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 ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Association of Governing Boards of Universities and Colleges (AGB) is the premier membership organization that strengthens higher education governing boards and the strategic roles they serve within their organizations. Through its vast library of resources, educational events, and consulting services, and with 100 years of experience, AGB empowers 40,000 members from more than 2,000 public and private institutions and foundations to navigate complex issues, implement leading practices, streamline operations, and govern with confidence. AGB is the trusted resource for board members, chief executives, and key administrators on higher education governance and leadership.

AGB works to identify emerging trends and issues in higher education governance and to promote their visibility by conducting research, developing publications, facilitating programs, and serving as a guide to address challenges and opportunities. The Association focuses exclusively on higher education governance and helps board members and other higher education leaders assess their governance policies, practices, and strategies to improve performance, build leadership capacity, and plan for the future. AGB's comprehensive portfolio of information and services

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[1] All parties have consented to the filing of this brief. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief.

for boards and chief executives is nationally recognized. Its ultimate goal is to ensure that higher education remains a strong and vital national asset.

The Fifth Circuit's ruling below is of grave concern to AGB. Self-governance is a foundational attribute in the unique American higher-education system comprising volunteer trustees. Within that system, censure is an essential, time-honored tool for self-governance by the governing boards of public higher education institutions. AGB submits this brief to highlight the doctrinal and practical consequences of prohibiting college and university boards from censuring members who violate board policies and undermine board governance.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment restrains the government from "abridging the freedom of speech." U.S. Const. amend. I. It is thus "counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech." *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 448 (2015). Yet that is just the argument the Fifth Circuit endorsed below. It forbade the Houston Community College Board (the "Board") from responding to Respondent's criticism of the Board's actions—even though it permitted Respondent to levy that criticism in the first place. The Fifth Circuit arrived at that counterintuitive destination after several wrong turns.

To begin, the Fifth Circuit refused to treat the Board's censure as speech. But that is precisely what censure is—a statement on behalf of a governing body on a matter of public controversy. Indeed, the court

agreed that individual members of the Board have a protected First Amendment right to express themselves—one way or another—in this controversy. Legislators, after all, "*have an obligation* to take positions on controversial political questions." *Bond* v. *Floyd*, 385 U.S. 116, 136–137 (1966) (emphasis added). But the court would not afford the same right to the Board as a corporate body speaking for the institution. That distinction belies this Court's precedent and common sense. The Board, as a government entity, has the right "to speak for itself." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467 (2009) (internal quotation marks omitted). And this Court has never held "the first amendment * * * to be implicated by governmental action consisting of no more than governmental criticism of the speech's content." *Block* v. *Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986) (Scalia, J.). For good reason: "A rule excluding official praise or criticism of ideas would lead to the strange conclusion that it is permissible for the government to prohibit racial discrimination, but not to criticize racial bias; to criminalize polygamy, but not to praise the monogamous family; to make war on Hitler's Germany, but not to denounce Nazism." *Id.*

Next, the Fifth Circuit ignored the critical First Amendment inquiry: whether the Board actually infringed Respondent's free speech rights or merely interjected its own voice into public discourse. The censure resolution did not compel Respondent to speak. It did not prohibit him from speaking. It did not interfere in his official duties. It was not a law requiring him to take action *at all*. It "merely declar[ed]" the Board's own position. *Little* v. *City of North Miami*,

805 F.2d 962, 967 (11th Cir. 1986) (per curiam) (internal quotation marks omitted). Respondent thus asks this Court to gag the Board while allowing his own opprobrium. But as this Court warned long ago, the Constitution does not provide "a First Amendment heckler's veto." *Pleasant Grove*, 555 U.S. at 468 (internal quotation marks omitted).

There is more. The Fifth Circuit also discarded centuries-worth of this Court's precedent affording higher education institutions "a special niche in our constitutional tradition." *Grutter* v. *Bollinger*, 539 U.S. 306, 329 (2003). If anything, colleges and universities have historically been afforded *more* First Amendment freedoms than other governmental institutions. But the Fifth Circuit's ruling left many public college and university boards without needed tools to effectively express disapproval with rogue board members. Censure is one of the most impactful tools available to boards to enforce their own rules, ensure compliance with the law, and maintain compliance with crucial accreditation standards. Censure, in other words, is the essence of how college and university boards self-govern.

Unable to climb over this mountain of contrary precedent, Respondent seeks to go around and asks this Court to create a new rule. A board, Respondent insists, should be allowed to censure *speech* made *on* the legislative floor and *conduct off* the legislative floor but not *speech off* the legislative floor. That cannot be. "Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity"—not just those taken in the boardroom. *Bogan* v. *Scott-Harris*, 523 U.S. 44, 54 (1998) (internal quota-

tion marks omitted). It follows that the right to censure must extend at least that far, reaching all communications related to the board member's official duties. Nor is there any reason to cut that reach short. Doing so would merely push board debate out of the boardroom, where it belongs, and into places like social media.

In the end, precedent, history, and widespread practice all point to the same conclusion—"the First Amendment does not succor casualties of the regular functioning of the political process." *Blair* v. *Bethel Sch. Dist.*, 608 F.3d 540, 545 (9th Cir. 2010). This Court should apply the law as it always has and allow higher education institutions their academic freedom, intellectual independence, and right to self-govern.

ARGUMENT

I. Respondent's Rule Is Wrong And Unadministrable.

Respondent does not come to this Court as a private citizen suffering government compulsion or suppression of his speech by way of an actual law. *E.g.*, *Wooley* v. *Maynard*, 430 U.S. 705, 714–715 (1977) (striking down state statute compelling individuals to display state motto on license plates). He complains, essentially, that the Board criticized *his* criticism of the Board when it voted to pass the censure resolution. But "[t]here can be no more definite expression of opinion than by voting on a controversial public issue." *Miller* v. *Town of Hull*, 878 F.2d 523, 532 (1st Cir. 1989). And Board members—whether individually or as a collective body—were plainly entitled to

express their disagreement with Respondent's statements. Nothing in the First Amendment requires removal of that Damocles' sword.

A. Censure involves governmental speech exempt from the First Amendment.

Courts have long held it "unassailable" that "the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment." *Miller*, 878 F.2d at 532; *see also Zilich* v. *Longo*, 34 F.3d 359, 363 & n.3 (6th Cir. 1994); *Blair*, 608 F.3d at 545; *Werkheiser* v. *Pocono Twp.*, 780 F.3d 172, 178 (3d Cir. 2015) (all observing the same). That is because, as this Court explained, "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Bond*, 385 U.S. at 135–136. And that is why the Fifth Circuit below determined that the individual members of the board would have been "entitled to assert legislative immunity" had they been sued for voting for the censure resolution. Pet. App. 16a.

Puzzlingly, however, the court ruled the Board's criticism implicates the First Amendment. But what is true of individual public officials is also true of the collective: the First Amendment allows the government "to speak for itself." *Pleasant Grove*, 555 U.S. at 467 (internal quotation marks omitted). "Indeed, it is not easy to imagine how government could function if it lacked this freedom," *id.* at 468—"[i]t is the very business of government to favor and disfavor points of view," *Nat'l Endowment for the Arts* v. *Finley*, 524

U.S. 569, 598 (1998) (Scalia, J., concurring in judgment). This Court has accordingly never "excluded" the government's point of view from the "uninhibited, robust, and wide-open debate" or its "wares" from the "uninhibited marketplace of ideas." *Block*, 793 F.2d at 1313 (Scalia, J.) (internal quotation marks omitted); *see also* Laurence Tribe, American Constitutional Law 588, 590 (1978) (reasoning that the guarantee of freedom of speech "does not mean that government must be ideologically 'neutral,' "; it does not "silence government's affirmation of national values," or prevent government from "add[ing] its own voice to the many that it must tolerate"). Quite the contrary: legislators have a "duty" to " 'speak' on matters of public concern," including "in their capacity as the majority." Pet. App. 36a (Jones, J., dissenting from denial of rehearing en banc).

That could not be more true of college and university boards. Unlike legislative bodies generally, boards have a heightened ethical responsibility to speak as "collective, corporate bod[ies]" to safeguard institutional missions. Ass'n of Governing Bds. of Univs. & Colls., AGB Statement on External Influences on Universities and Colleges 3 (2012) ("AGB Statement on External Influences");[2] Ass'n of Governing Bds. of Univs. & Colls., AGB Statement on Board Responsibility for Institutional Governance 1 (2010), https://tinyurl.com/z4kzhskp; *see infra* Section II.A. And their independence and ability to speak is crucial to the role of colleges and universities in our constitutional republic. *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250

[2] On file with AGB.

(1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.").

A straightforward corollary of these principles is that a college or university board may censure its own members. A censure—which Black's law dictionary defines, among others, as "an authoritative expression of disapproval or blame"—does no more than express the board's viewpoint on a matter of public concern. *Censure*, Black's Law Dictionary (11th ed. 2019); *see Zilich*, 34 F.3d at 363–364 ("Such resolutions are simply the expression of political opinion."); Helen Norton, The Government's Speech and the Constitution 226 (2019) (characterizing censure as government "counterspeech"). The board may communicate its objection collectively—for the same reason that individual members may proclaim their disapproval seriatim by voting for the censure resolution. Either way, that disapproval comprises "political expression," and so merits "the most protect[ion]" the First Amendment can offer. *Block*, 793 F.2d at 1314 (Scalia, J.).

More fundamentally, there is no constitutional difference between Respondent's right to criticize the Board and the Board's "corresponding right" to criticize Respondent: "*all* of the Board members have a protected interest in speaking out." *Blair*, 608 F.3d at 545–546; *Werkheiser*, 780 F.3d at 178 (holding that a board had a "competing First Amendment right to make a political statement by removing" one of its members from an appointed position). And when it comes to multiple competing views, "the remedy to be applied is more speech, not enforced silence." *Meese* v. *Keene*, 481 U.S. 465, 481 (1987) (quoting *Whitney* v.

California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)); *cf. Bond*, 385 U.S. at 136 ("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."). Yet the court below would "withhold[ ]" vital "information from the public," *Meese*, 481 U.S. at 481, forgetting that speech by political figures affects the rights of both speakers and voters, *Bullock* v. *Carter*, 405 U.S. 134, 142–143 (1972). The Constitution does not demand—or, indeed, permit—that.

B. Censure alone does not impinge First Amendment rights.

The Fifth Circuit's ruling suffers another flaw: the Board's resolution did not "*compel[ ]* others to espouse or to suppress certain ideas and beliefs." *Phelan* v. *Laramie Cnty. Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1247 (10th Cir. 2000). The reason the government's own speech "is exempt from First Amendment scrutiny," *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) is that the First Amendment restricts only "government regulation of private speech," *Pleasant Grove*, 555 U.S. at 467. To come under the First Amendment purview, then, the governmental measure must actually punish, or threaten to punish, protected speech by governmental action that is "regulatory, proscriptive, or compulsory in nature." *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972).

Censure does none of that; "it has only an indirect effect" on speech. *Id.* at 12; *see also Block*, 793 F.2d at 1311, 1313 (Scalia, J.) (explaining that "governmental criticism of the speech's content" has only an "indirect

deterrent effect" on speech). Respondent thus "remained free to express h[is] views publicly," to perform his elected duties, and even "to criticize the ethics policy and the Board's censure" in return. *Phelan*, 235 F.3d at 1248; *see Meese*, 481 U.S. at 480–481 (observing that disseminators of material labeled as "propaganda" by Congress could "add any further information they think germane to the public's viewing of the materials").

Government measures that flunk the "regulatory, proscriptive, or compulsory" test look quite different. Consider *Keyishian* v. *Board of Regents of University of New York*, where public-school teachers were discharged because of their political acts or associations. 385 U.S. 589, 604 (1967). Or *Baggett* v. *Bullitt*, where a governmental agency imposed an oath of vague and uncertain meaning as a condition of employment. 377 U.S. 360, 372 (1964); *see also Baird* v. *State Bar of Ariz.*, 401 U.S. 1, 7 (1971) (reversing denial of admission to the bar on the ground that an attorney refused to answer a question regarding her past political associations); *Lamont* v. *Postmaster Gen.*, 381 U.S. 301, 307 (1965) (striking a regulation requiring private individuals to make a special written request to the post office before certain political literature could be delivered to them); *Meese*, 481 U.S. at 480 (distinguishing this line of cases); *Blair*, 608 F.3d at 544 (explaining that the "prototypical" retaliatory First Amendment claim involves "a government worker who loses his job as a result of some [critical] public communication").

Censure is entirely different—it "is not a law at all." *Zilich*, 34 F.3d at 364. The highest penalty it carries is a bruised ego. Such reputational injury, however, is not enough in the First Amendment context: It does

not defeat constitutional interests in furthering uninhibited, robust debate on public issues. *See N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 270, 279–280 (1964) (explaining that a public official may recover in state libel action only when the alleged libelous statement is false and when the statement is made with malice). At day's end, "[t]he First Amendment guarantees freedom of speech, not freedom from speech." Pet. App. 40a (Ho, J., dissenting from denial of rehearing en banc) (emphases omitted). And "neither precedent nor reason," justify finding "government disapproval" of ideas "in itself unlawful." *Block*, 793 F.2d at 1312 (Scalia, J.) (emphasis omitted). Such a rule would merely "stifle fully protected government speech at the hands of a fully protected speaker." Pet. App. 37a (Jones, J., dissenting from denial of rehearing en banc).

C. Respondent's rule has no basis in doctrine or common sense.

In the Court below and in opposing certiorari, Respondent proposed a rule that would allow a governmental body to censure a member's *speech within* the legislative debate and *conduct outside* the legislative debate but not *speech outside* the legislative debate. Opp. 18. Respondent described these as "settled boundaries," *id.*, yet he cited no case enforcing such a distinction. That is unsurprising: There is no doctrinal through-line that could justify singling out for protection from censure off-the-floor legislative speech.

Start with Respondent's distinction between speech on and off the legislative floor. Respondent's own cases demonstrate that this Court has never parsed legislative speech based on *where* it occurs, but on

whether it is " 'integral' to lawmaking 'processes.' " *Id.* (quoting *Gravel* v. *United States*, 408 U.S. 606, 625 (1972)). That makes sense. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti* v. *Ceballos*, 547 U.S. 410, 421–422 (2006). And so a board should be able to censure what its member communicates "in his or her professional capacity" so long as that communication relates to the member's "official duties"—no matter where the member chooses to espouse his views. *Id.* at 422–423.

Meting out First Amendment protections based solely on the forum where the speech takes place, by contrast, would lead to nonsensical results. It would prohibit a board from speaking out against members who, for example, make false allegations against their peers, publish hateful remarks against minorities that are anathema to a college's or a university's mission, or even reveal confidential information to millions on Twitter. At the same time, it would permit a board to censure members for merely taking a stand on a matter of public concern in the privacy of the board's chamber. The only thing such a rule would accomplish is push sensitive discussions off the boardroom floor where they can be carefully considered. But that subverts the usual—and the ethical—operations of the boards.

Take, for example, AGB Statement on External Influences, which sensibly recognizes that "[a] board with consistently agreeable members would be neither plausible nor in an institution's best interest." AGB Statement on External Influences, *supra*, at 5. But, AGB cautions, those tensions are meant to be

aired out "in the boardroom": although members must feel free to "sharply disagree during the deliberative process, once a decision has been made the board must always speak publicly with one voice." *Id.* Respondent's rule gives short shrift to these foundational precepts. *Cf. Pleasant Grove*, 555 U.S. at 468 (warning against "limit[ing]" the "debate over issues of great concern to the public" to "the private sector" (internal quotation marks omitted)).

The line between conduct and speech is even more elusive—as this very case demonstrates. The HCC Board did not censure Respondent for pure speech, but also for acting 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." Pet. App. 32a. As the resolution explains, Respondent, on at least two separate occasions, hired investigators to surveil another member of the Board to perpetuate his unsubstantiated allegations that she did not reside in the district in which she was elected. *Id.* at 3a, 42a. He hired another investigator "to conduct an investigation of the Board and the College without the consent of the Board." *Id.* at 43a. And he instituted a wave of robocalls. *Id.* at 32a. Part of the resolution thus directed Respondent to "immediately cease and desist from all inappropriate conduct." *Id.* at 45a. Under Respondent's rule, courts would need to parse this resolution to determine which portions permissibly denounce conduct and which unconstitutionally criticize speech. Nothing in this Court's precedent allows such "judicializing" of legislative motivations. *Id.* at 37a.

Indeed, the "practical problems" of forcing the courts to "decide when the government has crossed the line

between mere fact-finding (which presumably remains constitutional) and ideological advocacy" are alone sufficient to defeat Respondent's rule. *Block*, 793 F.2d at 1313 (Scalia, J.). The better course is to allow college and university boards to decide for themselves when a member's behavior warrants censure and instead leave the constitutional line where it has always been: at the actual "exercise or threat of state power." *Id.* at 1314. And "[i]f the citizenry objects" to the board's declaratory views, "newly elected officials later could espouse some different or contrary position." *Pleasant Grove*, 555 U.S. at 468–469 (quoting *Bd. of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 235 (2000)).

II. Respondent's Rule Threatens Grave Consequences For Higher Education Institutions.

Censure is not merely a time-honored tradition; it is often the only tool a public college or university board can use to enforce its own rules, ensure compliance with the law, and avoid dire consequences such as loss of accreditation. It is the essence of self-governance—and a key means for a university to voice institutional positions *as an institution*, rather than a collection of individual officials who happen to hold similar views. Prudently, this Court has long permitted colleges and universities to do just that. *See Grutter*, 539 U.S. at 329 (recognizing "the important purpose of public education and the expansive freedoms of speech" afforded to universities). Today, Respondent asks the Court to reverse course, profoundly limiting colleges' and universities' academic freedom. But the First Amendment "secures the right to criticize, not the

right *not* to be criticized." Pet. App. 40a (Ho, J., dissenting from denial of rehearing en banc).

A. This Court's First Amendment jurisprudence has always permitted colleges and universities to self-govern and promote their chosen values.

Beginning with Chief Justice Marshall's opinion in *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819), this Court has championed the intellectual independence of American colleges and universities. And it has repeatedly reaffirmed the importance of academic freedom under the First Amendment. *See Sweezy*, 354 U.S. at 250 ("The essentiality of freedom in the community of American universities is almost self-evident."); *Keyishian*, 385 U.S. at 603 (academic freedom is "a special concern of the First Amendment"); *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 312 (1978) ("The freedom of a university to make its own judgments" "long has been viewed as a special concern of the First Amendment."); *Grutter*, 539 U.S. at 329 ("universities occupy a special niche in our constitutional tradition").

What makes that cherished independence not merely theoretical but real is colleges' and universities' ability to defend themselves from the "fluctuating policy[ ] and repeated interferences" of improper "influence[s]." *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 648. That is no easy task. Colleges and universities are under frequent pressure to alter missions or offer new academic programs that may run counter to their missions. AGB Statement on External Influences, *supra*, at 4. Sometimes this pressure comes "from well-meaning interests and supportive constituents," *id.*;

other times, as here, it stems from self-interested board members intent on leaking confidential information, publicly denigrating the college's antidiscrimination policy, and filing spurious lawsuits that cost institutions hundreds of thousands of dollars to defend. Whatever the source, the effect is the same: even the appearance of self-serving political agendas undermines trust in the board's stewardship. *Id.* at 6.

This is why ethical standards consistently insist that boards exercise their authority to weed out inappropriate "intrusion." *Id.* at 4. AGB standards, for example, explain that the board must govern "as a collective, corporate body" to "demonstrate board independence" and bridle "[i]ndividual board members whose views are not consistent with board decisions." *Id.* at 2–3, 5. Board members, of course, remain free to advocate for their constituents *during* the debate. But once the Board has acted, "[i]ndividual board members * * * must respect the actions of the corporate body and avoid putting their own interests before that of the institution." *Id.* at 2; *see also* Ass'n of Governing Bds. of Univs. and Colls., AGB Statement on the Fiduciary Duties of Governing Board Members 6 (2015) ("AGB Statement on Fiduciary Duties").[3]

Board members, individually and collectively, must also abide by fiduciary duties imposed by state law. To do so, board members must act in good faith and in a manner they reasonably believe to be in the best interests of the institution (duty of care), avoid personal conflicts of interest (duty of loyalty), and adhere to the institutional mission (duty of obedience). *See id.* at 2, 4–10. Fulfilling these duties often requires boards to

[3] On file with AGB.

speak with one voice. *See, e.g.*, *id.* at 11 (directing boards to institute audit committees to ensure board members comply with fiduciary duties).

AGB is not alone in emphasizing collective governance. The Project on Governance for a New Era—which includes Judge Cabranes, a former Trustee of Yale University, Columbia University, and Colgate University, and numerous other current and former trustees, among others——has similarly prescribed that "[e]ffective board leadership involves" "acting after due deliberation, even when not everyone agrees." Project on Governance for a New Era, A Blueprint for Higher Education Trustees 2 (Aug. 2014), https://tinyurl.com/3vxz335a. Cathy Trower, president of a board governance consulting firm and trustee at Wheaton College, and Peter Eckel, director of leadership at the University of Pennsylvania's Alliance for Higher Education and Democracy and trustee at the University of La Verne, agree. A board, they explain, should "[c]reate *and uphold* a statement of expectations" or "a code of conduct[ ] that spells out the responsibilities of board members and how the board will deal with violations." Cathy Trower & Peter Eckel, *Making Boards Accountable for Themselves*, Inside Higher Ed (Dec. 16, 2016), https://tinyurl.com/um72mh5n (emphasis added). "Great boards do not tolerate renegades who violate agreed-upon terms of engagement"; they "have consequences for misbehavior." *Id.*

Indeed, the most basic and uncontroversial principles dictate that entities—including elected college and university boards—should be able to set their own rules and ensure that all members comply with those

rules. After all, if a board can protect itself from *external* interference, *internal* discipline is implied. That is the bread-and-butter of self-governance. *See* AGB Statement on External Influences, *supra*, at 2 ("Boards must police themselves in assuring the highest level of ethical behavior among their members, including avoiding any board member assuming the role as an advocate for a special interest in the outcome of a board's decision."); H.R. Res. 2, 2008 Gen. Assemb., Extra Sess. (N.C. 2008) (claiming "inherent authority" to "discipline"). And so long as that discipline remains "within constitutionally prescribed limits," this Court should follow its long "tradition of giving" the boards an appropriate "degree of deference." *Grutter*, 539 U.S. at 328.[4]

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[4] Numerous college and university boards' codes of ethics across the country, including those of AGB members, likewise call for collective governance. *E.g.*, Univ. of Cent. Fla. Bd. of Trs., Statement of Expectations 2, https://tinyurl.com/hxx8kz59 (last visited July 19, 2021) ("By law, the Board, acting as a collective body, is responsible for governance of the university. Individual Trustees have no authority except as delegated by the Board as a whole."); San Jacinto Cmty. Coll. Dist. Bd. of Trs., Bylaws 3 (June 7, 2021), https://tinyurl.com/k7dmwpy6 ("The Board possesses and exercises its authority and duties as a collective body."); Del Mar Coll. Dist. Bd. of Regents, Bylaws 2 (amended Nov. 13, 2012), https://tinyurl.com/tt8tjx3n ("The Board possesses and exercises its authority and duties as a collective body[;] * * * no individual member may speak, obligate, or exercise authority in the name of the Board."); Macomb Cmty. Coll. Bd. of Trs., Bylaws (rev. Sept. 18, 2019), https://tinyurl.com/a7zfstrd ("The Board shall act as a collective body and individual members of the Board of Trustees[ ] shall assume no authority to act independently without prior Board approval.");

Beyond internal self-governance, college and university boards must also be able to express their own views in the public sphere. Only then can boards promote and protect their institutional values and missions. *See* AGB Statement on External Influences, *supra*, at 3 (instructing boards to "keep[ ] the mission as a beacon"); Trower & Eckel, *supra*, (explaining that boards must be accountable for "[u]pholding the institution's mission"). A board should not be compelled to stay mute when its member posts "racist, homophobic and misogynistic" slurs. Megan Healy, *Calls for Resignation of Cuesta College Board President Over Social Media Posts*, KSBY (Nov. 13, 2020, 12:25 AM), tinyurl.com/7f34svyj. Or when a member broadcasts "fascist ideals" that dismiss minority issues as "crap" and "disparage[ ] gay and transgender people." Debra Moore, *FRC Trustee, Community Members Call for Saxton's Censure*, Plumas News (June 23, 2020), tinyurl.com/r74pkshs. It should be allowed to unequivocally—and authoritatively—express a contrary position of the institution as a whole, not just individual disapproval of other board members. That should be uncontroversial. Just like any other "government entity," the board must be able to "speak for itself"—"to say what it wishes and to select the views that it

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S. Plains Coll. Bd. of Regents, Policy and Procedure Manual (revision issued Nov. 15, 2012), https://tinyurl.com/ujsvf7dw ("The Board possesses and exercises its authority and duties as a collective body[;] * * * no individual member may speak, obligate or exercise authority in the name of the Board."); Monroe Cnty. Cmty. Coll. Dist. Bd. of Trs., Bylaws 5 (rev. Aug. 24, 2015), https://tinyurl.com/dvvathhx ("The Board shall act as a collective body and individual members shall assume no authority to act independently without prior Board approval.").

wants to express." *Pleasant Grove*, 555 U.S. at 467–468 (internal quotation marks and citation omitted).

B. Censure is how boards promote self-governance, protect institutional missions, and ensure compliance with the law.

Use of censure as discipline has a long historical pedigree. Elected officials in all layers of the government—from the local school board to the United States Senate—have used this time-honored tradition to promote self-governance and protect institutional missions. The Senate first censured one of its members in 1811. Anne M. Butler & Wendy Wolff, U.S. Senate Hist. Off., *United States Senate Election, Expulsion, and Censure Cases: 1793–1990*, at xxix (1995). The House was not far behind, censuring one member for "insulting [the] Speaker of the House" in 1832, another for referring to a piece of legislation as a "monstrosity" in 1868, and yet another for using "unparliamentary language" in 1921. *List of Individuals Expelled, Censured, or Reprimanded in the U.S. House of Representatives*, U.S. House of Representatives https://tinyurl.com/4bsac6hr (last visited July 19, 2021); *see also* H. Journal, 40th Cong., 2d Sess. 195 (1868) (defending its censure practice as "universal[ ]" for "all deliberative bodies").

University boards, for their part, have censured their members since at least 1978. *See* Jack Birkinshaw, *Junior College Aide Censured in Altercation*, L.A. Times, at D1 (Jan. 5, 1978) (reporting that the Los Angeles Community College District Board of Trustees voted to censure a board member for carrying out a physical attack against the chancellor during

a closed-door meeting); *Phelan*, 235 F.3d at 1245; *cf.* Leonard Buder, *Board Censures College Officials: Scores Them for Proposing 'Theoretical" Tuition of $400 at City Colleges*, N.Y. Times 1 (Nov. 18, 1965) (detailing how the Board of Higher Education of the City of New York censured a university chancellor and other municipal college officials for proposals to charge tuition). This Court has repeatedly granted "great weight in a proper interpretation of constitutional provisions" to such "[l]ong settled and established practice[s]." *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

Public colleges and universities across the Nation continue this practice today. The board for the Contra Costa Community College District, for example, recently censured one of its members for making unsubstantiated public comments about the district's chief human resources officer in violation of the board's rules and California law. Tristan Shaughnessy, *Governing Board Misconduct: 4CD Trustee Censured for Violating Code of Ethics at Public Meeting*, Inquirer: Student Voice of Diablo Valley College (May 19, 2021), https://tinyurl.com/u887rb7c. And the University of Michigan Board of Regents censured one of its members for calling three top state leaders "witches" and suggesting they be burned at the stake. Rick Fitzgerald, *U-M Board Votes to Censure Regent Ron Weiser*,

Univ. Record (Apr. 2, 2021), https://tinyurl.com/z22f2tpt.[5] Indeed, HCC's own code of ethics calls for the Board to "speak with one voice." Houston Cmty. Coll., Board of Trustees Bylaws, art. H, § 3 (amended Sept. 2, 2020), https://tinyurl.com/xz3yfvce; *see also id.* art. A, § 4(h) (imploring trustees to "[r]efrain from any attempt to influence any operational decision, including but not lim-

[5] *See also, e.g.*, Mackenzie Shuman, *Cuesta College Trustee Censured, Ousted as Board President After 'Offensive' Facebook Posts*, Tribune (Dec. 22, 2020, 6:41 PM), https://tinyurl.com/42er5s6b (explaining that Cuesta College censured one of its trustees for "offensive, disrespectful, [and] demeaning" social media posts that violated "the trustee role"); Madeline St. Amour, *Tainted Search at Maricopa*, Inside Higher Ed (Sept. 4, 2020), https://tinyurl.com/cajn2c6h (reporting that Maricopa County Community Colleges District censured an elected member of the governing board for violating a confidentiality agreement and attempting to persuade a chancellor candidate not to apply); Roxie Hammill, *JCCC Board Censures Trustee Angeliina Lawson For Code of Conduct Violations*, Shawnee Mission Post (Feb. 21, 2020), https://tinyurl.com/k8hvfmrk (describing censure of a member of the Johnson County Community College Board of Trustees for sending a letter that was perceived to damage the college's reputation and violate the board's code of conduct); Bruce A. Scruton, *Freeholders: No Cause to Discipline Scanlan*, N.J. Herald (Oct. 11, 2019, 11:50 AM), https://tinyurl.com/tmwpfbk (recounting that Sussex Community College Board censured a trustee for retweeting racist and sexist tweets); Jack Stripling, *Rogue Trustee in Texas Stirs Debate in Higher Education*, Chronicle of Higher Educ. (Apr. 18, 2014), https://tinyurl.com/jjbmpam8 (explaining that a University of Texas Regent was censured for being a "rogue trustee," which involved initiating protracted investigations of University of Texas administrators, submitting unreasonable and burdensome records requests, and disclosing confidential student information).

ited to individual admissions, personnel, or purchasing decisions, except when the decision is an agenda topic at an official Board meeting").

A key reason for this widespread and entrenched practice is that public college and university boards lack effective alternative tools to respond to members who violate the board's rules or undermine the board's mission or message. This very case provides an example. In Texas, community-college board members are elected for six-year terms. Tex. Educ. Code § 130.082(e). A board itself cannot remove an elected member, and no governing body directly oversees school and community college boards. *See id.* §§ 11.051, 130.082(d), 130.084 (entrusting management of schools and community colleges to their boards alone). Censure is thus the "highest level of sanction available" during that six-year tenure. Pet. App. 4a, 44a.

Other states similarly constrain college and university boards' ability to discipline their members. *See, e.g.*, La. Const. art. x, § 24 (requiring state congress action to impeach board members); Cal. Cmty. Coll., Off. of Gen. Couns., Procedures and Standing Orders of the Board of Governors 16 (Nov. 2020 ed.), https://tinyurl.com/k6wts4ep (listing censure as the ultimate disciplinary sanction available to the board); N.C. Agric. and Tech. State Univ. Bd. of Trs., Duties of Board Members 9 (rev. Aug. 2020), https://tinyurl.com/48uaezz7 (explaining that only the Board of Governors can vote to remove an elected Trustee, not the Board of Trustees itself).

Respondent's rule would thus eliminate these boards' only viable tool to address wrongdoing by individual board members. That would have disastrous effects. For one, unchecked behavior of rogue board members can lead to loss of accreditation. This case once again well illustrates the point: Houston Community College received an official letter from its accrediting agency expressing concern that the college had violated a "Core Requirement" regarding institutional "leadership" and "governance"—that its governing board "act with authority only as a collective entity" and "not [be] controlled by a minority." Pet. App. 44a; S. Ass'n of Colls. & Schs., Comm'n on Colls., *Resource Manual for the Principles of Accreditation* 3, 20 (3d ed. 2018) ("SACSCOC").

This is not a one-off requirement. All seven primary institutional accreditors for public and not-for-profit universities and colleges require board autonomy and freedom from external influences. And some, like the SACSCOC, expressly require that governing boards not be controlled by a minority. *See, e.g.*, WASC Senior Coll. & Univ. Comm'n, Governing Board Policy 1 (rev. 2017), https://tinyurl.com/5dew5vnr ("The governing board must not be effectively controlled by a minority of board members or by related entities."); Accrediting Comm'n for Cmty. and Junior Colls. W. Ass'n of Schs. & Colls., Accreditation Standards 15 (June 2014), https://tinyurl.com/49pvsxdp ("Once the board reaches a decision, all board members act in support of the decision."); Higher Learning Comm'n, Policy Book 18 (June 2021), https://tinyurl.com/wtp9vcse ("The governing board" must "preserve[ ] its independence from undue influence on the part of * * * external parties."); Middle States

Comm'n on Higher Educ., Standards for Accreditation and Requirements of Affiliation 11 (2015), https://tinyurl.com/hyva2z2w ("Members [of the governing board] must have primary responsibility to the accredited institution," must "ensure the impartiality of the governing body" and must "not allow political, financial, or other influences to interfere with their governing responsibilities").

For another, the board's inability to respond—as an institution—to derogatory, racist, or sexist board members' remarks may lead to a lawsuit charging a college or university with tolerating a hostile environment in violation of federal laws like Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments Act of 1972. Baylor University, for example, has been sued for deliberate indifference over claims of on-campus sexual assault under Title IX. A board member's emails disparaging women who alleged sexual assault were used as evidence to support that claim. *See* Amend. Compl., ECF No. 2, *Doe* v. *Baylor Univ.*, 6:16-cv-00173 (W.D. Tex. June 28, 2016). Linfield University was similarly sued under Title IX for a widespread culture of indifference to sexual-assault claims and creation of hostile educational environment. This time, a Linfield University trustee's sexual assault formed the basis of the suit. *See* Compl., ECF No. 1, *Motis* v. *Jubb*, 3:19-cv-02000 (D. Or. Dec. 10, 2019).

Respondent's rule would thus force college and university boards onto a "high tightrope without a net." *United Steelworkers of Am., AFL-CIO-CLC* v. *Weber*, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring). On one side lies a Section 1983 board member's suit. On the other, litigation by employees and students or

even loss of accreditation. Nothing in the First Amendment requires the Court to put boards in such a perilous position. The Court should instead afford colleges and universities the same "degree of deference" they have historically enjoyed, *Grutter*, 539 U.S. at 328, and allow the boards to use the time-tested means of self-governance.

CONCLUSION

For these reasons and the reasons in the Petitioner's brief, the judgment of the Fifth Circuit should be reversed.

Respectfully Submitted,

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July 2021