No. 20-804

In the Supreme Court of the United States

HOUSTON COMMUNITY COLLEGE SYSTEM,
Petitioner
v.
DAVID BUREN WILSON,
Respondent.

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

BRIEF FOR THE STATE OF TEXAS, THE DISTRICT OF COLUMBIA, AND FIFTEEN ADDITIONAL STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the First Amendment restrict the authority of an elected body to issue a censure resolution in response to a member's speech?

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INTEREST OF AMICI CURIAE

Amici curiae are the State of Texas, the District of Columbia, and the States of Alabama, Connecticut, Hawaii, Idaho, Illinois, Louisiana, Maine, Maryland, Michigan, Minnesota, Nevada, Oklahoma, Pennsylvania, Utah, and Virginia ("*Amici* States").[1] The *Amici* States have an interest in protecting their legislatures' historical power to censure or otherwise reprimand their own members, and to ensure they can contribute their own speech to the marketplace of ideas. The *Amici* States have a further interest in safeguarding the ability of local legislatures and boards—like the Houston Community College ("HCC") Board—within their borders to distance themselves from individual members' statements and express their own views. By subjecting HCC to the prospect of liability for violations of the First Amendment because the Board censured one of its members, the judgment of the court below threatens State and local legislatures' historic power to admonish their own members and to speak as the government.

INTRODUCTION

"[T]he First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely." *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017). And legislatures and other elected bodies have, since before the founding, exercised the ability to censure or otherwise reprimand their own members. A censure is at its core nothing if not speech—an expression of disapproval.

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. On July 9, 2021, counsel of record for all parties received notice of amici's intention to file this brief.

After being elected to a seat on the Board of the Houston Community College District, David Wilson disagreed with some of the actions of that Board. He arranged robocalls to make his disagreement publicly known, sued the Board twice, and hired one private investigator to determine whether a Board member lived in the appropriate district, and another to investigate HCC. Pet. App. 3a. Wilson's lawsuits cost the Board nearly $300,000 in legal fees, Pet. App. 43a, and directly threatened HCC's accreditation. Pet. App. 44a.

Because it determined that these actions were "not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct," the Board censured Wilson for his behavior as an expression of its disapproval. Pet. App. 32a.

Wilson subsequently amended one of his lawsuits to include claims that the Board's censure violated his First Amendment rights. A panel of the court of appeals held that the suit could go forward, and HCC's petition for rehearing en banc failed by an equally divided vote.

The panel's decision ignores our nation's long history of legislative censure and seriously undermines government's ability to speak as the government. This Court should reverse.

SUMMARY OF ARGUMENT

I. This Court has long recognized the risk of judicial interference with the legislative process. Accordingly, legislators enjoy immunity from suit for their legislative actions. *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998). That immunity leaves legislative bodies with the primary responsibility for disciplining their own members, *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951), and the electorate with the ultimate power to hold members accountable. This crucial dynamic—leaving to legislatures the

principal role of supervising legislators—finds its roots in English common law. It was also incorporated into our Constitution through the Speech and Debate Clause, U.S. Const. art. I, § 6, cl. 1, and by giving each house of Congress the power to "determine the Rules of its Proceedings" and "punish its Members for disorderly Behavior," *id.* art. I, § 5, cl. 2. This Court has recognized that this rule applies to State and local legislatures as well, and analogues of these federal constitutional provisions were included in many State constitutions.

The historical record establishes three principles. First, legislative bodies are entitled to impose internal discipline, and a legislator's recourse for challenging a disciplinary action lies with the legislative body itself. Second, and closely related, a disciplined legislator's remedy for discipline does *not* lie with the courts. Third, like other longstanding limitations, legislative discipline in the form of censure does not violate the First Amendment because a legislature's ability to censure a member existed in 1791, and has existed ever since.

Because Wilson, a member of HCC's Board, was censured by the Board, application of these principles means that the judgment of the court below should be reversed.

II. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). When the government speaks on controversial issues, it must necessarily pick a side in a dispute where citizens—and even individual legislators—have deeply held and conflicting beliefs. But "government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect

the marketplace of ideas," *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015), except "if, for example, the government seeks to compel private persons to convey the government's speech," *id.* at 208.

The HCC Board's decision to censure Wilson was government speech, and it did not compel or coerce Wilson into speaking, or not speaking. In any event, this Court has repeatedly affirmed that the default First Amendment remedy for disfavored speech is more speech. The Board's censure itself was merely counter-speech, to which Wilson was free to respond. This too confirms that the judgment of the court of appeals should be reversed.

ARGUMENT

I. Centuries of Historical Practice Establish That Legislative Reprimand Does Not Violate the First Amendment.

Courts should not easily cast aside as unconstitutional longstanding practices that predate the founding. *See N.L.R.B. v. Noel Canning*, 573 U.S. 513, 525 (2014) ("[T]his Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era."); *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002) (looking to founding era practice). Yet the panel below held that a legislative body, exercising its inherent authority to police its own members' conduct, could be liable for expressing its own views. Pet. App. 14a. This conclusion contravenes hundreds of years of historical practice recognizing that legislatures, and by close analogy publicly elected boards like HCC's, have enjoyed the exclusive

right to punish members for legislative activities and a concomitant right to censure members for misconduct.

A. Because legislators cannot be sued in court for legislative action, legislatures bear the primary responsibility for policing their members' behavior.

1. Federal, State, and local legislators are absolutely immune from liability for their legislative activities. *See Bogan*, 523 U.S. at 46. This immunity "has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries," and was "taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney*, 341 U.S. at 372. The justification for this immunity is manifest: "[T]o enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech." 2 *The Works of James Wilson* 37–38 (Andrews ed. 1896); *see also Spallone v. United States*, 493 U.S. 265, 279 (1990) ("[A]ny restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process.").

This Court has said that claims brought under 42 U.S.C. § 1983—the most common vehicle for suits against state actors—"cannot be understood in a historical vacuum," *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981), and must be "construed in the light of common-law principles that were well settled at the time of [section 1983's] enactment," *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). Accordingly, a legislator's actions as a legislator cannot form the basis of a section 1983 claim because, based on historical tradition, "[c]ourts are not the place for such controversies."

Tenney, 341 U.S. at 378. Instead, righting a legislator's wrongs is the shared responsibility of two other entities—the legislature itself and the voters. *See id.* at 378 ("Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.").

2. Critically, legislative immunity does not give legislators the right to act with impunity. To be sure, "the ultimate check on legislative abuse" is "the electoral process." *Bogan*, 523 U.S. at 53. But another important check on unruly legislators developed alongside the shield of immunity: the power of legislatures to punish their own members. *See Whitener v. McWatters*, 112 F.3d 740, 743–44 (4th Cir. 1997). Because this power has a similar historical pedigree, it too must limit section 1983 liability. Just as legislators cannot be liable for legislative acts, so too legislatures should not be liable for imposing legislative discipline.

a. The same "taproots" that establish a common-law right to legislative privilege establish a complementary right of legislative discipline. *See Tenney*, 341 U.S. at 372. The historical record is clear that immunity did not place critique of legislative speech beyond all reach. Rather, dating back to the Glorious Revolution and the English Bill of Rights of 1689, Parliament's struggle for supremacy and the resulting right of speech and debate established *who* could punish a member's speech (the Parliament) and who could not (the Crown). *See United States v. Johnson*, 383 U.S. 169, 178–81 (1966); *see also United States v. Brewster*, 408 U.S. 501, 545 (1972) (Brennan, J., dissenting) ("By close of the 17th century, Parliament had succeeded in obtaining rights of free speech and debate as well as the power to punish offenses of its members contravening the good order and integrity of its processes."). "The primary function of the

privilege" that resulted was "to limit jurisdiction to punish" to "Parliament and Parliament alone." not to immunize legislators from all discipline. David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 437 (1983). So Parliament left for itself to decide "what speech was allowable and what speech was an abuse." *Id.*

Carrying on that tradition, just as the Framers of the Constitution enshrined a Speech and Debate Clause, U.S. Const. art. I, § 6, cl. 1, they also gave Congress the power to "determine the Rules of its Proceedings" and "punish its Members for disorderly Behavior," *id.* art. I, § 5, cl. 2. The States at the founding also understood the importance of this power, as shown by case law and their Constitutions. For example, as early as 1808, the Supreme Judicial Court of Massachusetts recognized, "the power of the [legislature to punish] is censorial, and exercised to preserve purity in office." *Coffin v. Coffin*, 4 Mass. 1, 35 (1808). States including Delaware and New Hampshire protected the power in their Constitutions. *See* Del. Const. art. V (1776) ("[E]ach house shall . . . settle its own rules of proceedings" and "may also severally expel any of their own members for misbehavior"); N.H. Const. pt. 2, art. XXII (1784). The practice of State legislatures disciplining their own members has continued, unbroken, to the present. *See* Pet. Br. 21–24.

b. Commentary on this power illuminates one of its central justifications: "The humblest assembly of men is understood to possess the power" to set and enforce its own rules, and "the power to make rules would be nugatory[] unless it was coupled with a power to punish for disorderly behavior, or disobedience to those rules." Joseph Story, 2 *Commentaries on the Constitution of the United States* § 835 (1833). In other words, a deliberative

body must have the power to set and enforce rules to maintain order and allow for the "uninhibited discharge of [its] legislative duty." *Tenney*, 341 U.S. at 377; *cf.* The Federalist No. 51, at 349 (J. Cooke ed. 1961) (J. Madison) ("If angels were to govern men, neither external nor internal controls on government would be necessary."). Without any mechanism to enforce decorum, legislative bodies are vulnerable to unruly members who could "engage in personal invective" "that would unleash personal hostility and frustrate deliberative consideration." *Whitener*, 112 F.3d at 745 (quoting Bogen, *supra*, at 436); *see Vieth v. Jubelirer*, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring in the judgment) ("The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself."). These historical justifications remain salient today. States and localities have a weighty interest in maintaining legislative bodies where deliberation is possible because distractions are limited.

Legislative bodies, along with the States and institutions they govern, also have a significant interest in safeguarding their institutional integrity. While legislative immunity "protect[s] the integrity of the legislative process" from outside interference, *Brewster*, 408 U.S. at 507, legislative discipline allows a legislative body to *preserve* that integrity from internal disruption, *Powell v. McCormack*, 395 U.S. 486, 548 (1969). Indeed, in *Powell*, this Court expressly referred to Congress's power to punish and potentially expel its members as the means for "preserving its institutional integrity." *Id.* Because that interest is significant, legislative bodies must be able to vindicate it. And due to legislative immunity, any practical mechanism for doing so must be internal.

c. Actions undermining legislative order or integrity are no less susceptible to discipline because they occur outside the legislative chamber, or because the offending conduct is speech. As to the former, this Court has explained that Congress's power to expel members "extends to all cases where the offense is such as in the judgment of the senate is inconsistent with the trust and duty of a member." *In re Chapman*, 166 U.S. 661, 669–70 (1897) (citing 1 Story, *supra*, § 838). In fact, this Court has made plain that an "accused Member is judged by no specifically articulated standards, and is at the mercy of an almost unbridled discretion of the charging body" "from whose decision there is no established right of review." *Brewster*, 408 U.S. at 519 (footnote omitted). Thus, the right to discipline is not so limited to exclude activities outside the scope of legislative privilege. And as to the latter, it is not novel for a member of a legislative body to be censured for some sort of expression. Pet. Br. 21–28 (citing examples of censures from federal, State, and local bodies based on speech). Not only is a legislator's speech historically unprotected from legislative discipline, *see Whitener*, 112 F.3d at 745 (citing Robert C. Byrd, *The Senate: 1789–1989*, at 671 (1993)), it defies the unbroken historical tradition that disciplining a legislator's actions is uniquely within the province of the legislative body itself, Bogen, *supra*, at 437.

B. The Court should reaffirm the right of legislative bodies to police their own members.

Just as the "presuppositions of our political history" form the backdrop of common-law legislative immunity, so too should the Court recognize a legislative body's common-law right to supervise its own members. *See Tenney*, 341 U.S. at 372; *cf.* Stephen E. Sachs,

Constitutional Backdrops, 80 Geo. Wash. L. Rev. 1813, 1821–23, 1854–58 (2012). The "'universal and long-established' tradition of" legislative discipline "creates a 'strong presumption'" of constitutionality. *Republican Party of Minn.*, 536 U.S. at 785 (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375, 77 (1995) (Scalia, J., dissenting) (footnote omitted)). The Court should honor the historical pedigree of legislative discipline and reverse, for several reasons.

First, just as "legislative speech and voting is protected by absolute immunity," the legislative body's "exercise of self-disciplinary power is likewise protected." *Whitener*, 112 F.3d at 744; *see* Bogen, *supra*, at 437 ("The primary function of the [legislative] privilege [is] to limit jurisdiction to punish" legislators to the legislative body.). Legislative bodies, by their very nature, possess the power to punish their members to ensure decorum and preserve their institutional integrity. *See Powell*, 395 U.S. at 548; 2 Story, *supra*, § 835. Therefore, grievances arising from legislative discipline are cognizable internally (within the body) or politically (by the voters), but not judicially.

Second, and relatedly, like claims against a legislator for his actions within the legislative sphere: "Courts are not the place for such controversies." *Tenney*, 341 U.S. at 378. The Congress that enacted section 1983 did not "mean to overturn the tradition of legislative freedom achieved in England by Civil War" which was "preserved in the formation of State and National Governments here." *Id.* at 376. Nor did it "mean to subject [legislatures] to civil liability for acts done within the sphere of legislative activity." *Id.* This Court should recognize that Congress—"itself a staunch advocate of legislative freedom"—would not "impinge on a tradition so well

grounded in history and reason by covert inclusion" in section 1983. *Id.* As a result, even if legislative discipline could implicate a legislator's free-speech rights, the Court should afford legislative bodies immunity for their legislative discipline just as it affords individual legislators immunity for their legislative activity. *See Whitener*, 112 F.3d at 744 ("As legislative speech and voting is protected by absolute immunity, the exercise of self-disciplinary power is likewise protected.").

Third, this Court should treat legislative discipline like it treats "[l]aws punishing libel and obscenity"; to the extent they chill free speech, they are "not thought to violate" the First Amendment "because such laws existed in 1791 and have been in place ever since." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122 (2011). Legislative discipline, like libel and defamation law, predates the United States and has its roots in the English law and Parliamentary practice. *See* Bogen, *supra*, at 436. As a result, even if acts of legislative discipline were not immune from suit, they fall outside of the scope of the First Amendment.

II. The First Amendment Does Not Constrain Government Speech, Including Censure, That Counters But Does Not Coercively Suppress Private Speech.

Reversal is required on an additional ground: Not only does legislative discipline fall outside of the ambit of section 1983, but government speech falls outside the scope of the First Amendment entirely, provided it is not coercive. And the censure here was decidedly non-coercive legislative speech. Moreover, the First Amendment aims to promote rather than punish counter-speech, such as the censure here. Because the panel's opinion contravenes these key principles, it cannot stand.

A. The Government's right to contribute to the marketplace of ideas and select the views it wants to express is well-established.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Summum*, 555 U.S. at 467. "A government entity has the right to 'speak for itself'" and to "select the views that it wants to express." *Id.* (quoting *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000)). And that power is not confined to uncontroversial or administrative statements—as this Court has recognized, "some government programs involve, or entirely consist of, advocating a position." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005). Simply put, "[i]t is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens." *Southworth*, 529 U.S. at 229; *see also Summum*, 555 U.S. at 468 ("It is the very business of government to favor and disfavor points of view." (internal quotation marks and citation omitted)).

Here, the Board chose to express its view on what it saw as an individual Board member's efforts to obstruct, mischaracterize, delay, or otherwise undermine the Board's ability to implement validly adopted policies. The Board determined this conduct evidenced not just a lack of professional decorum, but also a willingness to elevate his personal "psychological smart of perceived official injustice," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998), above the overall best interests of HCC. The Board's expression of its conclusion was simply the exercise of its right, unconstrained by the First Amendment, "to advocate and defend its own policies." *Southworth*, 529 U.S. at 229.

B. The First Amendment does not preclude government speech in response to protected speech so long as the response lacks a coercive character.

Government speakers are no less welcome to contribute to the marketplace of ideas when they are engaging in counter-speech. The sole constraint is when a government speaker "seeks to *compel* private persons to convey the government's speech." *Walker*, 576 U.S. at 208 (emphasis added); *accord Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1247–48 (10th Cir. 2000) (compiling this Court's cases). Still, not every potential deterrent to speaking on a matter of public concern is subject to First Amendment challenge. *Compare Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 402 (1950) ("Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes."), *with United States v. Ramsey*, 431 U.S. 606, 624 (1977) ("Any chill that might exist under these circumstances may fairly be considered not only minimal . . . but also wholly subjective." (internal citation and quotation marks omitted)); *see Phelan*, 235 F.3d at 1247–48 (distinguishing between government action that "*compel*[*s*] others to espouse or to suppress certain ideas and beliefs" and action that may "discourage[]" but does not "impermissibly deter" speech).

To be sure, the Court has recognized that certain forms of retaliation by a public employer in response to an employee's speech can run afoul of the First Amendment, but this is simply not that case. For example, the Court has recognized that "the threat of dismissal from public employment" is "a potent means of inhibiting

speech." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968). It has not, however, extended such scrutiny to government speech—including censure or codes of conduct—that respond to an employee's First Amendment activity, especially when the response falls short of disqualifying a candidate or elected official from holding office. *See, e.g.*, *Bond v. Floyd*, 385 U.S. 116, 135 (1966) (addressing challenge to disqualification from membership in the Georgia legislature); *Republican Party of Minn.*, 536 U.S. at 768 (addressing challenge to canon of judicial conduct, the violation of which can result in "disbarment, suspension, and probation," and, for judges, "removal, censure, civil penalties, and suspension without pay"). Indeed, by distinguishing between a public employee's speech as *an employee* and a public employee's speech *as a citizen*, this Court has been careful to protect government speech, even when made by a public employee. *Lane v. Franks*, 573 U.S. 228, 237 (2014).

Wilson's speculative personal belief that he "was denied reelection, likely because he was censured by the Board," (Br. in Opp. at 12), does not establish the requisite degree of coercive impact. Government action that legally prevents one from holding office, *Bond*, 385 U.S. at 136, or maintaining a law license, *Republican Party of Minn.*, 536 U.S. at 768, is not the same as government speech that merely poses a risk of persuading voters a candidate is unfit to represent them. *See Meese v. Keene*, 481 U.S. 465, 478–79 (1987) (rejecting as "untenable" the district court's assumption that the "unsavory connotation" of the phrase "political propaganda" will "make[] this material unavailable to people like appellee . . . because of the risk of being seen in an unfavorable light by members of the public" (internal quotation marks omitted)). In fact, it is precisely this sort of electoral impact

(e.g., informing voters as to reasons a Board member may be unfit for office) that makes a legislature's government counter-speech desirable and important.

Here, the Board's censure poses no enforceable obstacles to Wilson's ability to engage in protected speech or perform the duties of the office to which he was elected. The censure did not legally obligate him to remove or recant any of his public statements, nor did it subject him to any additional liability for activities that the Board determined were inconsistent with the best interests of HCC. Absent such penalties or other serious consequences that might reasonably "compel a private party to express a view with which the private party disagrees," *Walker*, 576 U.S. at 219, Wilson cannot show that the threat of censure is so coercive as to "trigger the First Amendment rules designed to protect the marketplace of ideas," *id.* at 207.

C. The First Amendment does not safeguard one person's right to engage in protected speech at the expense of another's.

This Court has repeatedly recognized "the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 108 (1990); *see also Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

As such, the First Amendment generally "assume[s] that [truthful] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather

than to close them." *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Indeed, even in cases where this Court assumed that certain information "may be potentially misleading to some [recipients]," the Court nonetheless found that the risk failed to satisfy the "heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." *Peel*, 496 U.S. at 109.

Notably, Wilson does not contest whether he engaged in any of the conduct identified in the Board's censure—such as publishing allegations of Trustees' unethical or illegal conduct on his website or hiring a private investigator to investigate HCC. *See* J.A. 10–11. Instead, Wilson concedes the factual accuracy of the censure, but "contends he was always acting in the best interest of HCC and his constituents." *Id.* at 11. While Wilson is entitled to his own views of what best serves the interests of HCC, the First Amendment does not empower him to suppress the Board's ability to express a different perspective.

To the contrary, "[u]nder our system of government, counterargument and education are the weapons available to expose these matters, not abridgement of the rights of free speech and assembly." *Wood v. Georgia*, 370 U.S. 375, 389 (1962); *accord Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973) (rejecting the "view that every potential speaker is 'the best judge' of what the listening public ought to hear or indeed the best judge of the merits of his or her views"). This is no less true when a governmental body, like the legislature, is providing the counterargument. Courts should not use the First Amendment to muzzle government counter-speech, or to prevent legislatures from furnishing information in response to public debate. To hold

otherwise would unfairly constrain States and their legislative bodies. And it would underestimate the capability of voters to process and scrutinize government speech.

Wilson's claim assumes that, when provided with all of the same information about his conduct that is listed in the censure, voters will be incapable of seeing past "the imprimatur of a governmental body itself" (Br. in Opp. at 1)[2] to determine for themselves whether his actions served the best interests of HCC. *Contra Virginia Bd.*, 425 U.S. at 770 (rejecting public-good argument that "rests in large measure on the advantages of their being kept in ignorance").

This assumption is the antithesis of this Court's statements that "it is the democratic electoral process that first and foremost provides a check on government speech" and that "the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate." *Walker*, 576 U.S. at 207; *see also Virginia Bd.*, 425 U.S. at 770 ("[P]eople will perceive their own best interests if only they are well enough informed."). After all, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in

[2] For example, Wilson argued below that "Board members are free to express their individual opinions . . . . However, the act of a governmental body as a whole . . . is more than the mere expression of the individual Board members." Opening Br. at 29. Presumably voters are aware that the outcome of a legislative vote consists of the sum of individual legislators' positions, however. Wilson might as well argue that the First Amendment deprived the Board of authority to defend against his lawsuits because that choice was also the act of a governmental body as a whole rather than the expression of individual Board members.

the end, accountable to the electorate and the political process for its advocacy." *Southworth*, 529 U.S. at 235.

In other words, it is for constituents to decide if they disapprove of the Board's censure of Wilson. Wilson was and remains free to advocate to voters that the Board's censure itself was not in the best interests of HCC for all the same reasons he uses to justify his prior conduct—the perceived need to "root out what he saw as the unwise, unethical, and often unlawful conduct of fellow Board members" (Br. in Opp. at 2)—and he can employ those arguments either in support of his own candidacy or in opposition to the candidacy of current Board members. His failure to persuade, however, does not justify taking that value judgment out of the hands of the electorate in the name of the First Amendment.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted.

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