No. 20-804

In the Supreme Court of the United States

HOUSTON COMMUNITY COLLEGE SYSTEM, PETITIONER

v.

DAVID BUREN WILSON

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the First Amendment prohibits an elected body from adopting a censure resolution in response to a member's speech.

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INTEREST OF THE UNITED STATES

This case concerns whether the First Amendment's free-speech protection abridges the power of an elected body to censure one of its members. The United States has a substantial interest in the resolution of that question. The United States House of Representatives and Senate have censured and otherwise disciplined their Members throughout the Nation's history, including because of Members' speech. Some federal agencies have authority to censure individuals, including governmental officials, in certain circumstances. The United States also has a substantial interest in the correct interpretation and application of the federal Constitution.

STATEMENT

Respondent asserted causes of action under 42 U.S.C. 1983 in a state-court suit, alleging that petitioner

violated his First Amendment rights. The case was removed to the United States District Court for the Southern District of Texas. The district court dismissed the complaint for lack of Article III standing. Pet. App. 20a-28a. The court of appeals reversed. *Id.* at 1a-19a.

1. Petitioner is a public entity operating community colleges in and around Houston, Texas. Pet. App. 2a. From 2013 to 2019, respondent was an elected member of the board of trustees that governs that school system. *Id.* at 2a, 5a. The board is charged with "exercis[ing] the traditional and time-honored role for such boards as their role has evolved in the United States." Tex. Educ. Code Ann. § 51.352(a) (West 2020). Among its statutory responsibilities is to "enhance the public image of each institution under its governance." *Id.* § 51.352(a)(2).

During respondent's tenure as an elected trustee, he repeatedly "voiced concern that [the other] trustees were violating the Board's bylaws and not acting in the best interests of" the school system. Pet. App. 3a. Respondent "arrang[ed] robocalls regarding the Board's actions," gave "interview[s] with a local radio station," filed multiple suits against petitioner and the other trustees in state court, "hired a private investigator" to investigate one of the other trustees, and "maintained a website where he published his concerns." *Ibid.*

In January 2018, the board adopted a resolution of censure against respondent. Pet. App. 3a-4a; see *id.* at 42a-45a (copy of resolution). The board determined that respondent had violated its bylaws by failing to "(1) respect the board's collective decision-making process; (2) engage in open and honest discussions in making board decisions; (3) respect trustees' differing opinions; (4) interact with trustees in a mutually respectful manner; and (5) act in Houston Community College System's

best interest." *Id.* at 21a. The board found that respondent's "conduct was not only inappropriate, but reprehensible," and that it "warrant[ed] disciplinary action." *Id.* at 44a. The board announced that respondent was "PUBLICLY CENSURED for his conduct," *ibid.*, and further resolved that he would be "(1) ineligible for election to a board officer position for the 2018 calendar year; (2) ineligible for travel-related expense reimbursements for college year 2017-2018; and (3) required to maintain board approval when requesting access to funding for community affairs programs for college year 2017-2018." *Id.* at 21a; see *id.* at 44a-45a.

Respondent amended one of his already-pending state-court complaints against petitioner and the other trustees to add claims under 42 U.S.C. 1983, alleging that the passage of the censure resolution violated his constitutional right to free speech under the First Amendment, made applicable to the States by the Fourteenth Amendment. See Pet. App. 4a. Petitioner and the trustees removed the case to federal district court, see 28 U.S.C. 1331, 1441(a), and 1446, and following the denial of respondent's motion to remand, see 28 U.S.C. 1447(c), respondent amended the complaint to make petitioner the only defendant. Pet. App. 4a-5a. Respondent sought an injunction against enforcement of the censure resolution, compensatory damages, punitive damages, and attorney's fees. *Id.* at 4a.

2. The district court dismissed the suit for lack of Article III standing. Pet. App. 20a-28a. Relying on the Tenth Circuit's decision in *Phelan* v. *Laramie County Community College Board of Trustees*, 235 F.3d 1243 (2000), cert. denied, 532 U.S. 1020 (2001), the court held that "the censure does not cause an actual injury to [respondent's] right to free speech." Pet. App. 27a. The

court explained that respondent "is not prevented from performing his official duties"; that "[i]n spite of the censure, [respondent] is free to continue attending board meetings and expressing his concerns regarding decisions made by the board"; and that "the censure does not prohibit [respondent] from speaking publicly." *Ibid.* The court also explained that the board's other disciplinary actions did not injure respondent because he "ha[d] not made a claim for reimbursement" for travel expenses and he "ha[d] access to the board account for community affairs and [could] run for a board officer position." *Ibid.*

3. The court of appeals reversed. Pet. App. 1a-19a.

a. As relevant here, the court of appeals found that respondent had adequately alleged an injury in fact to support Article III standing because he alleged that the "public censure ha[d] caused him mental anguish," which the court found analogous to "a reputational injury." Pet. App. 8a. The court did, however, find that respondent's claims for prospective relief were moot because while the appeal was pending, respondent had resigned from his position as a trustee and had been defeated in his subsequent reelection bid. See *id.* at 5a, 9a.

The court of appeals also found that respondent had adequately pleaded a free-speech claim. The court observed that "[a]lthough the district court did not technically reach this issue, having dismissed the case for lack of standing," addressing the merits on appeal was appropriate because the district court had "effectively concluded that [respondent's] censure did not give rise to a First Amendment claim." Pet. App. 9a-10a. In the court of appeals' view, "the importance of allowing elected officials to speak on matters of public concern"

compelled the conclusion that "censures of publicly elected officials can be a cognizable injury under the First Amendment." *Id.* at 10a-11a. Relying on its prior precedent finding that a formal reprimand of an elected judge can support a free-speech claim, see *id.* at 11a-14a, the court concluded that "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983," *id.* at 14a. The court found that precedent instructive based on its view that "elected judges are, ultimately, 'political actors,'" and that "if anything, judges are afforded *less* protection than legislators." *Id.* at 15a (citation omitted). The court agreed, however, that "the additional measures taken against [respondent]," which involved his eligibility for an officer position and certain travel expenses, as well as his ability to access certain funds, "do not violate his First Amendment rights" because respondent lacked an "entitlement" to those perquisites. *Id.* at 15a n.55.

b. The court of appeals denied rehearing en banc by an equally divided 8-8 vote. Pet. App. 29a-30a.

Judge Jones wrote an opinion, joined by four of her colleagues, dissenting from the denial of rehearing en banc. Pet. App. 31a-38a. She found "compelling" the decisions of other courts of appeals holding that "a legislature's public censure of one of its members, when unaccompanied by other personal penalties, is not actionable under the First Amendment." *Id.* at 32a-33a. Citing the Tenth Circuit's decision in *Phelan*, *supra*, Judge Jones reasoned that a "censure or reprimand" might "strike hard verbal blows," but does not "'impermissibly deter the exercise of free-speech rights.'" Pet. App. 33a (citation omitted). She also found the panel's reliance on precedents about judges misplaced, in part

because "judges, even elected judges, are not equivalent to legislators when it comes to participating in the public square," and because "[j]udicial discipline is incommensurable with legislative debates." *Id.* at 36a.

Judge Jones observed that "the duty of legislators is precisely to 'speak' on matters of public concern, either individually or in their capacity as the majority, without inhibition," and that "[s]uch 'speech' includes addressing the (mis)conduct of the legislative body's own members." Pet. App. 36a. Under the panel's decision, in her view, "the First Amendment becomes a weapon to stifle fully protected government speech at the hands of a fully protected speaker." *Id.* at 37a. Finally, she stated that the panel's decision "raises serious questions about how to apply strict scrutiny in a novel context and an already muddled area of the law." *Id.* at 37a-38a.

Judge Ho also wrote an opinion dissenting from the denial of rehearing en banc. Pet. App. 39a-41a. He stated that "[t]hose who seek office should not just expect criticism, but embrace it," *id.* at 39a, and that the First Amendment "secures the right to criticize, not the right *not* to be criticized," *id.* at 40a.

SUMMARY OF ARGUMENT

The court of appeals erred in finding that the passage of a censure resolution, standing alone, could violate respondent's right to free speech.

A. Dating back to the House of Commons and early colonial legislatures, elected bodies have long had the power to discipline their own members for a variety of infractions, including for objectionable speech. The Constitution expressly vested that traditional power in the United States House of Representatives and Senate, as did state constitutions in their respective legislatures. Nothing suggests that the ratification of the

First Amendment, or its incorporation against the States by the Fourteenth Amendment, abrogated or abridged the traditional power of elected bodies to discipline their members. Indeed, the House and Senate have throughout their histories disciplined Members for their speech. That is powerful evidence that such discipline does not "abridg[e] the freedom of speech" within the meaning of the First Amendment. And there is no sound basis to reach a different conclusion with respect to state legislatures or, as here, local elected bodies.

B. A censure resolution, standing alone, would not infringe a member's free-speech rights for the additional reason that it would constitute governmental speech. This Court has made clear that "[a] government entity has the right to 'speak for itself'" and "'to say what it wishes,'" and that such governmental speech is "'exempt from First Amendment scrutiny'" under the Free Speech Clause. *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467 (2009) (citations omitted). As the resolution here illustrates, a bare censure is pure speech, issued directly by a governmental body, its content solely determined by that body, expressing formal disapprobation of one of its members. Such governmental speech, even if highly critical, does not violate that member's free-speech rights. It is particularly important to ensure that members of an elected body cannot wield the Free Speech Clause to nullify censure resolutions passed by a majority of their colleagues, especially when such resolutions will necessarily speak on topics of public and political interest.

C. This case involves only a censure imposed by an elected body against one of its members. Different considerations might be relevant in other circumstances,

but this case provides no occasion for this Court to address them. For instance, the Court need not and should not address whether any constitutional claims might be available in circumstances where the discipline extended beyond a bare censure, or where a legislative body disciplined a nonmember (including another governmental official), or where a governmental body censures or otherwise disciplines members of a regulated profession or governmental employees.

ARGUMENT

The court of appeals erred in holding that respondent has a cognizable First Amendment interest in not being the subject of a censure resolution adopted by the elected body of which he was a member. Elected bodies have long been understood to have the power to discipline their members, including by censure or reprimand, and nothing suggests that the ratification of the First Amendment was understood to abrogate or abridge that power. Even setting that aside, the passing of a censure resolution by an elected body would be governmental speech that therefore does not violate the free-speech rights of the member being censured.

A. The First Amendment Did Not Abrogate The Longstanding Power Of Elected Bodies To Discipline Their Members, Including By Censure

1. Elected bodies in the Anglo-American legal tradition have long been understood to have the power to discipline their own members. For example, the "House of Commons had begun to exercise such authority at least as early as 1515, when an act was passed giving it power over questions of attendance." Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* 173 (1943). That chamber soon "began imprisoning

members, and other penalties were later adopted," including "suspension and expulsion," for a variety of infractions. *Ibid.*

The practice of discipline made its way across the Atlantic: "by the time the colonial assemblies began to function," their power to discipline their members "was a recognized tradition which these younger bodies were not slow in following." Clarke 173. That power "was more or less assumed as a part of privilege." *Id.* at 184. And "[b]y the middle of the eighteenth century, most of the claims of privilege in the colonies were too well established to be seriously questioned." *Id.* at 202. Nevertheless, some colonial legislatures enacted "special regulation[s] to provide more generally for the disciplining of members * * * when it seemed necessary to give this power definite expression." *Id.* at 184. After independence, that practice carried over to the States, most of whose constitutions included "an express provision authorizing each branch of the legislature thereby established, 'to punish its members for disorderly behavior.'" Luther Stearns Cushing, *Lex Parliamentaria Americana* § 685, at 269 (1856).

Against that well-established legal backdrop, it is no surprise that the Framers of the Constitution expressly vested in the United States House of Representatives and Senate the power to discipline their Members: "Each House may * * * punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." U.S. Const. Art. I, § 5, Cl. 2; see *id.* Cl. 1 (providing that "a smaller Number" than the majority of Members required for a quorum "may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide"). The principal innovation at the

Constitutional Convention was, at James Madison's suggestion, the requirement of a supermajority for expulsion of a Member, because that sanction "was too important to be exercised by a bare majority." 2 *The Records of the Federal Convention of 1787*, at 254 (Max Farrand ed., rev. ed. 1966). Otherwise, the House and the Senate were vested with the traditional power to discipline their respective Members that elected legislative bodies had long enjoyed. Indeed, in its first decade, the Senate expelled William Blount in 1797 for having "concocted a scheme for Indians and frontiersmen to attack Spanish Florida and Louisiana, in order to transfer those territories to Great Britain." Anne M. Butler & Wendy Wolff, *United States Senate Election, Expulsion, and Censure Cases 1793-1990*, at 13 (1995).

The power to discipline members, including by imposing fines and imprisonment, necessarily encompassed the more modest penalty of censure. A censure is "[a]n official reprimand or condemnation; an authoritative expression of disapproval or blame; reproach." *Black's Law Dictionary* 277 (11th ed. 2019); 2 *The Oxford English Dictionary* 1030 (2d ed. 1989) (defining "[t]he usual sense" of censure as including "blaming, finding fault with, or condemning as wrong; expression of disapproval or condemnation"). "Censure, reprimand, or admonition are the traditional ways in which parliamentary bodies have disciplined their members and maintained order and dignity in their proceedings." Jack Maskell, Congressional Research Service, RL 31382, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives* 10 (June 27, 2016). Early colonial legislatures censured their members for various infractions, often as the first step of progressively escalating punishment. See

Clarke 184, 190. Over its history, the House of Representatives has censured 23 Members and reprimanded 11 more, including most recently in July 2020. See Maskell 11, 20-21 (listing instances through 2012); H.R. Res. 1074, 116th Cong. (2020) (agreed to in House) (adopting recommendation to reprimand and impose $50,000 fine on Rep. David Schweikert). The Senate has censured nine Members. See Butler & Wolff xxix; see also *In re Chapman*, 166 U.S. 661, 668 (1897) (describing an instance in which the Senate investigated whether Members should be subject to "censure or expulsion" because they had acted "in a manner calculated to destroy public confidence in the body").

To be sure, a legislative body's power to discipline its members appeared to be an outgrowth of the even older and broader parliamentary power to punish members of the public, which the Constitution does not grant to the Houses of Congress. See Clarke 173 (describing the evolution of punitive measures against members of the House of Commons "until it came to be true that almost any punishment inflicted on outsiders might also be applied to persons within the house itself"); Clarke 185; *Kilbourn* v. *Thompson*, 103 U.S. 168, 188-189 (1881) (rejecting the principle that all powers of the House of Commons necessarily inhere in American legislative bodies). As this Court has observed, "[n]o general power of inflicting punishment by the Congress of the United States is found in [the Constitution]." *Kilbourn*, 103 U.S. at 182. Nevertheless, as discussed above, the power to discipline Members survived in the colonies and was expressly recognized in the federal Constitution and in various state constitutions. Accordingly, even if that power became unrooted from its earliest origins, its vitality remains.

2. Nothing suggests that the ratification of the First Amendment, or its incorporation against the States by the Fourteenth Amendment, was intended to abrogate or abridge the traditional power of elected legislative bodies, including the House and Senate, to discipline their members. Indeed, legislative bodies had frequently exercised that power in response to members' speech. For example, "the House [of Commons] first committed [*i.e.*, arrested and jailed] one of its members in 1548, for the use of language 'disrespectful' to religion and the Protector's Government." Dorian Bowman & Judith Farris Bowman, *Article I, Section 5: Congress' Power to Expel—An Exercise in Self-Restraint*, 29 Syracuse L. Rev. 1071, 1073 n.11 (1978). In 1581, it expelled a member because he had written a book containing defamatory comments about fellow members of Parliament. See *id.* at 1074. Subsequent expulsions were also based on "speeches outside of Parliament" or writings in "pamphlets or books." *Id.* at 1078; see *ibid.* ("[I]t is clear that members were expelled for no more than expressing unpopular opinions, albeit in strong terms.").

Colonial assemblies likewise disciplined members for their speech. See, *e.g.*, Bowman & Bowman 1084 (explaining that "colonial legislatures * * * felt free to expel members who expressed their views both within and without the legislature") (footnotes omitted); *id.* at 1084 n.72 (listing examples of speech outside the legislature); Clarke 197-198 (recounting a New Jersey incident in 1710 in which "two men were put out for answering a question of the council as to why they voted as they did on a certain measure in the house," on the ground that their answering constituted "a breach of privilege").

Of particular relevance for present purposes, the United States House of Representatives and Senate have long disciplined Members for their speech. For example, the Senate censured Timothy Pickering in 1811 for reading aloud a letter "written by French Foreign Minister Talleyrand that President Thomas Jefferson had submitted to the Senate five years earlier." Butler & Wolff 27. Because the letter had never been made public, Pickering "had broken a Senate rule by reading an executive document before the injunction of secrecy had been officially removed." *Ibid.* For the same reason, the Senate censured Benjamin Tappan in 1844 for divulging to the *New York Evening Post* a message from President John Tyler to the Senate "outlin[ing] the terms of an annexation agreement with Texas" that the President had been secretly negotiating. *Id.* at 47.

As for the House of Representatives, its very first censure of a Member, in 1832, was of William Stanbery "for an alleged insult to the Speaker." 2 Asher C. Hinds, *Hinds' Precedents of the House of Representatives* § 1248, at 799 (1907). Stanbery said to the Speaker, Andrew Stevenson, "'I have heard the remark frequently made, that the eyes of the Speaker are too frequently turned from the chair you occupy toward the White House,'" which the censure resolution viewed as "'insinuati[ng]'" the "'indignity'" that the Speaker was "'shaping his course, as this presiding officer of the House, with the view to the obtainment of office from the President.'" *Ibid.* Since that incident, the House has censured Members for "the use of unparliamentary or insulting language" on at least seven more occasions. Maskell 11; see *id.* at 20; see also 2 *Hinds' Precedents* §§ 1244-1259, at 797-812.

In none of the nineteenth-century incidents in the House or Senate does there appear to have been any suggestion that the exercise of disciplinary power impermissibly infringed or chilled that Member's First Amendment right to free speech. And in the modern era, First Amendment concerns have not prevented official expressions of disapproval of a Member's speech. Cf. H.R. Res. No. 744, 111th Cong. (2009) (agreed to in House) (resolution "disapprov[ing] of the behavior" of a congressman who "interrupted" the remarks of the President to a joint session of Congress because it "was a breach of decorum and degraded the proceedings of the joint session, to the discredit of the House").

That longstanding practice strongly supports the conclusion that a House's "punish[ing] its Members for disorderly Behaviour," U.S. Const. Art. I, § 5, Cl. 2, including when that "Behaviour" involves speech, does not constitute "abridging the freedom of speech" within the meaning of the First Amendment. It follows that the punishment, including censure, of a Representative or Senator does not violate the First Amendment. Cf. *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2197 (2020) (observing that early congressional practice "provides contemporaneous and weighty evidence of the Constitution's meaning," in a case involving the President's constitutional removal power) (citation omitted); *Trump* v. *Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (historical practice is "of great weight" in cases involving the separation of powers) (citation omitted); *Town of Greece* v. *Galloway*, 572 U.S. 565, 576-577 (2014) (same, in cases involving the Establishment Clause); *United States* v. *Gaudin*, 515 U.S. 506, 519 (1995) (same, in cases involving the Sixth Amendment right to a jury); *New York Trust Co.* v. *Eisner*, 256 U.S.

345, 349 (1921) (similar, in a case involving federalism and the Direct Tax Clause, because "a page of history is worth a volume of logic").

3. There is no sound basis to draw a different conclusion with respect to state legislatures and local legislative bodies that censure their own members. As noted above, the power of the House and Senate to discipline their members for disorderly behavior, although expressly included in the Constitution, originated in the widespread practice of colonial assemblies, which were the precursors to state legislatures. Indeed, just as the Speech or Debate Clause reflected the traditional "privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings," the constitutional provision granting each House the power to punish its Members for disorderly behavior "was a reflection of political principles already firmly established in the States." *Tenney* v. *Brandhove*, 341 U.S. 367, 372-373 (1951). And nothing in the Constitution, including the Fourteenth Amendment, purports to abrogate or abridge that traditional power in the States. Cf. U.S. Const. Amend. X. Accordingly, just as a House or Senate resolution of censure against a Representative or Senator does not violate the First Amendment, the constitutional free-speech rights of state legislators are not infringed when they are censured by the legislatures of which they are members.

So too with censure resolutions passed by local and municipal elected bodies against their respective members. To continue the analogy to *Tenney*, this Court has made clear that the absolute immunity enjoyed by state legislators for their legislative activities also extends to regional and local legislators. *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391,

404-405 (1979) (regional legislators); *Bogan* v. *Scott-Harris*, 523 U.S. 44, 53-54 (1998) (local legislators). As the Court explained, such immunity enjoyed a "venerable tradition" in the common law, and "the rationales for such immunity" at the federal and state levels "are fully applicable to local legislators." *Bogan*, 523 U.S. at 49. The same is true of the venerable power of a legislative body to discipline its own members, including by expressing official disapproval in the form of a censure. As Justice Story observed, such disciplinary powers over members "are such, as are usually delegated to all legislative bodies in free governments," 2 Joseph Story, *Commentaries on the Constitution of the United States* § 829, at 294 (1833), and even "[t]he humblest assembly of men is understood to possess th[e] power" to "determine the rules of its own proceedings," which "would be nugatory, unless it was coupled with a power to punish for disorderly behaviour, or disobedience to those rules," *id.* § 835, at 298. Story gave as an example a member who is "so lost to all sense of dignity and duty, as to disgrace the house by the grossness of his conduct." *Ibid.* He observed that the Senate had punished conduct that occurred outside the Senate, and the House of Commons understood its disciplinary power as extending "to all cases, where the offense is such, as, in the judgment of the house, unfits him for parliamentary duties." *Id.* § 836, at 300-301. Consistent with those observations, local elected bodies have, like their federal counterparts, long issued censure resolutions that respond to members' speech—including speech that occurs outside the body itself. See Pet. Br. 25-28 (discussing examples); *Zilich* v. *Longo*, 34 F.3d 359, 363 (6th Cir. 1994) ("Legislative bodies may censure, suspend or otherwise discipline a member. They have done

so under English and American law for centuries."), cert. denied, 514 U.S. 1036 (1995).

The court of appeals thus erred in holding that the censure here could violate respondent's constitutional free-speech rights. As a local or regional elected body, the board enjoys the traditional and historical power to discipline its members, including for a member's speech, as explained above. See Tex. Educ. Code Ann. § 51.352(a) (stating that the board "shall exercise the traditional and time-honored role for such boards as their role has evolved in the United States"). While the board lacks the power to remove one of its members, censure is an available disciplinary option. See Pet. App. 4a. It follows that the exercise of the board's power to censure respondent did not infringe respondent's "freedom of speech" within the meaning of the First Amendment.

B. An Elected Body's Censure Resolution Against A Member Is Governmental Speech That Does Not Infringe That Member's Free-Speech Rights

Even setting aside a legislative body's traditional and historic power to punish its members, a censure resolution, standing alone, would not infringe the member's free-speech rights for the additional reason that it would constitute governmental speech. As this Court has made clear, "[a] government entity has the right to 'speak for itself[,]' * * * 'to say what it wishes,' and to select the views that it wants to express," because "'[i]t is the very business of government to favor and disfavor points of view.'" *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467-468 (2009) (citations omitted). Indeed, the availability of governmental speech is critically important, as "it is not easy to imagine how government could function if it lacked this freedom." *Id.* at 468. "To

govern, government has to say something, and a First Amendment heckler's veto of * * * the government's voice in the 'marketplace of ideas' would be out of the question." *Ibid.* (citation omitted).

Examples of governmental speech "exempt from First Amendment scrutiny" under the Free Speech Clause, *Summum*, 555 U.S. at 467 (citation omitted), include the choice of "[p]ermanent monuments displayed on public property," *id.* at 470; the issuance of specialty automobile license plates, *Walker* v. *Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015); and a promotional advertising campaign for beef and beef products in which the government established the message and exercised final approval authority, *Johanns* v. *Livestock Marketing Association*, 544 U.S. 550, 560 (2005).

A censure resolution passed by a majority of an elected body, speaking on behalf of that body, easily qualifies as governmental speech under those precedents. Indeed, such a resolution is *nothing but* speech, issued directly by a governmental body, its content solely determined by that body, expressing formal disapprobation of a member. The censure here illustrates the point: after recounting respondent's various actions and statements, it declares that respondent "has repeatedly acted in a manner not consistent with the best interests of the College or the Board"; that "the Board finds that [respondent's] conduct was not only inappropriate, but reprehensible"; and that "[respondent] is hereby PUBLICLY CENSURED for his conduct." Pet. App. 44a. It is hard to imagine any label more apt for that official censure than "governmental speech." That elected bodies have a long history of expressing their condemnation of members through censure; that such

censures are "'closely identified in the public mind with the [body]'"; and that the body "maintains direct control over the message[] conveyed" in the censure, all underscore that such a censure is governmental speech. *Walker*, 576 U.S. at 212-213 (citation omitted) (emphasizing those three factors as important to identifying governmental speech).

And such governmental counter-speech, even if highly critical of the member being spoken about, does not violate that member's free-speech rights. Cf. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 273 (1964) ("Criticism of [public officials'] conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations."). As the D.C. Circuit has observed, "[w]e know of no case in which the first amendment has been held 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 (Scalia, J.), cert. denied, 478 U.S. 1021 (1986). To the contrary, "the first amendment [does not] consider[] speakers to be so timid, or important ideas to be so fragile, that they are overwhelmed by knowledge of governmental disagreement." *Ibid.*; see Pet. App. 39a-41a (Ho, J., dissenting from denial of rehearing en banc) (similar). For that reason, censure resolutions passed by legislative bodies against their members—including the one at issue here—are "exempt from First Amendment scrutiny" under the Free Speech Clause. *Summum*, 555 U.S. at 467 (citation omitted); cf. *id.* at 468-469 (explaining that "[w]hile government speech is not restricted by the Free Speech Clause," it "must comport with the Establishment Clause").

Moreover, it is particularly important to ensure that elected officials cannot wield the Free Speech Clause to nullify censure resolutions passed by a majority of their colleagues, especially when such resolutions will necessarily speak on topics of public and political interest. As this Court has observed in the context of private speakers, the First Amendment should be read to protect, not undermine, our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 U.S. at 270. Indeed, "the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment." Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 23 (1971); see James Madison, Report on the Virginia Resolutions (1800) (observing that "the right of electing the members of the government[] constitutes more particularly the essence of a free and responsible government," and that "the right of freely examining public characters and measures, and [of] free communication thereon, is the only effectual guardian of every other right"), in *The Virginia Report of 1799-1800, Touching the Alien and Sedition Laws* 227 (J.W. Randolph 1850). The principles that apply to citizen critics of governmental officials do not lose their force when the government itself does the talking. Cf. *Bond* v. *Floyd*, 385 U.S. 116, 136 (1966) ("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.").

C. This Court Need Not Address Circumstances Beyond The Mere Censure Of A Member Of An Elected Body

The resolution of the specific question presented in this case (see Pet. i) is straightforward: whether viewed as an exercise of the longstanding and traditional power of an elected body to discipline its members, or as an example of governmental speech—or both—the censure here did not violate respondent's free-speech rights. It is important to note that this case involves a bare censure imposed by an elected body against one of its members. Different considerations might be relevant in other circumstances involving censure by governmental entities, which could present greater or lesser free-speech concerns. But this case provides no occasion for this Court to address those circumstances.

First, this case does not involve the constitutional implications of any discipline that goes beyond a mere censure or any discipline that is imposed on a nonmember. The court of appeals based its decision solely on the censuring of respondent. See Pet. App. 14a. To be sure, the board's resolution also imposed restrictions on respondent's eligibility for an officer position and for certain travel expenses, as well as his ability to access certain funds. See *id.* at 44a. And unlike a bare censure, those additional disciplinary actions are less readily characterized as governmental *speech*, although they would surely fit within the traditional power of an elected body to discipline its members in ways short of removal. Nevertheless, the district court found that respondent had not shown any retrospective injury resulting from those punitive measures, see *id.* at 27a, and any prospective injury has since been mooted by

respondent's failure to win reelection, see *id.* at 9a. Accordingly, there is no need for this Court to consider the First Amendment implications, if any, of punitive or disciplinary actions beyond a mere censure.

Likewise, this case does not involve the censure of someone other than a member of an elected body, and so presents no opportunity to consider whether any cognizable constitutional claims might exist were an elected body to take punitive actions against a nonmember. Cf. *Kilbourn*, 103 U.S. at 189-190 (distinguishing the express power to punish "members for disorderly behaviour" from the power to punish contempt of Congress by nonmembers in at least some circumstances); *Gravel* v. *United States*, 408 U.S. 606, 641 (1972) (Douglas, J., dissenting) (observing that "Madison at the time of the Whiskey Rebellion spoke in the House against a resolution of censure against the groups stirring up the turmoil against that rebellion" on the ground that "'the censorial power is in the people over the Government, and not in the Government over the people'") (citation omitted). Nor need the Court address the authority of a House of Congress to censure officials in the Executive Branch. Cf. Jane A. Hudiburg & Christopher M. Davis, Congressional Research Service, R45087, *Resolutions to Censure the President: Procedure and History* 5-13 (Feb. 1, 2021) (describing congressional attempts to censure Presidents); Jack Maskell & Richard S. Beth, Congressional Research Service, RL34037, *Congressional Censure and "No Confidence" Votes Regarding Public Officials* 6-7 (June 23, 2016) (describing congressional censures of Executive Branch officials).

Second, this case does not require the Court to address the scope of legislator immunity, including under the Speech or Debate Clause, which is not at issue here.

Cf. *Gravel*, *supra*. The immunity of individual legislators from liability for their legislative activities, like the power of a legislature to discipline its own members, has its roots in parliamentary privilege. See Clarke 61. And one might infer that legislatures have disciplined their members for various infractions in part *because* those members were immune from many external checks. But a legislature may choose to discipline a member even when that member may also face civil or criminal liability for the same actions; the United States, for instance, has long held the view that a disciplinary action by the House against a Member does not preclude a subsequent criminal prosecution of that Member, and vice versa. *Punishment by the House of Representatives No Bar to an Indictment*, 2 Op. Att'y Gen. 655, 655-656 (1834); cf. *United States* v. *Brewster*, 408 U.S. 501, 520 (1972). Consistent with that view, the House has censured Members accused of criminal conduct, and the Senate has considered doing so. See, *e.g.*, 2 *Hinds' Precedents* § 1286, at 852-857 (discussing the 1873 censure of Oakes Ames and James Brooks, who were accused of having engaged in bribery before their elections); Butler & Wolff 309-310 (discussing the 1924 Senate investigation of Burton K. Wheeler, who was under indictment in Montana). Accordingly, the scope of legislator immunity does not control the question presented here.

Third, this case does not involve censures or similar types of discipline imposed by governmental entities on regulated parties or parties who practice before those entities, or on other governmental employees or officials. Cf. 15 U.S.C. 7217(d)(2)-(3) (authorizing the Securities and Exchange Commission to "censure" the Public Company Accounting Oversight Board or

individual members of that Board); 31 C.F.R. 10.50(a) and 10.51(a)(12) (Secretary of the Treasury may censure practitioners before the IRS for disreputable conduct, including "the use of abusive language"); *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 437-438 (2015) (state bar may regulate licensed attorneys running for elected judgeships); *Garcetti* v. *Ceballos*, 547 U.S. 410, 418-419 (2006) (government may regulate its own employees). Like the judiciary's exercise of discipline over lawyers who practice before it, cf. Fed. R. Civ. P. 11(c), those and similar exercises of discipline will often involve less weighty First Amendment concerns and, in any event, are not implicated by this case. Cf. *Garcetti*, 547 U.S. at 418 ("The government as employer indeed has far broader powers than does the government as sovereign.") (brackets and citation omitted).

Because this case does not involve any of those circumstances, this Court need not and should not address them. Instead, it should resolve this case on the straightforward and narrow ground that an elected body's censure of one of its members does not violate that member's free-speech rights—because elected bodies have long held the power to discipline their members, or because a censure of that sort constitutes governmental speech, or both.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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