No. 20-____

IN THE

Supreme Court of the United States

HOUSTON COMMUNITY COLLEGE SYSTEM,

Petitioner,

v.

DAVID BUREN WILSON,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

RELATED PROCEEDINGS

Wilson v. Hous. Cmty. Coll. Sys., 2019 WL 1317797 (S.D. Tex. Mar. 22, 2019)

Wilson v. Hous. Cmty. Coll. Sys., 955 F.3d 490 (5th Cir. 2020)

Wilson v. Hous. Cmty. Coll. Sys., 966 F.3d 341 (5th Cir. 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Houston Community College System respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-19a) is published at 955 F.3d 490. The order denying rehearing en banc, with its dissenting opinions (Pet. App. 29a-41a), is published at 966 F.3d 341. The district court's memorandum opinion and order (Pet. App. 20a-28a) is unpublished but available at 2019 WL 1317797.

JURISDICTION

The court of appeals entered its judgment on April 7, 2020. Pet. App. 1a. The court denied a timely petition for rehearing en banc on July 15, 2020. *Id.* at 29a. On March 19, 2020, this Court entered a standing order, the effect of which extends the time within which to file a petition for a writ of certiorari in this case to December 14, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech."

STATEMENT OF THE CASE

Elected bodies at all levels of American government have long had the power to "censure"—that is, to express official disapproval toward—their own members. The Houston Community College System Board of Trustees is one of those bodies. Following an increasingly chaotic series of events sparked by trustee David Wilson, the Board voted to censure him. The Fifth Circuit, breaking from five federal courts of appeals and one state court of last resort, held the First Amendment prohibits an elected body from censuring a member when the censure responds to the member's speech. This Court should resolve whether the First Amendment's Free Speech Clause limits a local government's censure power.

A. Historical background

From early modern times, elected bodies have set standards for their own members' speech and conduct and have responded to violations of those standards. Resolutions of censure emerged in the seventeenth century as the mechanism for expressing disapproval. *Whitener v. McWatters*, 112 F.3d 740, 743 (4th Cir. 1997) (noting that Parliament "could censure [members]"). Then, as now, censure is "[a]n official reprimand or condemnation" expressing a deliberative body's sense that one of its members has engaged in wrongdoing. *Censure*, *Black's Law Dictionary* (11th ed. 2019).

Throughout American history, elected bodies at all levels of government have exercised the authority to censure their own members. Joseph Story explained that even "[t]he humblest assembly of men" possesses the power to determine rules for its members, and that such power "would be nugatory, unless it was coupled

with a power" to address, among other things, "disobedience to those rules." 2 *Commentaries on the Constitution of the United States* § 835 (1833).

Today, censure remains a common tool for addressing disobedience by a member of a governing body. *Robert's Rules of Order*, the most widely used manual of parliamentary procedure in the United States, explicitly authorizes the practice. Henry M. Robert, *Robert's Rules of Order: Newly Revised* § 10, at 120 (Sarah Corbin Robert et al. eds., 10th ed. 2000). Congress and state legislatures have repeatedly censured their members.[1] And in a typical month, local bodies issue dozens of censures. See *infra* at 20.

In certain circumstances, a censure resolution may include additional consequences beyond the statement of condemnation. But the defining feature of a censure resolution is its official expression of disapproval. And this case concerns only that expression. Pet. App. 14a.

B. Factual background

1. Petitioner Houston Community College System (HCC) is a public institution that serves students in the Houston area. Pet. App. 2a. It is governed by a Board of nine elected trustees who are responsible for providing policy direction that, among other things,

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[1] For cases involving Senators, see U.S. Senate, *Powers & Procedures: Censure*, https://perma.cc/RXS5-WF69. For cases involving Representatives, see Jack Maskell, Cong. Rsch. Serv., RL31382, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives* 20 (2016). For cases involving state legislators, see Nat'l Conf. of State Legislatures, *General Legislative Process: Censure, Expulsion, and Other Disciplinary Actions* 6-3 (1996), https://perma.cc/ADK7-CF9T.

enhances the public standing of HCC. *Id.*; *see* Tex. Educ. Code Ann. § 51.352.

After a controversial campaign, respondent David Wilson was elected to HCC's Board in 2013. Wilson's tenure was marked by immediate and constant turmoil. In a span of three years, he filed multiple lawsuits against HCC, helped others to file additional lawsuits, was accused of leaking confidential information, publicly denigrated HCC's antidiscrimination policy, and sparked media attention for a laundry list of other controversies.[2]

Individual board members repeatedly expressed concern that Wilson was creating discord detrimental to the community college system. Nevertheless, he persisted. And he proclaimed that a "reprimand is never going to stop me."[3]

2. Events came to a head in 2017. Against Wilson's opposition, the Board voted to fund an overseas HCC campus. Pet. App. 3a. In response, Wilson orchestrated a wave of negative robocalls to other members' constituents. *Id.* 42a. Shortly thereafter, Wilson also hired private investigators to probe the

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[2] Wilson's activities prompted one local newspaper to provide a compendium of "Dave Wilson Controversies." https://perma.cc/98UZ-G234. For additional news coverage, see, e.g., Brittany Britto, *Controversial HCC Board Member Resigns, Announces New Candidacy*, Hous. Chron. (Aug. 27, 2019), https://perma.cc/47TV-T3ZS; Alyssa Foley, *Trustee Called Out for Anti-LGBT Rant, Again*, The Egalitarian (Mar. 11, 2017), https://perma.cc/M2BM-8KGN; Benjamin Wermund, *HCC Trustees Plan to Censure Dave Wilson*, Hous. Chron. (June 14, 2016), https://perma.cc/BQ98-GQ2F.

[3] Samantha Ketterer, *HCC Board of Trustees Approve Public Reprimand of Member*, Hous. Chron. (June 16, 2016), https://perma.cc/A8U7-C3TU.

college and a fellow trustee (to find out where she lived), and filed yet another lawsuit against HCC—his fourth in four years—because a fellow trustee voted via videoconference.[4] By that point, Wilson's four lawsuits had cost HCC almost $300,000 in legal fees.[5]

What's more, Wilson's actions posed a direct threat to HCC's accreditation. Pointing to a news article about Wilson's antics, HCC's accrediting agency sent a letter expressing its concern that HCC 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." *See* Pet. App. 44a (describing the letter); Southern Association of Colleges and Schools Commission on Colleges, *Resource Manual for the Principles of Accreditation* 3, 20 (3d ed. 2018), https://perma.cc/D2GR-S9KR (setting out the Core Requirement). The letter demanded "evidence establishing that Mr. Wilson's actions were not indicative of a failure to comply with" that requirement. Pet. App. 44a. If HCC were in violation, it could face sanctions up to loss of its accreditation. *Principles*, *supra*, at 178.

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[4] For the private investigators and two of Wilson's lawsuits, see Pet. App. 3a. For the other two lawsuits, see Britto, *supra* note 2 (discussing Wilson's lawsuit over an HCC campus in Katy), and Benjamin Wermund, *Trustee Says HCC Land Deal Broke Law, Calls for Chancellor's Resignation*, Hous. Chron. (Aug. 20, 2015, 10:54 AM), https://perma.cc/KZ4C-EKZ3 (discussing Wilson's filing of a criminal complaint against HCC).

[5] *See* Ketterer, *supra* note 3 ($273,000 in fees for defending against Wilson's lawsuits prior to June 2016); Pet. App. 43a (roughly $26,000 in fees for defending against his third and fourth lawsuits).

Concerned about its accreditation, and having concluded that Wilson's "lack of respect for the Board's collective decision-making process" undermined "the best interests of the College [and] the Board," the Board publicly censured Wilson. Pet. App. 42a, 44a. Under the circumstances, the censure was the most appropriate option the Board could take under Texas law for repudiating Wilson's activities. *See id.* 44a.[6]

C. Proceedings below

1. Wilson responded to the censure by adding new claims to an already pending state-court lawsuit against HCC and the other trustees. *See* Pet. App. 4a. Invoking 42 U.S.C. § 1983, he alleged that the censure violated his rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Id.* Wilson sought compensatory damages of $10,000 for mental anguish, punitive damages of $10,000, and attorney's fees. *Id.*

HCC and the trustees removed the case to federal court. Pet. App. 4a. After Wilson's motion to remand was denied, he dropped the claims against the individual trustees. *Id.* 5a.

The district court granted HCC's motion to dismiss. It based its ruling on the Tenth Circuit's decision in *Phelan v. Laramie County Community College Board of Trustees*, 235 F.3d 1243 (10th Cir.

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[6] In addition to the core condemnation that the censure resolution conveyed, the Board also imposed a few additional conditions involving matters like eligibility for Board officer positions. Pet. App. 4a n.7. But those other matters are not at issue here: the Fifth Circuit based its holding exclusively on the "reprimand" conveyed by the Board's condemnation, *id.* 14a, dismissing in a footnote the other conditions as irrelevant, *id.* 15a n.55.

2000). That decision held that an elected community college board's censure of one of its own members did not violate the First Amendment because censure is simply a "statement" of the board's disapproval. *Id.* at 1248; *see* Pet. App. 27a.[7]

Applying *Phelan*'s reasoning, the district court found that HCC's censure of Wilson similarly did "not cause an actual injury to his right to free speech." Pet. App. 27a. Wilson was "not prevented from performing his official duties," nor did the censure "prohibit him from speaking publicly." *Id.* To the contrary, Wilson remained free to "attend[] board meetings and express[] his concerns regarding decisions made by the board." *Id.*

2. On appeal, a panel of the Fifth Circuit reversed the district court's decision and reinstated Wilson's damages claim.[8] The panel held that "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983." Pet. App. 14a. The panel believed that the district court had "improperly

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[7] Although *Phelan* had determined that the claim at issue there should be dismissed under Rule 12(b)(6) for failure to state a claim, the district court here dismissed the complaint under Rule 12(b)(1) for lack of standing. Pet. App. 5a. In a case like this, the analysis of the merits and standing "quickly become[] blended" because the reason the complaint fails to state a claim is that the plaintiff has suffered no injury to a legally protected interest. 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.4 (3d ed. 2020). This "blend[ing]" commonly occurs in the First Amendment context. *Id.* at n.10, n.13.

[8] By this time, Wilson's claims for declaratory and injunctive relief had become moot because he was no longer a trustee. Pet. App. 2a.

endorsed the Tenth Circuit's decision in *Phelan*." *Id.* 10a. Instead, the panel relied on Fifth Circuit precedent holding that judges whose protected speech triggered censure by the Texas Commission on Judicial Conduct—an independent state agency responsible for overseeing and punishing judicial misconduct—could raise First Amendment retaliation claims. *See id.* 11a-13a. Because Wilson had been censured for speech that would generally be protected by the First Amendment, the court held that Wilson had stated a claim under Section 1983. *Id.* 9a-10a, 18a.

3. The Fifth Circuit denied HCC's petition for rehearing en banc by an eight-to-eight vote. Pet. App. 30a.

Chief Judge Owen and Judges Elrod and Higginson voted to rehear the case but did not elaborate their reasoning. Judge Jones filed a dissent joined by Judges Willett, Ho, Duncan, and Oldham. She charged that "the panel's holding is out of step with four sister circuits, all of them in agreement that a legislature's public censure of one of its members, when unaccompanied by other personal penalties, is not actionable under the First Amendment." Pet. App. 32a & n.3 (citing *Werkheiser v. Pocono Twp.*, 780 F.3d 172 (3d Cir. 2015); *Blair v. Bethel Sch. Dist.*, 608 F.3d 540 (9th Cir. 2010); *Phelan v. Laramie County Community Coll. Bd. of Trustees*, 235 F.3d 1243 (10th Cir. 2000); and *Zilich v. Longo*, 34 F.3d 359 (6th Cir. 1994)).

In addition, Judge Jones warned that the panel's decision "threatens to destabilize legislative debate" and "invites federal courts to adjudicate 'free speech' claims for which there are no manageable legal standards." Pet. App. 31a. And in her view, the panel had erred by not distinguishing between legislative

censures, which take place "in the hurly-burly political world of a legislative body," and cases involving "judicial discipline." *Id.* 35a-36a.

Judge Ho filed a separate dissent. In addition to reiterating the primary dissent's concern about the panel's departure from other circuits, he maintained that the First Amendment "guarantees freedom *of* speech, not freedom *from* speech," and "secures the right to criticize, not the right *not* to be criticized." Pet. App. 40a. "Tough scrutiny" of our elected officials "is not a bug, but a defining feature of our constitutional structure." *Id.* 39a. And Judge Ho endorsed then-Judge Scalia's declaration that in "no case" had the First Amendment ever "been held to be implicated by governmental action consisting of no more than governmental criticism of the speech's content." *Id.* 41a (quoting *Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986)).

REASONS FOR GRANTING THE WRIT

Censure is an essential, time-honored tool for self-governance by elected bodies. In rendering this tool unavailable when a censure responds to a member's speech, the Fifth Circuit's decision sharply conflicts with the rule adopted by three federal courts of appeals and one state court of last resort. And it is irreconcilable with an even more government-protective rule in two other circuits. This conflict generates deep uncertainty about the continued availability of this frequently used tool. The Court should use this case to resolve the uncertainty.

What's more, the Fifth Circuit's rule disregards three separate lines of this Court's precedent. It fails to apply the presumption of constitutionality accorded to longstanding historical practice; it wrongly bars a

quintessential form of government speech; and it implausibly holds that elected officials suffer a constitutional injury when they are criticized for their performance in office. The Fifth Circuit's rule threatens to impede local democracy and embroil federal courts in issues best left to the political arena.

I. The Fifth Circuit's decision squarely conflicts with decisions from other federal courts of appeals and a state court of last resort.

Both the panel (Pet. App. 10a) and the dissenters from the denial of en banc review (*id.* 32a-33a) recognized that allowing Wilson's First Amendment claim to proceed was inconsistent with the Tenth Circuit's decision in *Phelan v. Laramie County Community College Board of Trustees*, 235 F.3d 1243 (10th Cir. 2000), *cert. denied*, 532 U.S. 1020 (2001). But this is only the beginning of the conflict. The Fifth Circuit's decision also squarely conflicts with decisions of the Fourth Circuit, Sixth Circuit, and Vermont Supreme Court. Moreover, it is irreconcilable with the even more government-protective rule adopted by the Third and Ninth Circuits.

1. The Fourth, Sixth, and Tenth Circuits and the Vermont Supreme Court have all held that the First Amendment does not restrict an elected body's authority to express its view of a member's speech by issuing a censure resolution.

Fourth Circuit. The Fourth Circuit has offered the most comprehensive discussion of this rule. In *Whitener v. McWatters*, 112 F.3d 740 (4th Cir. 1997), an elected county board of supervisors censured a member for using "abusive language" toward other members of the board in private conversations. *Id.* at 741. The Fourth Circuit held that the board's decision

did not violate the First Amendment. *Id.* at 745.

Citing the historical roots of censure in Parliament, colonial assemblies, the Articles of Confederation, and the Constitution, the court explained that censure is among the "primary power[s] by which legislative bodies preserve their 'institutional integrity.'" *McWatters*, 112 F.3d at 744 (quoting *Powell v. McCormack*, 395 U.S. 486, 548 (1969)). Because citizens cannot sue legislators for legislative acts, "bodies are left to police their own members," and it is "well-established" that this includes "disciplin[ing] members for speech." *Id.* at 744. Censure exists to "protect the public reputation of legislative bodies," to make "orderly operation possible," and to enable bodies to respond to members' speech that "threaten[s] the deliberative process." *Id.* at 745.

In light of censure's history and importance, the court concluded that the Board's censure of Whitener was not only constitutional, but represented a core legislative act. *McWatters*, 112 F.3d at 744-45. As an elected official, Whitener could not claim protection from the mere expression of the "legislative body's judgment." *Id.* at 744.[9]

In reaching this conclusion, the Fourth Circuit expressly aligned itself with the Sixth Circuit's decision in *Zilich v. Longo*, 34 F.3d 359 (6th Cir. 1994),

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[9] The panel's First Amendment analysis and holding were necessary to the court's conclusion that the suit against the individual members should be dismissed on grounds of legislative immunity. *See McWatters*, 112 F.3d at 741, 744 ("Because we hold that a legislative body's discipline of one of its members is a core legislative act, we affirm" the district court's conclusion that "the Board members enjoyed absolute legislative immunity.").

cert. denied, 514 U.S. 1036 (1995). *See McWatters*, 112 F.3d at 745.

Sixth Circuit. In *Zilich*, the Sixth Circuit held that the First Amendment did not restrict a city council's ability to express its views through a censure resolution responding to a member's speech. 34 F.3d at 364. A city council member criticized the city's mayor and law department, and the city council responded by passing a resolution expressing its "disapproval and outrage." *Id.* at 361, 364. The council member sued, alleging the censure violated his First Amendment rights.

The Sixth Circuit recognized that elected bodies "frequently" adopt resolutions "condemning" their members. *Zilich*, 34 F.3d at 363. Likening censure to legislators "vot[ing] every day for or against the position of another legislator because of what other members say on or off the floor," the court explained that censures are "simply the expression of political opinion." *Id.* at 363-64. It followed that the First Amendment protects *both* "Zilich's right to oppose the mayor" and the council's "right to oppose Zilich." *Id.* at 363. The First Amendment is "not an instrument designed to outlaw" political opinion expressed through "legislative resolutions," especially, where, as here, the censure is merely "hortatory." *Id.* at 363-64.

Tenth Circuit. Expressly endorsing *Zilich*, the Tenth Circuit also held that an elected body's censure of one of its members does not give rise to an actionable First Amendment claim. *Phelan*, 235 F.3d at 1247. There, a community college board voted to censure a fellow trustee who, in opposition to a proposed tax measure, ran a newspaper advertisement that was "potentially detrimental" to the college. *Id.* at 1245-46.

The court began its analysis with the well-established proposition that the government "may interject its own voice into public discourse." *Phelan*, 235 F.3d at 1247. The government can speak so long as its speech does not "punish, or threaten to punish" private speech. *Id.*

Applying these principles, the court concluded that the censure imposed on Phelan was "not a penalty," but "simply" the Board's "statement" expressing its disapproval of her speech. *Phelan*, 235 F.3d at 1248. The censure in no way "restrict[ed Phelan's] opportunities to speak." *Id.* Rather, she "remained free to express her views publicly and to criticize the ethics policy and the Board's censure." *Id.* Accordingly, the court held that the censure did not abridge Phelan's First Amendment rights.

Vermont Supreme Court. The Vermont Supreme Court has also held, in a case involving both due process and First Amendment claims, that an elected official cannot bring a Section 1983 suit in response to being censured. *LaFlamme v. Essex Junction Sch. Dist.*, 170 Vt. 475, 476 (2000). Given the nature of the plaintiff's claims, the court concluded that he could demonstrate a Fourteenth Amendment-protected liberty interest only if he showed "a deprivation of a First Amendment right." *Id.* at 482. LaFlamme could not. Censure alone did not interfere with his ability to speak, as determined at trial, and the court saw no other First Amendment interest at issue. *Id.*

In none of these jurisdictions could Wilson have successfully maintained a First Amendment-based challenge to HCC's censure resolution.

2. The Third and Ninth Circuit have relied on *Zilich* and *Phelan* to adopt an even more government-

protective rule: They have held that the First Amendment permits elected bodies to express their disapproval through actions far more tangible than censure.

Third Circuit. In *Werkheiser v. Pocono Township Board of Supervisors*, 704 Fed. Appx. 156 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 1001 (2018), an elected board responded to a member's comments about township hiring and compensation practices by declining to reappoint him as the township's roadmaster. *Id.* at 157-58. Citing *Zilich*, the Third Circuit held that the board's decision did not give rise to a First Amendment claim. *Id.*[10]

The court began by declaring that the First Amendment does not "guard against every form of political backlash" that arises out of "hardball politics." *Werkheiser*, 704 Fed. Appx. at 158 (quoting *Werkheiser v. Pocono Township*, 780 F.3d 172, 181 (3d Cir.), *cert. denied*, 577 U.S. 956 (2015)). As such, an elected body can respond to its members' speech without fear of a First Amendment claim, so long as the body's response does not "imped[e]" an elected official's "ability to carry out his basic duties." *Id.* Because the decision not to reappoint Werkheiser did not in any way interfere with his "duties as an elected Supervisor," he had no actionable First Amendment claim. *Id.* at 159-60 (citing *Werkheiser*, 780 F.3d at 183). Earlier this year, the Third Circuit relied on

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[10] Earlier in the case, the Third Circuit held that the individual commissioners were entitled to qualified immunity because no law clearly established that an act like the Board's "violates the First Amendment if it is taken in retaliation for speech made in [plaintiff's] capacity as an elected official." *Werkheiser v. Pocono Township*, 780 F.3d 172, 181 (3d Cir. 2015).

Werkheiser to hold that a censure resolution prompted in part by a board member's sexist comments did not give rise to a First Amendment claim. *See Curley v. Monmouth Cty. Bd. of Chosen Freeholders*, 816 Fed. Appx. 670, 675 (3d Cir. 2020) (terming *Werkheiser* "our relevant precedent").

Ninth Circuit. Similarly, in *Blair v. Bethel School District*, 608 F.3d 540 (9th Cir. 2010), the Ninth Circuit held that a school board member who was removed from an appointed position for his public criticism of the school's superintendent had no First Amendment claim. *Id.* at 542.

Explicitly noting its "agree[ment] with the analysis of the Sixth Circuit in *Zilich* and the Tenth Circuit in *Phelan*," the Ninth Circuit found that Blair's removal was, "for First Amendment purposes, analogous" to the censures in those two cases. *Blair*, 608 F.3d at 546. Like the censures, Blair's removal did not violate the First Amendment because he still "retained the full range of rights and prerogatives that came with having been publicly elected." *Id.* at 544. Moreover, presaging Judge Ho's dissent in this case, the Ninth Circuit explained that both the censures and the removal occurred in the "political arena," *id.* at 543, where "[d]isagreement is endemic," *id.* at 546, and that "more is fair in electoral politics than in other contexts," *id.* at 544.

In the "political arena," *Blair*, 608 F.3d at 543, the Ninth Circuit held that the First Amendment protected *both* free speech interests implicated—the member's "right to criticize" and the body's "corresponding right" to respond, *id.* at 545-46. The First Amendment does not provide a right of action for "casualties of the regular functioning of the political process." *Id.* at 545.

3. By contrast, the Fifth Circuit held in this case that, standing alone, "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983." Pet. App. 14a. Both the panel and the judges who dissented from the denial of rehearing en banc agree that this holding differs from the holdings of other circuits that have addressed the question. *See* Pet. App. 10a (the district court "improperly endorsed the Tenth Circuit's decision in *Phelan*"); Pet. App. 32a ("the panel's holding is out of step with four sister circuits").

The panel's cursory discussion of *Zilich* and *Blair* does nothing to dispel the circuit conflict. The Fifth Circuit thought *Zilich* was "inapposite" here because the action in *Zilich* "did not concern a censure, but [rather] a city council resolution." Pet. App. 16a. This is a distinction without a difference. The resolution at issue here was entitled a "Resolution of Censure." Pet. App. 42a. The resolution in *Zilich* was entitled "A Resolution expressing the disapproval and outrage of the Council." 34 F.3d at 361 n.2. The two are materially identical: after all, "censure" is defined as an "authoritative expression of disapproval." *Censure*, *Black's Law Dictionary* (11th ed. 2019).

As for *Blair*, the panel thought it was "inapposite" because the Fifth Circuit, like the Ninth, does not permit First Amendment-based challenges to removals from appointed board positions. Pet. App. 16a. But the Ninth Circuit declared that Blair's removal was, "for First Amendment purposes, analogous to the condemning resolution in *Zilich* and the censure in *Phelan*." 608 F.3d at 546. In a clash over whether censure—the act at issue in this case—can give rise to a First Amendment claim, it's clear on

which side the Ninth Circuit stands: That court expressly "agree[d] with the analysis" of the Sixth and Tenth Circuits. *Id.*

4. This conflict will not resolve itself. The Fifth Circuit clearly rejected the reasoning of other circuits that have considered the question presented.

At the same time, the courts of appeals that apply the opposite rule and reasoning have done so for years, if not decades, and there is no reason to believe they will revisit the question either. To the contrary, courts within those circuits regularly adhere to that rule. *See Curley*, 816 Fed. Appx. at 675 (applying *Werkheiser*); *Aquilina v. Wrigglesworth*, 298 F. Supp. 3d 1110, 1116 (W.D. Mich.), *aff'd*, 759 Fed. Appx. 340 (6th Cir. 2018) (applying *Zilich*); *Glass v. Forster*, 2020 WL 3077868, at *5 (D. Or. June 10, 2020) (applying *Blair*); *Aris v. Ward*, 2020 WL 3498751, at *4 (D.N.M. June 29, 2020) (applying *Phelan*). Only this Court's intervention can resolve the question presented by this petition.

II. This case is an excellent vehicle for resolving the split.

1. Whether the First Amendment prohibits an elected body from censuring one of its members in response to his speech was fully briefed and decided at every stage of the proceedings. *See* Pet. App. 1a-2a (court of appeals); *id.* 20a, 26a-27a (district court). And because the case comes before this Court on a motion to dismiss, *id.* 5a-6a, it presents the legal issue cleanly, without confounding factual disputes.

Moreover, this case is an ideal vehicle because petitioner is HCC itself, rather than individual trustees in their personal capacities. *See* Pet. App. 5a. As a municipal body, HCC cannot raise a qualified immunity defense. *See Owen v. City of Independence*,

445 U.S. 622, 638 (1980). Nor does the case present questions of legislative immunity. *Cf. Bogan v. Scott-Harris*, 523 U.S. 44, 53-54 (1998) (extending that doctrine to individual *members* of local legislative bodies). Therefore, there is no risk that the Court will find itself resolving the case without reaching the question presented.

2. The question presented is outcome determinative of this case. The Fifth Circuit panel reversed the district court's dismissal of the complaint solely on the grounds that "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983." Pet. App. 14a. Had this case arisen in the Third, Fourth, Sixth, Ninth, or Tenth Circuits, or in Vermont, the dismissal of Wilson's claim would have been affirmed.

III. The question presented is important to local governments across the country.

1. Thousands of elected governmental bodies across the nation need to know what constitutional constraints govern their use of the censure power.

There are more than 3,000 counties in the United States, each of them with some form of elected government. Below that, there are tens of thousands of cities, school boards, junior college districts, and the like.

Texas, where this case arose, illustrates the point. Within the state, there are thousands of political subdivisions. Each of these entities has an elected board. *See, e.g.*, Tex. Educ. Code Ann. § 11.054(a) (West 2019) (school districts); Tex. Water Code Ann. §§ 58.071-.072 (West 2019) (irrigation districts); Tex.

Loc. Gov't Code Ann. §§ 326.041, .043(b) (West 2019) (library districts).

What's more, government bodies across the nation have bylaws that authorize censure. Often, as with HCC, *see* Hous. Cmty. Coll., *Board of Trustees Bylaws* 15 (amended 2020), https://perma.cc/J5RD-GH2T, the bylaws expressly provide for the censure power as an option for addressing violations of the body's standard of conduct. *See, e.g.*, DeSoto, Tex., Ordinance No. 1946-13, § 1.1410 (2013), https://perma.cc/2M3W-WFFB; Chi., Ill., *Rules of Order and Procedure of the City Council, City of Chicago for Years 2019-2023*, https://perma.cc/DT9S-BZZB. In other cases, the bylaws simply adopt *Robert's Rules of Order*, which itself authorizes censure. *See, e.g.*, Newport Beach, Cal., *Procedural Rules for the Conduct of City Council Meetings* (2013), https://perma.cc/R72G-3772; Acton-Boxborough Regional School District, Mass., *School Committee Guidebook* (2019), https://perma.cc/JW8Z-VSCP.

2. Censure is not only on the books; it is frequently used. For example, in one recent month (August 2020) alone, local elected bodies issued more than twenty censures.[11]

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[11] This number comes from a search on the NewsBank database of local newspapers for the terms "voted to censure," "censure," "censured," and "censuring." The date range was restricted to the month of August 2020. If anything, this figure underreports the number of censures since not every censure is necessarily reported in a local newspaper. And this figure does not account for de facto censures, like the resolution in *Zilich*, that "express[] the disapproval" of the governing body without using the word "censure." *Zilich v. Longo*, 34 F.3d 359, 361 n.2 (6th Cir. 1994).

To be sure, not every reported censure responded to protected expression. But many did. For example, fifteen of the twenty-three August 2020 censures involved arguably expressive conduct.

More generally, the range of speech that triggers censure is quite broad. Consider a few recent examples.

- The school board in Lake Mills, Wisconsin censured one of its members for her Facebook posts. Sarah Weihert, *Davies Censured for Social Media Comments*, HNG News (July 27, 2020), https://perma.cc/2CWN-YGHU. In one post, the member accused a local citizen of being "racist." Sarah Weihert, *Community Members Call for Resignation*, HNG News (July 14, 2020), https://perma.cc/S49W-YEBX.
- The city council of River Falls, Wisconsin censured a city councilman for comments he made urging face mask compliance. This included an email to constituents where he demanded they stop being "rancid tub[s] of ignorant contagion and start acting like you care about the life and health of others." Michael Brun, *River Falls City Council Censures Member for 'Derogatory and Unprofessional' Comments in Face Mask Debates*, RiverTowns (Aug. 11, 2020), https://perma.cc/HV5V-FY5Z.
- Less than one week later, a city council in neighboring Minnesota censured one of its members for suggesting that a mask mandate could lead to "yellow star badges marking COVID-positive people." Jenny Berg, *St. Cloud City Council Censures Brandmire for*

'Yellow Star' Remark in Mask Debate, St. Cloud Times (Aug. 17, 2020), https://perma.cc/FTS7-H3XH.

If the Fifth Circuit's decision is correct, each of these governing bodies faces potential First Amendment liability.

3. The Fifth Circuit's unprecedented recognition of a federal cause of action when an elected body censures a member for his speech is likely to increase both the frequency and the cost of litigation.

To begin, the Fifth Circuit's decision provides renegade officials with appellate support for the proposition that the First Amendment restricts elected bodies' censure authority. The quantity of litigation in any jurisdiction where the answer to the question presented is uncertain may increase as plaintiffs invoke the Fifth Circuit's decision here.

And the costs of that litigation are asymmetric because Section 1983 lawsuits can be brought pro se by loose-cannon elected officials. So, while bringing these lawsuits may be a relatively low-cost endeavor for the plaintiff, defending against the lawsuits is costly for the elected body, which must either employ or hire counsel to represent it. Thus, the increase in risk of litigation may chill government bodies from issuing censures in the first place.

4. The question presented is especially important because of its interaction with the requirements of federal law and, for the hundreds of junior college districts like HCC, accrediting bodies.

It is an unfortunate reality that some members of local elected boards make statements denigrating members of the public because of race, sex, or religion. *See, e.g.*, Deana Carpenter, *Peters Township School*

Board Censures Member After Racist Facebook Post, Pittsburgh Post-Gazette (May 20, 2019), https://perma.cc/ASH5-SV2S (school board member posted a link to an article entitled "10 Things That Would Instantly Happen If All Negroes Left America"); Caitlin Taylor, *Bedford School Board Censures Bruning*, The Monroe News (June 23, 2020), https://perma.cc/X6B2-DGCC (school board member made social media posts "with memes mocking African Americans, immigrants, women and other groups").

Censure provides an elected body with a well-understood tool for repudiating those remarks, thereby helping to dispel any claim that the government tolerates 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. If an elected body risks a Section 1983 suit by condemning such statements, then those bodies must figure out some other way to show that they are not deliberately indifferent.

And as this case shows, certain kinds of board member dissidence can create a risk that an institution will lose its accreditation. *See supra* at 5. Here too, institutions need to know whether responding to that risk by passing a resolution of censure will plunge them into Section 1983 liability.

In short, the Fifth Circuit's rule forces elected government bodies onto a "high tightrope without a net." *United Steelworkers v. Weber*, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring) (citation omitted). On one side lies Section 1983 litigation by board members. On the other side lies litigation by employees, students, or members of the public the body serves, or a loss of accreditation. Local entities need to know where they stand.

IV. The Fifth Circuit's decision is wrong.

In the Fifth Circuit, "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983." Pet. App. 14a. That holding is triply wrong: It invents, against centuries of history, a constraint on the longstanding practice of censure. It enables individual plaintiffs—for the first time in our Nation's history—to suppress a form of government speech rooted deeply in the common law, employed routinely at the time of the Founders, and practiced at all levels of American government ever since. And it embraces a theory of constitutional "injury" rejected by this Court for more than a century.

A. The Fifth Circuit's rule is contrary to centuries of practice.

The practice of censure in response to a legislator's speech has been exercised at all levels of American democracy for over 200 years. It is implausible that censure has been unconstitutional all this time, waiting only for a three-judge panel of the Fifth Circuit to discover the infirmity in 2020.

1. This Court has repeatedly granted "great weight in a proper interpretation of constitutional provisions" to "[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)). Indeed, this Court has recognized that "traditional ways of conducting government" can themselves "give meaning to the Constitution." *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (internal quotation marks and citation omitted).

The presumption of constitutionality is particularly strong where the procedure in question

has been "practi[c]ed for two hundred years by common consent." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). *Cf. NLRB v. Noel Canning*, 573 U.S. 513, 526 (2014) ("hesitat[ing] to upset" a government practice that has been in place "more than 200 years"). And the presumption is at its apex where the procedure at issue has been "[t]he unbroken practice for two centuries in the National Congress" and for "more than a century" in the states. *Marsh v. Chambers*, 463 U.S. 783, 795 (1983).

2. That presumption applies here. Censure is both a longstanding practice and a traditional way of conducting government. The practice of censure has been fixed in English and American government since before the Founding. *See, e.g.*, 2 *Journal of the House of Lords, 1578-1614*, at 327-28 (1830), https://perma.cc/6CT4-FFMH (describing a 1604 motion to censure a member of the House of Lords for his "very offensive Speech"). And it has been deployed by legislative bodies at all levels of American government throughout our history, including (as here) in response to speech by an individual member deemed objectionable by the body as a whole.

Perhaps the most famous American example involves the Senate's 1954 censure of Senator Joseph McCarthy for comments on "a nationwide television and radio show" and "stat[ements] to the public press" that "tended to bring the Senate into dishonor and disrepute" and "to impair its dignity." S. Res. 301, 83d Cong. (1954). And Senate practice on the subject long predated the Red Scare; the Senate first censured one of its own members as early as 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, meanwhile, has

censured its members for, among other things, "insulting [the] Speaker of the House" (1832), referring to a piece of legislation as a "monstrosity" (1868), and using "unparliamentary language" (1921). U.S. House of Representatives, *List of Individuals Expelled, Censured, or Reprimanded in the U.S. House of Representatives*, https://perma.cc/3J7Y-L9KE.

3. Speech-related censure resolutions have long been issued not only at the highest levels of the federal government, but in tens of thousands of de Tocqueville's "local assemblies of citizens." 1 Alexis de Tocqueville, *Democracy in America* 73 (Henry Reeve trans., 1835). In 1904, for instance, the Chicago City Council censured Alderman Hubert Butler for comments "attacking the integrity and reputation of [his] colleagues." *Butler v. Harrison*, 124 Ill. App. 367, 370 (Ill. App. Ct. 1906). Alderman Butler's resulting lawsuit met its demise in the state courts of Illinois. If Mr. Butler "feels aggrieved," the court there remarked, "his constituency is the only superior tribunal to which he can appeal," for "[i]t certainly cannot be seriously insisted, although it is suggested by counsel, that the courts should interfere in this case." *Id.* at 371.

In that respect, not much has changed since 1904. Every two days on average, a local government somewhere in the country censures one of its elected members for his or her speech. *See supra* at 21. In other words, the practice of censure is "not merely old; it is continuing," representing the current practice of local governments nationwide, as well as "a substantial number of the States" and "the Federal Government." *Burnham v. Superior Ct.*, 495 U.S. 604, 615 (1990) (Scalia, J.) (plurality opinion). *See supra* at 21-22 (discussing its contemporary frequency at the

local level). What *has* changed, with the Fifth Circuit's decision here, is the willingness of appellate courts to allow censure-related lawsuits to proceed. The Fifth Circuit's rule contravenes "a consistent and almost universal tradition that has long rejected" the rule, and which "continues explicitly to reject it today." *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997).

B. Censures involve core government speech not subject to challenge under the Free Speech Clause.

The Fifth Circuit's holding—that government bodies may not criticize their members' speech via a censure resolution—also ignores this Court's consistent admonition that the government is entitled to express its own opinion on public questions. "[C]ensure resolutions" are a form of government "counterspeech." Helen Norton, *The Government's Speech and the Constitution* 226 (2019). And the "Free Speech Clause" simply "does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009).[12]

1. A local government body "has the right to 'speak for itself'" and "'is entitled to say what it wishes.'" *Summum*, 555 U.S. at 467 (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000), and *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)). Indeed, "[i]t is the very business of government to favor and disfavor points of view." *Summum*, 555 U.S. at 468 (citation

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[12] "This does not mean," of course, "that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause," *Summum*, 555 U.S. at 468, and the Equal Protection Clause, *see id.* at 482 (Stevens, J., concurring). This case implicates neither clause.

omitted). Simply put, "when the government speaks," as it routinely does via censure resolutions, "it is entitled to promote a program, to espouse a policy, or to take a position." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015).

The Court has repeatedly explained that this protection of government speech is fundamental to our system of representative government. After all, "'it is not easy to imagine how government could function if it lacked the freedom' to select the messages it wishes to convey." *Walker*, 576 U.S. at 208 (quoting *Summum*, 555 U.S. at 468) (internal punctuation omitted).

2. Government speech in the traditional form of a censure performs yet another valuable function: it provides the public with an additional, and distinctive, perspective in the marketplace of ideas. *See Meese v. Keene*, 481 U.S. 465, 481-82 (1987).

That perspective is all the more valuable where, as here, it concerns a question on which public deliberation is particularly essential and on which the elected body may have information otherwise unavailable to the public: the conduct of an elected official and his ability (or lack of ability) to work cooperatively on a multimember body. This Court has emphasized that "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995). Those informed choices depend upon public access to "the widest possible understanding of the quality of government service rendered by all elective or appointed public officials"—an understanding that stretches to *all* officials, "from the least to the most important." *N.Y. Times Co. v.*

Sullivan, 376 U.S. 254, 304 n.5 (1964) (Goldberg, J., concurring in judgment) (quoting *Barr v. Matteo*, 360 U.S. 564, 577 (1959) (Black, J., concurring)). But the Fifth Circuit's rule undermines that goal, actively *punishing* elected bodies for providing the public with a valuable perspective about their elected officials' performance in office.

3. The Fifth Circuit ignored another, equally strange implication of its decision: the perverse interaction between its rule and the principles of legislative immunity. The panel recognized that the individual members of a governing body are "entitled to assert legislative immunity" if they are sued for voting to censure another member. Pet. App. 16a. But how can criticism by elected officials be absolutely protected if issued by individual members in their official capacity but constitutionally forbidden if issued by the collective body? By the Fifth Circuit's logic, if Members A-Y of a government body each stand up *seriatim* and read aloud an identical text criticizing Member Z, Z has no case. But if her colleagues read the text aloud in chorus, Z can bring a constitutional suit for mental anguish.

That result cannot be correct. While First Amendment law draws many distinctions, the line between solos and choruses is not among them.

C. An elected body's censure of one of its members inflicts no injury cognizable under the Free Speech Clause.

The problems with the Fifth Circuit's holding run deeper still. Standing alone, a government's expression of its opinion on an issue of public concern inflicts no constitutional injury. That principle is all the stronger when it comes to expressions of

disapproval directed at public officials. And that is precisely what censure involves: "an expression of opinion" by a government body regarding a member's speech or conduct. Laurence Tribe & Joshua Matz, *To End a Presidency* 85 (2018).

1. The government's expression of an opinion, even a critical one, inflicts no constitutional injury. The Court laid down that rule at least a century ago: "[T]he opinions and advice, even of those in authority, are not a law or regulation such as comes within the scope of the several provisions of the Federal Constitution designed to secure the rights of citizens as against action by the States." *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571, 575 (1919).

The Court has repeatedly affirmed that basic principle in the First Amendment context, explaining that the government's mere expression of an opinion inflicts no injury to free speech rights. On the contrary, only uses of government power that are "regulatory, proscriptive, or compulsory in nature" and which generate "specific present objective harm or a threat of specific future harm" cause constitutional injury under the Free Speech Clause. *Laird v. Tatum*, 408 U.S. 1, 11, 14 (1972).[13]

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[13] This Court's opinion in *Paul v. Davis*, 424 U.S. 693 (1976), held that even an *untrue* governmental accusation of misconduct does not deprive an individual of a constitutionally protected interest. *See id.* at 695-96, 698-99. If falsely accusing a private citizen of being a shoplifter cannot support a Section 1983 claim, then accurately accusing a public official of "lack of respect" for fellow board members and board rules, Pet. App. 43a, cannot do so either.

In short, the First Amendment bars the government from *suppressing* a viewpoint, not from *expressing* one.

2. The Fifth Circuit's theory of constitutional injury fares even worse when applied to elected officials like Wilson. HCC is unaware of a single case where this Court has held that intra-legislative criticism of an elected official, via a censure resolution or otherwise, violates the First Amendment. Indeed for 150 years the Court has said just the opposite: For elected officials, criticism from political opponents is simply part of the job.

This Court observed as early as 1845 that "when any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office." *White v. Nicholls*, 44 U.S. 266, 290 (1845) (quoting *Commonwealth v. Clap*, 4 Mass. 163, 169 (1808)).

Recognizing that political reality, the common law acknowledged that "criticism may reasonably be applied to a public man in a public capacity which might not be applied to a private individual." *McKee v. Cosby*, 139 S. Ct. 675, 679 (2019) (Thomas, J., concurring in the denial of certiorari) (quoting Thomas Starkie, *Starkie on Slander and Libel* *242 (Horace Wood ed., 4th ed. 1877)). The law thus granted citizens a privilege to comment on the "'public conduct of a public man,' which was a 'matter of public interest' that could 'be discussed with the fullest freedom' and 'made the subject of hostile criticism.'" *Id.*

The Court carried that principle forward into its modern First Amendment jurisprudence, explaining

that elected local government officials are among the public servants who must be treated by the courts as "men of fortitude, able to thrive in a hardy climate." *N.Y. Times v. Sullivan*, 376 U.S. at 273 (citation omitted).

In short, injury to an official's reputation—let alone hurt feelings (the injury Wilson alleged here, Pet. App. 18a)—"is not enough to defeat constitutional interests in furthering 'uninhibited, robust' debate on public issues." *Phelan v. Laramie County Community Coll. Bd. of Trustees*, 235 F.3d 1243, 1248 (10th Cir. 2000) (quoting *Sullivan*, 376 U.S. at 270).

That principle has full application here. Because "American politics is not for the thin-skinned, even, or perhaps especially, at the local level," a "local school board's admonishment of a member is not likely to be the stuff of constitutional violation." *Manley v. Law*, 889 F.3d 885, 889-90 (7th Cir. 2018). For elected officials, criticism—including from one's fellow officials—simply comes with the job. As Judge Ho recognized here, "[t]hose who seek office should not just expect criticism, but embrace it." Pet. App. 39a.

D. Permitting censured officials to sue the body on which they sit undermines local democracy and chills speech.

The consequences of the Fifth Circuit's error are profound: Permitting suits like Wilson's to proceed will tax the federal courts, impede local democracy, and undermine First Amendment values.

First, the Fifth Circuit's rule "judicializ[es]" political debate, Pet. App. 37a, transferring local democracy from the town square to the federal courthouse. That transfer puts federal courts in the position of refereeing wars of words between elected

officials. As Judge Jones recognized, that task "invites federal courts to adjudicate 'free speech' claims for which there are no manageable legal standards." *Id.* 31a. By injecting the federal courts into "legislative disputes" involving political speech alone, *id.* 37a, the Fifth Circuit plays Pandora, opening a box it offers no instructions for closing.

Second, the Fifth Circuit's rule deprives local bodies of an important governance tool. Local boards and commissions often have limited power to respond to rogue members. For example, HCC lacked the power to expel Wilson. Pet. App. 4a. *But cf.* U.S. Const. art. I, § 5, cl. 2 (giving Congress that power with respect to its members). In many cases, a resolution of censure may be the most powerful tool available to condemn speech or conduct that undercuts a board's ability to carry out its responsibilities. *See, e.g.*, Pet. App. 44a (explaining that censure is the maximum sanction available to the Board under Texas law). If the First Amendment is construed to strip local governments of their power to censure in response to speech, it will become increasingly challenging for those governments to operate effectively, to preserve public confidence, to avoid tolerating a hostile environment, and—in the case of local college and university systems—to maintain their accreditation. *See supra* at 23-24.

Finally, the Fifth Circuit's rule comes at a cost to speech itself. Wary of triggering Section 1983 litigation should they issue criticism that a court could construe as sufficiently similar to a "censure," local government bodies will think twice before criticizing a member—generating precisely the sort of "chilling effect" the First Amendment is designed to combat. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 872 (1997). If

the words of a censure resolution alone can expose a local government to damages under Section 1983, other forms of local government speech may well do the same. A letter of concern signed by the members of a city council, but not formally titled a "censure," could conceivably qualify. So too could a jointly signed op-ed in the local newspaper. The edges of the Fifth Circuit's rule are far from clear, only further chilling speech itself.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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