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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As HCC's opening brief explains, a legislature's power to censure one of its members is both deeply rooted in history and still widely used today, especially at the local level. Such a censure is also core government speech. One member of an elected body cannot properly invoke the Free Speech Clause, which protects his own speech, to silence a critical response from the body as a whole. Both minority and majority legislators are elected by the voters, who are best kept apprised of the views and actions of their representatives by an open cycle of speech and counter-speech. Those voters, not the courts, are the appropriate referees for disputes about who is truly speaking or acting in the public interest.

In response, Wilson attempts to reframe the question presented, focusing on potential non-speech aspects of legislative discipline that are not at issue here. He argues for limitations on legislative discipline that the history and cases he cites do not support. And he suggests a concession by HCC that any disciplinary action that can be labeled "punishment" must violate the First Amendment.

None of this is sufficient to support Wilson's position. Any strong form of Wilson's proposed new prohibition on legislative censures would simply stifle responsive government speech. And any form that left significant room for government counter-speech would either turn on formalistic traps for the unwary (such as labeling a resolution a "statement of position," not a "censure") or entangle courts in intractable disputes. This Court should reject the creation of any such retaliation claim.

ARGUMENT

I. This case involves only censure.

1. Wilson repeatedly refers to the "additional practical penalties" included in the Board's censure resolution, *see, e.g.*, Resp. Br. 31—temporarily making him ineligible for Board officer positions or travel reimbursements and requiring special approval for access to certain community development funds. The arguments of Wilson's amici likewise seem to be directed largely toward the possible adoption of other, more coercive measures in some other case. *See* ACLU Br. 10-16.

As HCC explained at the petition stage, those measures are not at issue here because they formed no part of the basis for the Fifth Circuit's decision. *See* Pet. i, 6 n.6; BIO 22-23; Pet. Reply 6 & n.3. The Fifth Circuit recognized a First Amendment retaliation claim based solely on a censure, and remanded only Wilson's claim for damages for "mental anguish." Pet. App. 1a-2a, 7a-8a, 9a-11a, 14a-18a & n.62. It expressly held that "the additional measures taken against Wilson" did "not violate his First Amendment rights," *id.* 15a n.55, and that his claims for declaratory or injunctive relief had to be dismissed as moot, *id.* 2a, 9a, 18a-19a. *See also id.* 40a n.2 (Ho, J., dissenting from denial of rehearing en banc) (while Wilson complained about other measures, "the panel allowed him to proceed based on words alone").

Wilson's present arguments relying on those measures are thus more than simply additional contentions in support of the judgment below. Accepting them would enlarge Wilson's rights under

the Fifth Circuit's judgment and materially change the nature of future proceedings. If, for example, any injury from those measures were now redressable at all, the remedy would have to be something other than damages for "mental anguish," Pet. App. 18a. Any such outcome would be improper in the absence of a cross-petition. *See, e.g.*, *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013). Moreover, any effort to find some alternative remedy for, say, possible expenses that Wilson never actually incurred would involve nothing but speculation.

Even if the additional measures were before this Court, they would not support a First Amendment retaliation claim. As the Fifth Circuit recognized, Pet. App. 15a n.55, Wilson had no right to be elected to Board office or to spend Board funds without approval, and a temporary restriction on claims for travel expenses (which Wilson never submitted, *see id.* 27a) would not have amounted to an actionable adverse action even in an ordinary government-employee case. None of those measures materially burdened Wilson's right to speak or his ability to represent his constituents. *See id.* (district court opinion). Certainly they could not have chilled the speech of any politician of "ordinary firmness." *See* Petr. Br. 14-16.

2. Wilson also argues that legislative censure was barred here because it is "of a piece" with, or at least "on the same spectrum as," more severe measures such as fines or expulsion, although no such measure was available to the HCC Board. *Compare* Resp. Br. 3, 35-36 *with* Pet. App. 44a (noting that censure was "the highest level of sanction available to the Board under Texas law"). It

is true that other bodies, such as Congress and state legislatures, have the authority to fine or expel their members under some circumstances; and use of that authority in response to a member's speech might raise more difficult questions. But such a situation would also involve different considerations, and the Court need not prejudge the outcome of any future case in order to resolve the one before it now. *See also* U.S. Br. 21-22.

On the one hand, for example, even a fine or expulsion in direct response to speech would find support in the same tradition of legislative disciplinary power that HCC has invoked here. *See* Petr. Br. 18-29. Moreover, judicial review of any such action taken by Congress or a state legislature would be complicated by principles of separation of powers, structural federalism, and sovereign immunity. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 553 (1969) (Douglas, J., concurring) (individual elected to Congress may not be excluded based on factors not enumerated in the Constitution, but expulsion of a sitting member might be unreviewable); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."); *Chase v. Senate of Virginia*, 2021 WL 1936803, at *3 (E.D. Va. May 13, 2021) (First Amendment challenge to speech-based censure barred by sovereign immunity). The complications would multiply if, as seems likely, the measure responded in part to speech but also in part to improper conduct—as was true in this case. *See* Petr. Br. 34 n.33.

On the other hand, a fine or expulsion could not readily be defended as mere government counter-speech. *See* Petr. Br. 30-33. Rather, the practical effect of those measures would be far more like the coercive or regulatory actions normally at issue in retaliation cases. *See id.* at 11-16; *infra* Part III.2. A First Amendment challenge to a fine or expulsion would thus present different questions. But the additional factors that might make such a challenge problematic also distinguish it from the present case. Wilson cannot use the specter of possible fines or expulsions by a different body under different circumstances to support his challenge to the censure at issue here.

3. In a similar vein, Wilson relies heavily on *Bond v. Floyd*, 385 U.S. 116 (1966), which held that the First Amendment prohibited the Georgia legislature from refusing to seat a state representative-elect based on prior public statements that a majority asserted were incompatible with a required loyalty oath. *See, e.g.*, Resp. Br. 12-13, 17, 19. But *Bond* dealt with the complete exclusion of a properly elected representative, based on pre-election speech. That action implicated not only the rights of the speaker but also the franchise of his constituents. Wilson was not excluded, and the censure did not affect his ability to discharge his representative duties.

The power of an elected body to censure or otherwise discipline a sitting member under its own rules or procedures is distinctly different from the question of expulsion—as the Court emphasized just three years after *Bond* in another exclusion case, *Powell v. McCormack*. *See* 385 U.S. at 512 ("exclusion

and expulsion are not fungible proceedings"); *id.* at 506-512 (discussing distinctions); *see also id.* at 553 (Douglas, J., concurring). *Bond* does not stand for the proposition that elected legislators are immune from censure by their peers for their statements or actions while in office.

II. Wilson's historical arguments lack merit.

Wilson acknowledges the long history of legislatures exercising disciplinary power over their members, including through censures. *E.g.*, Resp. Br. 21-26. He offers two arguments for distinguishing that history from the present case, but neither is persuasive.

1. Wilson first contends that legislatures retain their full disciplinary power only for speech within the "legislative sphere"—a concept drawn from cases construing the different issue of legislative immunity and, in particular, the federal Speech and Debate Clause. Resp. Br. 18-19; *see, e.g.*, *Gravel v. United States*, 408 U.S. 606, 616-617 (1972); *Kilbourn v. Thompson*, 103 U.S. 168, 201-202 (1881). To begin with, it is hardly clear how, in the modern era, one would seek to isolate the "legislative sphere" for this purpose. *Cf. Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2045-2046 (2021) (discussing difficulty of framing any general test for "off-campus" speech). But even leaving that aside, Wilson offers neither historical nor logical support for using that speech-and-debate concept to limit legislative disciplinary power.

The Speech and Debate Clause reflects a separation-of-powers tradition of legislative immunity from executive or judicial action based on "any Speech or

Debate in either House." U.S. Const. art. I, § 6, cl. 1. For any such speech, a legislator "shall not be questioned in any other Place." *Id.* In that "unique constitutional context," courts have naturally "recognized the constitutionally significant distinction between lawmakers' speech taking place within the 'legislative sphere' and speech taking place outside of it." Resp. Br. 18. But the traditional power of legislatures to discipline their own members, including for speech, is not simply a "negative pregnant," *id.*, of that immunity from interference by other Branches. The disciplinary power has its own historical roots, embodied at the federal level in its own constitutional provision. *See* Petr. Br. 19-21; U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly behaviour, and, with the Concurrence of two thirds, expel a Member."). There is no logical reason to limit that power, which serves important purposes of legislative self-governance, to responding only to "disorderly behaviour" occurring on the floor. *Cf.* U.S. Const. art I, § 5, cl. 1 (each House may "compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide").

The history of the disciplinary power is certainly related in some respects to the history of legislative immunity. *See, e.g.*, Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 234 (2017). But as HCC has demonstrated, the disciplinary power has never been *limited* to members' speech or conduct within the "legislative sphere"—either as a matter of historical development or in modern practice, especially at the local level. *See* Petr. Br. 18-29. Wilson offers nothing

to refute that demonstration. Indeed, even now he does not argue that elected bodies may not discipline their members for "extra-legislative" speech at all—only that in such cases they are limited by the First Amendment. *See* Resp. Br. 18-19. Yet he does not even attempt to explain why the Framers would have designed a system under which a House of Congress could censure (or, presumably, fine or expel) a member "unconstrained by the Free Speech Clause" for a speech on the floor, *id.* at 18, but not for the same speech given on the Mall, *id.* at 19.

2. Wilson also points to two historical incidents from the Founding era. Resp. Br. 21-26. But neither supports his contention that the Framers "rejected the notion that governmental bodies could adopt [censures] in response to political expression protected by the First Amendment." Resp. Br. 26; *see id.* at 21-26.

a. First, Wilson highlights the case of John Wilkes. Resp. Br. 22-24. But as HCC has explained, that well-known background to the adoption of the Constitution supports HCC's position here. *See* Petr. Br. 20-21. The Framers viewed Parliament's repeated refusal to re-seat Wilkes, despite his constituents' insistence on reelecting him, as an abuse of power. *Id.* But it is at best unclear whether they questioned the propriety of Parliament's having expelled Wilkes in the first place, based on extra-legislative speech that it considered seditious. *Id.* at 21; *see also, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 527-531 (1969) (discussing contemporary reaction to the Wilkes case).

In any event, the Framers did not respond to the Wilkes affair by imposing any substantive restriction on Congress's exercise of the traditional legislative

disciplinary power embodied in Article I, Section 5. *See* Petr. Br. 22. Rather, they included two new safeguards in the Constitution. First, they specified the qualifications for membership in each House of Congress—denying either body a free-ranging right to exclude duly elected representatives on the premise of judging the "Qualifications of its own Members." U.S. Const. art. I, § 5, cl. 1; *see Powell*, 395 U.S. at 532-548. Second, they imposed a new procedural check, requiring a two-thirds majority to expel a member. U.S. Const. art. 1, § 5, cl. 2; *see Powell*, 395 U.S. at 536, 547-548. That was what James Madison urged to address concern that the expulsion power was "too important to be exercised by a bare majority of a quorum," lest "in emergencies [one] faction might be dangerously abused." *Powell*, 395 U.S. at 536 (citation omitted).[1]

It was these two specific provisions that the Framers adopted to address concerns over the Wilkes precedent. Wilson provides no basis for his implicit contention that the general free-speech protection later embodied in the First Amendment imposed an additional limitation on traditional legislative disciplinary powers.

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[1] An earlier version of the discipline provision would have prohibited expulsion "a second Time for the same Offence." 2 Max Farrand, *The Records of the Federal Convention of 1787* 166 (1911). That proposal further confirms both that the provision was responsive to the Wilkes case and that what was deemed especially offensive was the repeated exclusion of Wilkes after his repeated reelection—not the initial expulsion itself. *See Powell*, 395 U.S. at 527-529.

b. Wilson's second historical incident, Congress's debate over censures after the Whiskey Rebellion, does not provide the neat "conclusions" that he needs. Resp. Br. 25; *see id.* at 24-26. Wilson seeks to brush away the distinction between censures of elected officials and censures of private citizens as one "without a difference," *id.* at 25, but he does not explain why that is so. Even if the "character" of a censure does not change from one case to the other, *id.*, the question whether Congress has the power to "target[]" a non-member, *id.*, is surely different from the internal discipline question presented here. Congress may well have the power to censure others, including "insurrectionists." *Id.* at 24. But if it does, the source of that authority is not a legislature's traditional power to discipline its own members.

Moreover, Wilson oversteps in extrapolating from the opposition of Madison and others to the proposed Whiskey Rebellion censure, and Congress's ultimate failure to enact it, a broad lesson that "[t]he Framers" collectively "rejected the notion that governmental bodies could adopt [censures] in response to political expression[.]" Resp. Br. 26. Neither Madison nor Congress as a body ever expressed that extreme position, and the courts never had occasion to consider it. Washington himself proposed the censure, *id.* at 24; the Senate adopted a report praising the President and endorsing his views and actions, 4 Annals of Cong. 794-795 (1794); and the "debates that raged in newspapers at the time," Resp. Br. 25, were just that—debates. Nothing about the incident addresses—let alone resolves—the question here.

III. The permissibility of legislative censure does not turn on Wilson's "punishment" label.

Wilson suggests that HCC agrees with him "that a legislative body may not punish a member for his extra-legislative speech." Resp. Br. 15. From that premise, he argues that HCC cannot prevail without establishing "that the Board's censure of Wilson was not a punishment at all." *Id.* at 1-2. Wilson mistakes HCC's position.

HCC has freely acknowledged that a censure is a form of legislative discipline, and thus in some sense a "punishment." *See, e.g.*, Petr. Br. 12 ("[A] censure is certainly a form of legislative discipline[.]"); Pet. Reply 8 ("No doubt a censure may often be characterized linguistically as a 'punishment[.]'"). But nothing about that label answers the constitutional question in this case. And lest there be any further doubt, HCC agrees with the United States and the amici States that, with respect to censures, "the First Amendment categorically does not limit an elective body's power to formally punish a member for his extra-legislative speech." Resp. Br. 15.

1. Wilson cites a variety of cases for the broad proposition that any "punishment" for speech always violates the First Amendment. Resp. Br. 19-21, 26-30. But he cannot support that claim by taking superficially helpful language out of context.

For example, Wilson suggests that this Court has "repeatedly held that censures are sufficiently injurious in their own right to support a First Amendment violation." Resp. Br. 27. But both cases he cites addressed whether the government had or lacked the power to forbid the use of certain forms of advertising for professional services. *Ibanez v. Fla.*

Dep't of Bus. & Pro. Regul., 512 U.S. 136, 138-139 (1994); *Peel v. Att'y Registration & Disciplinary Comm'n*, 496 U.S. 91, 93-94 (1990) (plurality opinion). Those cases involved a "reprimand" and "censure," respectively, only because those terms were used in the particular professional disciplinary systems that led to decisions directly prohibiting the speech itself. *See Ibanez*, 512 U.S. at 138; *Peel*, 496 U.S. at 97-99. They do not consider, for example, whether a mere expression of disapproval by the plaintiffs' professional colleagues—a "censure" that carried no actual regulatory bite—would have led to the same result.

Wilson similarly takes language in lower-court opinions out of context. For example, he cites *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004), for the proposition that a "censure of a student by a teacher" is a "'form of punishment'" that is "certain to 'have a tremendous chilling effect.'" Resp. Br. 27 (quoting *Holloman*, 370 F.3d at 1268-1269). But while *Holloman* did describe "[v]erbal censure" as "a form of punishment, albeit a mild one," it also relied on other factors—notably, the physical "paddling" of the plaintiff student. 370 F.3d at 1269.

In contrast to Wilson's approach, this Court has been attentive to context in addressing retaliation claims. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), for example, the Court established "general lines" for balancing competing interests in cases involving speech by public employees. *Id.* at 569. In later cases, the Court has refined those lines to address various different situations—employees speaking on matters of private concern, for example, or engaging in speech "pursuant to their official

duties." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *see id.* at 417-420 (describing development of doctrine). "The proper inquiry is a practical one." *Id.* at 424-425 (rejecting reliance on "[f]ormal job descriptions" that "often bear little resemblance" to actual duties).

2. Using that sort of practical analysis, a common thread in successful retaliation cases is that the government has responded to speech by using, or threatening to use, power that is concretely coercive and "regulatory, proscriptive, or compulsory in nature." *Laird v. Tatum*, 408 U.S. 1, 11 (1972); *see* Petr. Br. 11-12.

Thus, criticism from a supervisor might reasonably lead an employee to fear dismissal if he does not curtail the criticized speech. *See Pickering*, 391 U.S. at 574. A reprimand might "reduce an employee's likelihood of receiving future bonuses, raises, and promotions." *Millea v. Metro-North R.R.*, 658 F.3d 154, 165 (2d Cir. 2011). Or a student could reasonably fear that "tremendous discretionary authority" would be exercised in quite tangible ways. *Holloman*, 370 F.3d at 1268-1269. Only in rare cases with extreme facts have some courts concluded that mere speech by a public official can amount to actionable retaliation. *See* Petr. Br. 13-14; *Bloch v. Ribar*, 156 F.3d 673, 678-681 (6th Cir. 1998).

The same logic does not support recognizing a retaliation claim in the legislative discipline context here. There was no "gross disparity in power" between Wilson and his peers. *Holloman*, 370 F.3d at 1269. The Board majority could not create any "tremendous chilling effect on the exercise" of his First Amendment rights. *Id.* The power over Wilson's

future as an elected official rested with voters, not the rest of the Board. Pet. App. 4a. Indeed, on the facts here, a censure was the "highest level of sanction available to the Board under Texas law[.]" Pet. App. 44a. The worst threat the Board could level at Wilson was that it might censure him again.

These differences between the present context and others in which government authority may be wielded supply "logical limit[s]" to any holding in the present case. *See* Resp. Br. 40. An elected body's right to censure one of its members rests both on the long tradition of legislative disciplinary power and on the nature of the censure as government speech of a unique sort. Petr. Br. 18-29, 30-33. Change either the specific disciplinary context or the particular nature of the government action and the rest of the analysis could also change. *See also supra* Part I.2 (discussing possible cases involving other disciplinary measures); *cf., e.g.*, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2044-2045 (2021) (special standards for government regulation of speech in public schools, such as ability to address disruptive speech); *Garcetti*, 547 U.S. at 425-426 (similar for speech of government employees); *Elrod v. Burns*, 427 U.S. 347, 367-368 (1976) (plurality opinion) (First Amendment protections against patronage dismissal do not extend to "policymaking positions").

However those different questions might be resolved in future cases, the Court need not address them here. Refusing to recognize a new retaliation cause of action for legislative censures does not preclude courts from allowing suits in other circumstances where they may be appropriate. And nothing in HCC's position requires holding that, beyond the

specific circumstances here, legislatures or other government speakers necessarily have free rein to "censure" employees, students, journalists, or anyone else.

3. Ultimately, Wilson exalts form over substance. *E.g.*, Resp. Br. 37-38. He concedes that an elected body "absolutely may" speak critically of a member, even in an enacted resolution. Resp. Br. 16-17. It may declare a member's speech to be "indecorous," "regrettable," "disparag[ing]," "inappropriate," "reprehensible," and "[not] the position of the institution"—wrong in "substance" and improper in "method[] of expression." Resp. Br. 13, 37-38, 41. Yet everything changes, Wilson maintains, if the body "invoke[s] its separate disciplinary power," phrases its criticism in terms of a violation of institutional rules, and "command[s]" a member to "cease and desist"—whether or not it would have the authority to do anything else to back up that "command." *Id.* at 36-37. Above all, the body must not label its resolution of condemnation as a "censure." *See id.* at 21.

Application of the First Amendment cannot turn on that kind of analysis. Wilson suggests that labels like "censure" or "punishment" and what bylaw provision a body cites as authority for its action would provide a bright line for parties and courts. *See* Resp. Br. 2, 13, 38. But if the line were formal enough to be bright, it would accomplish very little—perhaps protecting plaintiffs like Wilson from the incremental "mental anguish" they would otherwise suffer from being "censured" rather than merely having their speech declared "reprehensible," *id.* at 13, 38, or told off under one section of the bylaws rather than another, *id.* at 2. Even then the rule would not be

costless; on the other side of the ledger it would incrementally chill the speech of elected majorities, especially at the local level—and create a trap for unwary or inadequately advised local boards, who could easily find themselves on the losing side of fee-shifting lawsuits based on nothing more than inattentive drafting.

IV. Allowing retaliation claims like Wilson's would entangle courts while undermining First Amendment values.

HCC began its opening brief by recounting the history of speech and conduct on Wilson's part that led his colleagues to censure him for "demonstrat[ing] a lack of respect for the Board's collective decision-making process" and "repeatedly act[ing] 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." Petr. Br. 5 (quoting Pet. App. 42a, 44a); *see id.* at 2-5. Wilson begins his response with a counter-statement of his own efforts to "oppose[] what he saw as unwise, unethical, and often corrupt conduct by the Board." Resp. Br. 6; *see id.* at 1, 3-7. The overarching point in this case is this: Spirited disputes of this sort among local (or other) politicians are best refereed by voters, not the courts.

The Court should thus refrain from "judicializing legislative disputes" or constitutionalizing "the hurly-burly political world of a legislative body." Pet. App. 36a-37a (Jones, J., dissenting from denial of rehearing en banc). That approach is consistent not only with history but also with robust contemporary practice, especially at the local level. *See* Petr. Br. 18-29, 33-38.

Wilson resists HCC's showing on this point by arguing that some of HCC's examples of legislative censures would survive his proposed new cause of action, based on his theory of plenary disciplinary power in the "legislative sphere." Resp. Br. 44. As HCC has explained, however, that theory has no legal grounding. *See supra* Part II.1. He also points out that suits have been filed challenging some censures, and that some bodies have chosen to adopt rules prohibiting censures based on speech. Resp. Br. 44; *see also id.* at 30, 1a-2a. But no such suit succeeded before the decision below in this case, *see* Pet. 10-17; and elected bodies are of course free to restrain themselves in ways not mandated by the First Amendment. Wilson's arguments therefore do nothing to undermine HCC's reliance on widespread local practice.

Wilson also does not elaborate on what it would look like for courts to start refereeing disputes among local (or other) legislators. His new cause of action would entangle federal and state courts in a whole new category of First Amendment retaliation cases, involving intractable questions such as whether a censure addressed "speech" or "conduct" and whether its phrasing or other circumstances were sufficient to chill the speech of an elected politician of "ordinary firmness." *See, e.g.*, Petr. Br. 14-18, 34 n.33; *see also* Pet. App. 31a (Jones, J., dissenting from denial of rehearing en banc) (panel decision "invites federal courts to adjudicate 'free speech' claims for which there are no manageable legal standards"). Allowing litigation of that sort would "mandat[e] judicial oversight of communications between and among" elected legislators and "demand permanent judicial intervention in the conduct of governmental operations,"

especially at the local level, "to a degree inconsistent with sound principles of federalism and the separation of powers." *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

Wilson's new action would also invite squabbling legislators to seek the appearance of a judicial imprimatur. Consider two censures HCC has highlighted from Minnesota and Wisconsin, responding to comments on either side of face mask disputes. Pet. 20-21. A censured legislator prevailing in either case would surely hail it as a victory not only for free speech, but for one position or the other on mask mandates. The same dynamic would apply to many disputes.

For all these potential costs, Wilson never convincingly explains what there is to gain from allowing First Amendment suits from legislators in his position. Although he asserts that a ruling for HCC—preserving the law just as it has been up to now—"would be extraordinarily damaging to the open exchange of ideas and the First Amendment's concern for a well-informed electorate," Resp. Br. 41, he provides nothing to back up that claim. Certainly Wilson himself made clear, in response to a previous resolution, that a mere "reprimand [was] never going to stop [him]." *See* Petr. Br. 2-3.

On the contrary, as HCC has explained in detail, the risks to "the open exchange of ideas" and "a well-informed electorate" flow from Wilson's position, not HCC's. *See* Petr. Br. 28-38. Thus, for example, under Wilson's rule, an individual legislator would be fully protected in speaking out on issues of local policy or practice. *See, e.g.*, Resp. Br. 6-7. But the body he criticized would be severely constrained in its ability

to respond through a traditional form of core government speech—upholding its own rules and norms, calling out speech or behavior by one of its members that the majority deems unacceptable, and informing the very electorate for whom Wilson professes concern. Petr. Br. 31-33.

In particular, as HCC has catalogued, local legislative bodies have censured members for a wide range of racist or otherwise offensive comments. *See* Petr. Br. 25-28. Examples include statements opposing Jewish candidates, Petr. Br. 25 & n.16; alleging that school administrators were hired "only because they had Spanish surnames," *id.* at 26 & n.18; suggesting that women should not have positions of authority because they are "too emotional and petty," *id.* at 26 & n.19; and calling colleagues "dangerous authoritarians who got bought out by the police union," *id.* at 35 n.34. When such statements are made by a member of an elected body, the body itself must be able to respond, formally and forcefully. Petr. Br. 31-32. Denying it the ability to do so through a traditional censure resolution would only turn the First Amendment into "a weapon to stifle fully protected government speech at the hands of a fully protected speaker." Pet. App. 37a (Jones, J.). The Court should reject Wilson's invitation to take that step.

CONCLUSION

The judgment of the court of appeals should be reversed.

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