently punitive. Indeed, courts uniformly recognize that "[p]ublic reprimands are serious sanctions" (*Miss. Comm'n on Jud. Performance* v. *Brown*, 761 So. 2d 182, 185 (Miss. 2000) (en banc)) entailing substantial "stigma" for those subject to them (*The Fla. Bar v. Stein*, 471 So.2d 36, 37 (Fla. 1985)). Thus, a "censure is a real, substantial and serious punishment." *In re Cohn*, 139 N.E.2d 301, 306 (Ill. 1956) (Bristow, J., concurring in denial of rehearing). *Accord Whitener* v. *McWatters*, 112 F.3d 740, 745 n.* (4th Cir. 1997) (affirming that "the stigma of formal censure" gives rise to Article III standing).

3. Elected bodies ordinarily may censure members for conduct occurring both during a legislative session (*e.g.*, conduct that is disruptive of the body's work) and outside of a legislative session (*e.g.*, conduct that is unlawful or harmful to the body's reputation). Every censure by the U.S. House of Representatives, for exam-

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[1] Although the Court ordinarily applies the so-called *Pickering* balancing test in First Amendment retaliation cases (see *Pickering* v. *Bd. of Ed.*, 391 U.S. 563, 568 (1968)), that test does not apply to claims by elected officials. See *Republican Party of Minn.* v. *White*, 536 U.S. 765, 774-775 (2002); Pet. App. 13a.

ple, has involved (1) misconduct on the House floor; (2) unparliamentary language on the House floor or in the Congressional Record; or (3) criminal conduct taking place outside of the House chamber. See U.S. House of Representatives, *List of Individuals Expelled, Censured, or Reprimanded in the U.S. House of Representatives*, https://perma.cc/3J7Y-L9KE.

To our knowledge, neither the United States Senate nor the U.S. House of Representatives has ever censured a member for speech protected by the First Amendment spoken outside the bodies' respective chambers.[2] And as the Court repeatedly has made clear, "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Republican Party of Minn.* v. *White*, 536 U.S. 765, 781-782 (2002) (quoting *Wood* v. *Georgia*, 370 U.S. 375, 395 (1962)). Indeed, the First Amendment's "manifest function * * * in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Bond* v. *Floyd*, 385 U.S. 116, 136 (1996).

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[2] The petition cites (at 24) the censure of Senator Joseph McCarthy in 1954 as an example of censure for political speech. That is misleading. He was censured for his "obstruc[tion of] the constitutional processes of the Senate" and conduct "contrary to senatorial ethics [that] tended to bring the Senate into dishonor and disrepute." S. Res. 301, 83d Cong. (1954). To the extent the censure concerned his speech, the senator's "statement released to the press" was also "inserted in the Congressional Record of November 10, 1954." *Ibid*. Statements in the Congressional Record are within the "legislative sphere" covered by the Speech or Debate Clause. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 126 (1979) ("[T]he Clause extend[s] to things generally done in a session of the House by one of its members in relation to the business before it.") (quotation marks and emphasis omitted).

B. Factual background

This case involves the Houston Community College System Board of Trustees' censure of respondent David Wilson for his public criticism of Board policies and Board members' actions.

1. Houston Community College System (HCC) is a public community college system that operates community colleges in the greater Houston area. A nine-member Board manages and controls the system. See HCC, *Board of Trustees*, https://perma.cc/G9F7-HGJC. The Board's work is governed by formal bylaws, pursuant to which trustees are elected by the public to serve six-year terms. Trustees are fiduciaries and must act solely for the benefit of HCC. See *Board of Trustees Bylaws*, art. A, § 1 (Sept. 2, 2020), https://perma.cc/45DK-UTVQ ("Bylaws").

The bylaws contain a code of conduct, according to which trustees must "[e]ncourage and engage in open and honest discussion in making Board decisions, * * * respect differences of opinion, and * * * keep an open mind until each Trustee has had an opportunity to address the Board," among other things. Bylaws, art. A, § 4(c)-(d). The code specifies that "[a]ny person may allege, in writing, using the form at Exhibit B, noncompliance with this Ethics Code." Bylaws, art. A, § 11(a) After such an allegation is made, "[t]he Chair, Vice-Chair, or Chancellor, as appropriate, will undertake a process to resolve the complaint," and "[i]f the Board finds a violation of this Ethics Code, it can reprimand or censure the Board member," which are "the only sanctions available under Texas law." *Ibid.*

2. The Board has made a series of controversial decisions over the past decade. Its 2011 decision to sign a $45 million, five-year contract with the government of Qatar to create a community college overseas, for ex-

ample, provoked extensive public controversy. See Jeannie Kever, *Qatar Turns to Houston Community College for New School*, Chron. (July 26, 2011), https://perma.cc/D5BE-2XN2. The Board framed the contract, which was not vetted by HCC's in-house lawyer, "as a bold moneymaking venture to help build that country's first community college." Benjamin Wermund, *HCC Scaling Back Qatar Agreement*, Houston Chron. (Mar. 13, 2016), https://perma.cc/LCS2-9L8V. The venture was seen by many as a boondoggle and was not renewed after the initial five-year term, having earned barely a third of its projected profit. Michael Hardy, *The Crazy College of Qatar*, New Republic (Aug. 31, 2016), https://perma.cc/99TQ-3P42.

An earlier internal investigation found compliance and procurement issues involving former and current members of the Board. The investigation revealed that one trustee had used her influence to direct work to her son's construction company and to obtain free consulting from a vendor. It found also that two other trustees "engaged in a relentless pattern and practice of conduct designed to enrich at a minimum their family and friends." Editorial Board, *It's About Time at HCC: Results of Investigation Should Bring Changes at Community College Board*, Chron. (Aug. 1, 2011), https://perma.cc/4E3D-RMLS. These events led the *Houston Chronicle* Editorial Board to lament that "scandal and shenanigans" had "tainted * * * the HCC board for far too long." *Ibid.*

Following a subsequent investigation by the FBI, HCC's longest-serving trustee, Chris Oliver, pleaded guilty to federal bribery charges and was sentenced to 70 months in prison. See Judgment, *United States* v. *Oliver*, No. 4:17-cr-132 (S.D. Tex. Jan. 25, 2018) (Dkt. 44). Oliver had received 69 bribe payments totaling over $225,000 from at least four people seeking con-

tracts with HCC between 2009 and 2016. Lindsay Ellis, *Former HCC Trustee Chris Oliver Gets 70 Months in Prison After Bribery Conviction*, Houston Chronical (Jan. 9, 2018), https://perma.cc/85DJ-QRWZ.

3. Wilson, a longstanding critic of HCC's Board, was elected to the Board in 2013. Pet. App. 2a.

The Board held a meeting at which a trustee cast her votes via video conference. Pet. App. 3a; Compl. ¶ 15, *Wilson* v. *Houston Cmty. Coll. Sys.*, No. 4:18-cv-744 (S.D. Tex. Mar. 18, 2018) (Dkt. 1-2) ("Compl."). At the time, the Board's bylaws permitted remote attendance at meetings but forbade remote voting. The Board nonetheless ratified the remotely-cast votes. *Ibid*.

Wilson subsequently sued HCC and its individual trustees, seeking a declaration that the remotely-cast votes were "illegal and void." Compl. ¶ 18. When the chair of the Board excluded Wilson from a subsequent Board meeting to discuss the lawsuit, Wilson filed a second action against HCC and its individual trustees, alleging that by excluding him from the executive session, HCC had "prohibited him from performing his core functions as a Trustee, deprived him of his right of freedom of association, and deprived the people of District 2, their right to representation." Petition 5, *Wilson* v. *Houston Cmty. Coll. Sys.*, No. 17-71693 (Tex. Dist. Ct. filed Oct. 24, 2017).

The Board later censured Wilson by a majority vote. Pet. App. 42a-45a. The resolution of censure found, in relevant part, that "because Mr. Wilson has repeatedly acted in a manner not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct, the Board finds that Mr. Wilson's conduct was not only inappropriate, but reprehensible, and such conduct warrants disciplinary action." Pet. App. 44a.

The resolution stated that Wilson, among other things, had "used public media to criticize other Board members for taking positions that differ from his own" (Pet. App. 42a); "regularly publishes information on a website that he created and maintains, alleging that other Board members have engaged in unethical and/or illegal conduct, without facts to support his allegations" (*ibid.*); and filed two lawsuits against HCC and board members—the first "complaining of the interpretation of Board Bylaws and state law regarding the ability of Board members to participate in meetings remotely," and the second "complaining of his exclusion from closed session" (Pet. App. 43a).

For his speech and lawsuits, the resolution declared Wilson ineligible to hold officer positions on the Board in 2018 and to receive reimbursement for HCC-related travel and directed him to cease "similar" conduct in the future. Pet. App. 44a-45a. Censure and reprimand are "the only sanctions available under Texas law" for disciplining members of the Board. Bylaws, art. A, § 11(d). The resolution further noted that "any repeat of improper behavior by Mr. Wilson will constitute grounds for further disciplinary action by the Board." Pet. App. 45a.

C. Procedural background

1. Wilson amended the complaint in the first lawsuit to include claims against HCC and the trustees pursuant to 42 U.S.C. § 1983. Pet. App. 21a. The amended complaint alleged that the censure infringed on his First Amendment rights and sought injunctive relief. *Ibid.* He also sought $10,000 in damages for mental anguish, $10,000 in punitive damages, and reasonable attorney's fees. *Id*.

HCC and the trustees removed the case to federal court. In a second amended complaint, Wilson dropped

his claims against the individual trustees, who enjoyed legislative immunity. Pet. App. 21a-22a.

2. The district court dismissed for lack of jurisdiction. Pet. App. 20a-28a. Relying on *Phelan* v. *Laramie County Community College Board of Trustees*, 235 F.3d 1243 (10th Cir. 2000), it reasoned that Wilson failed to demonstrate an injury-in-fact and thus lacked standing. Pet. App. 27a.

3. The Fifth Circuit reversed and remanded. Pet. App. 1a-19a. With respect to standing, the court held that the district court "erred in relying on *Phelan* to determine that Wilson lacked standing * * * because the *Phelan* court held that the plaintiff in fact *had standing*, noting that the plaintiff had alleged the Board's censure tarnished her reputation." Pet. App. 7a. Because Wilson alleged that his public censure caused him mental anguish, the Fifth Circuit held that he suffered an injury sufficient to confer standing, like the plaintiff in *Phelan*. Pet. App. 8a.

Turning to the merits, the Fifth Circuit held that Wilson had stated a First Amendment claim. Pet. App. 14a-15a. It emphasized that "[t]he Supreme Court has long stressed the importance of allowing elected officials to speak on matters of public concern." Pet. App. 10a. And "censures of publicly elected officials" for their protected speech, the court concluded, "can be a cognizable injury under the First Amendment." *Ibid.* (emphasis added).

Applying these principles, the Fifth Circuit emphasized that the Board's censure was intended to "punish[] him for 'criticizing other Board members for taking positions that differ from his own'" and "for filing suit alleging the Board was violating its bylaws." Pet. App. 14a. Because "[r]eporting municipal corruption undoubtedly constitutes speech on a matter of public

concern," the court held that Wilson had stated a First Amendment retaliation claim. Pet. App. 14a-15a.

The Fifth Circuit rejected HCC's argument that it is entitled to absolute legislative immunity. Pet. App. 16a-17a. It noted that "absolute legislative immunity is a 'doctrine[] that protect[s] individuals acting within the bounds of their official duties, not the governing bodies on which they serve.'" Pet. App. 17a (quoting *Minton* v. *St. Bernard Par. Sch. Bd.*, 803 F.2d 129, 133 (5th Cir. 1986)). Because Wilson had dropped the individual board members as defendants, the court held that HCC was not entitled to legislative immunity. *Ibid.*[3]

4. The court of appeals denied rehearing en banc. Pet. App. 29a-30a. Judge Jones filed a dissenting opinion, joined by four colleagues. Pet. App. 31a-38a. Judge Ho filed a separate dissent. Pet. App. 39a-41a.

REASONS FOR DENYING THE PETITION

HCC seeks further review of the Fifth Circuit's holding that Wilson suffered an injury-in-fact and stated a claim for relief. But the court of appeals did not err in reversing the district court, and its decision does not present a conflict warranting this Court's review at this time. This Court has repeatedly denied petitions for certiorari presenting similar questions,[4] and the same result is warranted here.

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[3] Wilson's claims for declaratory and injunctive relief were dismissed as moot. Pet. App. 9a.

[4] See *Werkheiser* v. *Pocono Township Board of Supervisors*, 704 F. App'x 156 (3d Cir. 2017), cert. denied, 138 S. Ct. 1001 (2018); *Phelan* v. *Laramie County Community College Board of Trustees*, 235 F.3d 1243 (10th Cir. 2000), cert. denied, 532 U.S. 1020 (2001); *Zilich* v. *Longo*, 34 F.3d 359 (6th Cir. 1994), cert. denied, 514 U.S. 1036 (1995); *LaFlamme* v. *Essex Junction School District*, 750 A.2d 993 (Vt. 2000), cert. denied, 531 U.S. 927 (2000).

A. The decision below is correct

The Fifth Circuit correctly reversed the district court. Wilson plainly has standing, and his First Amendment retaliation claim has merit.

1. Wilson has Article III standing

The district court dismissed the case for lack of an Article III injury, but HCC barely defends that holding. See Pet. 7 n.7. With good reason. The censure inflicted numerous standing-worthy injuries on Wilson: It barred him from accessing his discretionary trustee bank account, deprived him of travel reimbursements, and more generally imposed the "real, substantial and serious punishment" of a public censure. *In re Cohn*, 139 N.E.2d at 306 (Bristow, J., concurring). Wilson was denied reelection, likely because he was censured by the Board. Cf. *Meese* v. *Keene*, 481 U.S. 465, 479 n.14 (1987) ("The risk of this reputational harm * * * is sufficient to establish appellee's standing to litigate the claim on the merits.").

This Court has repeatedly adjudicated the merits of cases where the litigants' injury arose from a public censure or reprimand. See, *e.g.*, *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433 (2015) (the asserted injury was a censure by a state bar); *Nevada Comm'n on Ethics* v. *Carrigan*, 564 U.S. 117 (2011) (the asserted injury was a censure by an ethics board); *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030 (1991) (the asserted injury was a private reprimand by a state bar). Just as in those other cases, the censure here was manifestly sufficient to confer Article III standing. The Fifth Circuit's holding to that effect does not warrant further review.

2. The Board's censure of Wilson for his extra-legislative protected speech violated the First Amendment

The Fifth Circuit concluded that Wilson stated a claim upon which relief may be granted. That decision, too, is correct.

1. HCC's disagreement with the Fifth Circuit centers exclusively on the question whether a censure is an "adverse action" within the meaning of the First Amendment retaliation doctrine. Of course it is. Censures are "authoritative expression[s] of disapproval or blame." *Censure*, Black's Law Dictionary (11th ed. 2019). They condemn and castigate. They carry the imprimatur of governmental disapproval. They are a shaming penalty. As we explained above, therefore, "[p]ublic reprimands are serious sanctions" (*Brown*, 761 So. 2d at 185), inflicting "a real, substantial and serious punishment" (*In re Cohn*, 139 N.E.2d at 306 (Bristow, J., concurring)). Accord Pet. App. 13a ("a formal reprimand, by its very nature, goes several steps beyond a criticism or accusation").

HCC can hardly deny that a censure is a punishment for a perceived violation of a rule or standard. To be sure, HCC artfully avoids the word "punishment" in its petition, describing censures as "respon[es] to violations" (Pet. 2) that are used to "address[] disobedience" (Pet. 3). But the punitive nature of the censure is undeniable. The Board's resolution declared expressly that Wilson's speech was "not only inappropriate, but reprehensible," warranting "disciplinary action." Pet. App. 44a. And in imposing the censure, the Board proudly acknowledged that it was "the highest level of sanction available." *Ibid*. A "sanction" is a "penalty" or other measure "punishing disobedience." *Sanction*, Black's Law Dictionary (11th ed. 2019).

Beyond all that, the censure here did more than merely express a reprimand; it also barred Wilson from accessing his discretionary trustee bank account and receiving reimbursements for college-related travel. Pet. App. 44a. These are plainly adverse actions taken in retaliation for speech and petitioning protected by the First Amendment.

2. Against this background, the unconstitutionality of the Board's censure of Wilson is settled by *Bond* v. *Floyd*, 385 U.S. 116 (1966). See Pet. App. 10a-11a & n. 29. Bond was a member of the Student Nonviolent Coordinating Committee and had recently been elected to the Georgia House of Representatives. 385 U.S. at 118. Before the legislative session began, Bond expressed his support for criticism of the war in Vietnam. *Id.* at 121. In response, his colleagues in the Georgia legislature refused to seat him. *Id.* at 123-125.

On later judicial review of this adverse retaliatory action, the Court ruled for Bond. "The First Amendment," this Court explained, "requires that legislators be given the widest latitude to express their views on issues of policy." 385 U.S. at 136. "[D]ebate on public issues should be uninhibited, robust, and wide-open." *Id*. at 136 (quoting *N.Y. Times* v. *Sullivan*, 376 U.S. 254, 270 (1964)). Bond's disqualification for his speech, the Court held, "violated Bond's right of free expression under the First Amendment." *Id.* at 137.

That holding resolves this case: Wilson expressed a political point of view with which a majority of his colleagues disagreed, and he was officially punished as a consequence. The First Amendment does not tolerate that outcome. Pet. App. 10a-14a.

HCC suggests that censures (as distinct from expulsions or disqualifications) do not give rise to constitutional violations because public figures like Wilson

are "men of fortitude, able to thrive in a hardy climate." Pet. 30-31 (quoting *N.Y. Times*, 376 U.S. at 273). But that is exactly what the State argued in *Bond*, and the Court roundly rejected it. 385 U.S. at 136-137. In fact, the opposite rule applies: The fact that public figures like the members of HCC's Board must have the fortitude to tolerate public criticism is exactly why Wilson's speech may *not* be punished. *Ibid.*

These essential First Amendment protections do not cease to apply simply because Wilson himself is a Board member. "The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators." *Bond*, 385 U.S. at 136. If anything, "[t]he role * * * elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *White*, 536 U.S. at 781-782 (quoting *Wood* v. *Georgia*, 370 U.S. 375, 395 (1962)).

This Court's decisions "demonstrate that the First Amendment's protection of elected officials' speech is robust and no less strenuous than that afforded to the speech of citizens in general." *Rangra* v. *Brown*, 566 F.3d 515, 524 (5th Cir. 2009) (citing, for example, *Bond*, 385 U.S. at 133-135; *Wood*, 370 U.S. at 392, 395; and *White*, 536 U.S. at 774-775). The Fifth Circuit's decision is faithful to these bedrock principles.

3. HCC's contrary position is untenable

HCC's contrary position rests on the implausible idea that official censures are merely expressions of "government speech," themselves subject to First Amendment protection and categorically incapable of inflicting constitutional injury. Pet. 26-28.

That position is not tenable. As HCC readily admits (Pet. 13), "[t]he government can speak [only] so

long as its speech does not 'punish, or threaten to punish' private speech." But that is precisely what the censure here did: It "punished Wilson for 'criticizing other Board members for taking positions that differ from his own.'" Pet. App. 14a. Again, the Board itself characterized the censure as "disciplinary" and a "sanction." Pet. App. 44a. That is the very definition of punishment. Thus, even by HCC's lights, the censure here violates the First Amendment.

For that reason, a censure is manifestly different from the sort of "government speech" addressed by the Court in *Walker* v. *Texas Division of the Sons of Confederate Veterans*, 576 U.S. 200 (2015). See Pet. 27. That case affirmed only that government agencies may engage in speech as part of their policymaking and policy enforcement endeavors—they may, "through [both] words and deeds" act upon an "electoral mandate" to enact and enforce public policies. *Walker*, 576 U.S. at 207. Thus, officials elected on a platform of promoting recycling may "writ[e] [to] householders asking them to recycle cans and bottles." *Ibid*.

The issue here is not officials' use of speech to promote the policies that they were elected to pursue. It is, instead, about bare government punishment of political dissention. It turns the First Amendment upside down to say that the individuals who control government may use their positions of authority to pass off their own political views as the official opinions of the government itself, in resolutions censuring members of the minority for simple political disagreement. "Opinions," Madison cautioned, "are not the objects of legislation." 4 Annals of Cong. 934 (1794). On the contrary, the power to censure for speech and political ideas "is in the people over the Government, and not in the Government over the people." *Ibid*.

It could hardly be otherwise. "[I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Yet that is just what HCC asks this Court to approve: The majority of HCC's Board assert the right to speak officially for a governmental body in condemning Wilson for making statements that "criticize other Board members for taking positions that differ from his own." Pet. App. 42a. If official punishment for disagreeing with the political majority is not a violation of the First Amendment, nothing is.

HCC worries (Pet. 21-22) "that some members of local elected boards [may] make statements denigrating members of the public because of race, sex, or religion," observing that "[c]ensure provides an elected body with a well-understood tool for repudiating those remarks." But the shoe could just as well be on the other foot: Bigots could claim the majority and assert the right to announce, with the bullhorn of "government speech," the state's official disapproval of racial and religious tolerance. Unless HCC is willing to disclaim the right of a political minority to be free from official censure for speaking out in favor of liberalism and tolerance, as well, its position is without principle.

The bottom line is that the First Amendment does not permit political majorities to dictate political orthodoxy backed by threat of official sanction. That should not be a controversial statement.

None of this is to say, as HCC unconvincingly asserts (Pet. 23), that legislative censures for speech are wholesale unconstitutional under the Fifth Circuit's rule. The point is only that a legislative body may not censure its members for their protected speech taking place outside the legislative process itself.

Concerning matters *outside* the legislative process, censures remain available for members' conduct, and for speech not protected by the First Amendment. A censure would be permissible for illegal marijuana use, for example, but not for statements supporting the legalization of marijuana use. Likewise, a censure would be permissible for slander, but not for statements that merely criticize.

Concerning matters *within* the legislative process, censure remains available for both conduct and speech. As we noted at the outset, the deliberations of an elected body's members within the "legislative sphere" are immune from judicial scrutiny (*Gravel* v. *United States*, 408 U.S. 606, 624-625 (1972)) and may be "questioned" only by the lawmaking body itself (U.S. Const. Art I, § 6 cl. 1). Thus, the power to censure members for speech or conduct "integral" to lawmaking "processes" (*Gravel*, 408 U.S. at 625) is undeniable. "[B]ecause citizens may not sue legislators for their legislative acts, legislative bodies are left to police their own members" for such acts. *Whitener* v. *McWatters*, 112 F.3d 740, 744 (4th Cir. 1997).

Beyond those settled boundaries, however, the First Amendment does not permit a lawmaking body to punish one of its own, with the imprimatur of official government action, simply for engaging in protected political expression.

B. The petition does not present a conflict warranting the Court's review

The merits aside, the petition does not present a conflict warranting the Court's intervention at this time. HCC asserts that there is a division among the courts of appeals on the question whether legislative bodies may censure their members for their protected speech. But any conflict on this issue is greatly over-

stated, and the Court has repeatedly denied petitions presenting similar questions. *See supra* at 11 n.4. The same outcome is warranted here.

1. The Tenth Circuit is the only other court of appeals to resolve the question presented in even remotely analogous circumstances. See *Phelan* v. *Laramie Cnty. Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1247-1248 (10th Cir. 2000), cert. denied, 532 U.S. 1020 (2001). But unlike here, the censure in that case "carried no penalties" and "did not prevent [the plaintiff] from performing her official duties." *Id*. at 1248. The same cannot be said in this case. See Pet. App. 4a n.7; 43a-44a. Although the Fifth Circuit did not rely on that distinction (Pet. App. 15a n.55), the Tenth Circuit is not bound to agree and could hold that the practical infirmities imposed by the censure in this case call for the same outcome reached by the court below.

Moreover, in holding that the board's censure in *Phelan* was only a "minimal * * * discouragement" that "[did] not injure[] [the plaintiff's] free speech rights" (235 F.3d at 1248), the Tenth Circuit did not cite, let alone discuss, this Court's decision in *Bond*. Nor did the Tenth Circuit consider the cases relied upon by the Fifth Circuit in this case for the proposition that censures are "punitive in a way that mere criticisms, accusations, and investigations are not." Pet. App. 13a (quoting *Colson* v. *Grohman*, 174 F.3d 498, 512 n.7 (5th Cir. 1999)). To the extent there is a conflict at all, the Tenth Circuit may decide to revisit its First Amendment holding in a future case.[5]

2. HCC incorrectly asserts that there is a deeper conflict involving the Third, Fourth, Sixth, and Ninth

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[5] The Westlaw database indicates that *Phelan* has been cited, on average, in about two opinions per year since it was decided, but rarely for its resolution of the question presented.

Circuits and the Supreme Court of Vermont. Each of the cited cases is readily distinguished, as the Fifth Circuit itself explained. Pet. App. 16a-17a.

Two of the cited cases—*Whitener* and *Zilich* v. *Longo*, 34 F.3d 359 (6th Cir. 1994)—involve censures for obstructive or illegal conduct, not protected political speech. The Fourth Circuit in *Whitener* made this point express, explaining that the board had censured the plaintiff "for his lack of decorum, not for expressing his view on policy." 112 F.3d at 745. *Whitener* also involved claims against individual lawmakers, and the outcome turned on the defendants' absolute legislative immunity (*id*. at 744), not any holding concerning the First Amendment. HCC acknowledges (Pet. 17-18) that the issue of immunity is not present in this case.

Much the same goes for *Zilich*, in which the plaintiff was censured for violating the city council's residency requirement. See 34 F.3d at 361 n.2. The censure in that case was not for protected speech and thus does not implicate the question framed by the petition, which is limited by its own terms to censures "in response to a member's speech." Pet. i. Beyond that, the resolution in *Zilich* "contain[ed] no punishment or penalty" (34 F.3d at 364), which again is not true here. See Pet. App. 4a n.7; 43a-44a.

HCC's citation to *LaFlamme* v. *Essex Junction School District*, 750 A.2d 993 (Vt. 2000), cert. denied, 531 U.S. 927 (2000), is doubly misplaced. First, that case concerned the question whether a censure is "actionable under the Due Process Clause" and can support "a finding of denial of due process." *Id*. at 999. That is not an issue present in this appeal.

Second, although *LaFlamme* had involved a First Amendment claim earlier in the proceedings, a jury had rejected the claim on factual grounds. 750 A.2d at

998. Notably, however, the jury had been instructed in a manner consistent with the Fifth Circuit's ruling in this case: It was told that a lawmaking committee had only "the right to censure the plaintiff for words and conduct which occurred during committee meetings," but it "did *not* have the authority to censure the plaintiff for conduct which occurred outside of committee meetings." *Id*. at 997 (emphasis added). Under that instruction, Wilson would be entitled to relief.

As for *Blair* v. *Bethel School District*, 608 F.3d 540 (9th Cir. 2010), and *Werkheiser* v. *Pocono Township Board of Supervisors*, 704 F. App'x 156 (3d Cir. 2017), cert. denied, 138 S. Ct. 1001 (2018), neither of those cases involved a censure at all. The plaintiffs in both sued after being removed from board-appointed positions, not after being censured. *Blair*, 608 F.3d at 546; *Werkheiser*, 704 F. App'x at 157-158. Although the *Blair* court analogized the removal to a censure, removal in fact presents a distinct legal question. As the Ninth Circuit acknowledged, "[t]he Board's objective in stripping Blair of his leadership position, ostensibly, *wasn't to punish him for his advocacy* but instead to put in place a vice president who better represented the majority view." 608 F.3d at 544 (emphasis added). Similarly, the court in *Werkheiser* noted that "[the board member's] job was a political one and *depended on maintaining favor with a majority of his colleagues* on the Board." 704 F. App'x at 158 (emphasis added). Those cases thus implicate a legislative body's interest in selecting its own leadership and managing its internal governance structures. Here, in contrast, the censure did not implicate the same kind of internal governance issues.

There is accordingly no evidence that this case would have been decided any differently in the jurisdictions identified in the petition.

C. This case is not a suitable vehicle

This case is, in any event, a poor vehicle for deciding the question presented.

For starters, the case was dismissed on the pleadings. Pet. App. 20a-28a. HCC characterizes this as a feature, but for purposes of this Court's review, it is a bug. "Determining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a fact intensive inquiry." *Brennan* v. *Norton*, 350 F.3d 399, 419 (3d Cir. 2003) (quoting *Suarez Corp. Indus.* v. *McGraw*, 202 F.3d 676, 686 (4th Cir. 2000)). For example, there have not been any conclusive findings of what Wilson said, about what or whom, in what forum, to what audience. And the complaint does not allege the missing details. Without these facts settled, this Court's review would be premature.

What is more, the facts that *are* known suggest this case does not cleanly present the question presented in the petition. Contrary to HCC's (Pet. 3) and the dissent's assertion (Pet. App. 32a), the resolution of censure here imposed more than a mere written reprimand. As we have noted repeatedly, it also blocked his access to a discretionary bank account and denied him prospective reimbursements for travel. Pet. App. 4a n.7; 44a-45a. It is therefore wrong to say, as does the petition (at 3), that "this case concerns only [the Board's] expression" of disapproval; or, as does the dissent (at 32a), that the censure here was "unaccompanied by other personal penalties."

To be sure, the Fifth Circuit did not rely on the additional penalties in holding that Wilson's case could proceed. See Pet. App. 15a n.55. But that conclusion is debatable, and this Court need not take that same approach. And if we are correct that those other infirmities are sufficient burdens to state a claim, then

Wilson would be entitled to relief regardless of this Court's resolution of the question presented.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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