No. 20-804

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

REPLY BRIEF FOR PETITIONER

Jeffrey L. Fisher
Edward C. DuMont
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Richard Alan Morris
Counsel of Record
Jonathan G. Brush
ROGERS, MORRIS &
GROVER L.L.P.
5718 Westheimer Road
Suite 1200
Houston, TX 77057
(713) 960-6019
rmorris@rmgllp.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF FOR PETITIONER

Respondent all but concedes a conflict between the decision below and the Tenth Circuit, and his attempts to distinguish other cases are unpersuasive. The vehicle issues he posits are, to use his metaphor, not bugs but features. And he nowhere contests the petition's showing that the question presented is of great legal and practical importance. On the contrary, he agrees the case involves "bedrock principles" and "essential First Amendment protections," BIO 15.

Perhaps for these reasons, respondent devotes much of his opposition brief to crafting a new merits argument. Under his revised theory, the First Amendment bars censures only for speech "outside the legislative process." BIO 1. But respondent's current rethinking of the issues does not alter the much broader rule actually adopted by the decision below, which is now the law of the Fifth Circuit, and it provides no reason for this Court to deny review. Whatever the final answer on the merits, thousands of local government bodies across the country need to know whether a majority of their elected members may or may not censure a fellow member for disruptive activity involving public speech. *See* Pet. 18-22. The lower courts are in conflict over that important question, and this Court should address it.

1. Respondent argues briefly (BIO 18-21) that the conflict described in the petition is "overstated," *id.* 18-19, and even more briefly that this case would be a poor vehicle for review, *id.* 22. Neither argument is persuasive.

a. Respondent all but concedes the conflict between the decision below and *Phelan v. Laramie County Community College Board of Trustees*, 235

F.3d 1243 (10th Cir. 2000), *cert. denied*, 532 U.S. 1020 (2001). *See* BIO 19. That is not surprising. The court below expressly rejected *Phelan*, Pet. App. 10a—just as respondent asked it to do, *see* Resp. C.A. Br. 29-30 (arguing that *Phelan* was wrongly decided and "contradicts" Fifth Circuit precedent). And the dissent from denial of en banc review agrees that the panel's decision "exacerbates a circuit split," *id.* 31a; *see also id.* 33a-34a; Pet. 10, 12-13.

Respondent now attempts to distinguish *Phelan* on its facts, but the effort fails. He notes that the censure in this case was accompanied by some restrictions on, for example, his eligibility to serve as a Board officer for a year, which he characterizes as "penalties" that interfered with his ability to perform his official duties. BIO 19 (citation omitted); *see* Pet. App. 4a n.7. But as he ultimately acknowledges, in deciding this case the Fifth Circuit expressly rejected any reliance on those aspects of the Board's action. *Id.* 15a-16a n.55; *see* Pet. 6 n.6. Indeed, it agreed with HCC that the "additional measures taken against" respondent "d[id] *not* violate his First Amendment rights." Pet. App. 15a n.55 (emphasis added). Instead, the court framed the case as on all fours with *Phelan*, *id.* 10a; rejected the Tenth Circuit's analysis as inconsistent with Fifth Circuit precedent, *id.* 10a-14a; and held that the formal "reprimand" imposed on respondent when the Board "publicly censured" him established, without more, "an actionable First Amendment claim," *id.* 14a-15a. The sole claim the court remanded for trial was respondent's assertion that he is entitled to compensatory damages because "a public censure has caused him mental anguish," *id.* 8a; *see id.* 7a-8a, 17a-18a. The reasoning and result

below in this case thus conflict squarely with the reasoning and result in *Phelan*.

There is no basis for respondent's speculation that the Tenth Circuit might change its mind about *Phelan* if it considered this Court's decision in *Bond v. Floyd*, 385 U.S. 116 (1966), or Fifth Circuit cases that distinguish formal reprimands from "mere criticisms, accusations, and investigations." BIO 19 (quoting *Colson v. Grohman*, 174 F.3d 498, 512 n.7 (5th Cir. 1999)). *Bond* is not an obscure precedent, and the Tenth Circuit surely did not overlook it.[1] Rather, there was no reason for *Phelan* to discuss *Bond* because *Bond* considered a legislature's power to *refuse to seat* a representative elected by the people. Exclusion is the ultimate interference with an elected official's ability to carry out his or her official duties, and a body's power to exclude is an entirely different question from its power to express official disapproval by censuring a sitting member. *Cf. Powell v. McCormack*, 395 U.S. 486, 506-512, 548 (1969); *Whitener v. McWatters*, 112 F.3d 740, 744-745 (4th Cir. 1997). As the *Phelan* court explained, "the Board's censure [was] clearly not a penalty that infringe[d] Ms. Phelan's free speech rights" because it "did not prevent her from performing her official duties or restrict her opportunities to speak." 235 F.3d at 1248. And nothing about that analysis changed simply because the majority of Board members in *Phelan* chose to "voice their opinion," *id.*, through a "formal" censure, *cf.* Pet. App. 12a-13a.

---

[1] Indeed, *Phelan* relied prominently on *Zilich v. Longo*, 34 F.3d 359 (6th Cir. 1994), which in turn cites and quotes *Bond*, *id.* at 363.

b. Respondent likewise fails to distinguish other conflicting cases. He tries, for example, to dismiss the Sixth Circuit's decision in *Zilich v. Longo*, 34 F.3d 359 (6th Cir. 1994), as not even "implicat[ing] the question framed by the petition" because "[t]he censure in that case was not for protected speech." BIO 20.[2] But the very first sentence in *Zilich* explains that the case involved "a city council resolution denouncing [the] plaintiff, a former city council member, allegedly in retaliation for his political opposition to the mayor." 34 F.3d at 360; *see also, e.g.*, *id.* at 363 (Zilich claimed resolution was passed "in retaliation for his expressions of hostility toward the mayor and his criticisms of the mayor's conduct"). A court that did "not believe *any* constitutional violation ha[d] occurred" in *Zilich*, *id.* at 364, would have reached that same conclusion in this case.

Respondent's argument that *Zilich* did not involve any "punishment or penalty," BIO 20 (citation omitted), also fails. As discussed above, the Fifth Circuit in this case sustained a First Amendment claim based solely on a public censure, nothing more. *See supra* at 2; Pet. App. 14a-15a & n.55. If anything, the allegedly retaliatory measure in *Zilich*—which directed the city attorney to seek to enforce a demand that Zilich return all compensation he had received for two years of council service, *see* 34 F.3d at 361 & n.2—was far less "hortatory" (*id.* at 364) than the censure here.

---

[2] As that phrasing indicates, even respondent does not defend the Fifth Circuit's assertion that *Zilich* "did not concern a censure," Pet. App. 16a.

Respondent argues that the Fourth Circuit's decision in *Whitener v. McWatters* involved a censure for "obstructive . . . conduct, not protected political speech," and that the "outcome turned" on the legislative immunity of individual defendants. BIO 20. As the petition explains, however, *Whitener*'s First Amendment analysis was necessary to its immunity holding, Pet. 11 n.9; and what the court analyzed was Whitener's claim "that the Loudoun County Board of Supervisors retaliated against him for his speech," 112 F.3d at 745. True, the speech in question was "abusive," *id.* at 744, and Whitener was "disciplined for his lack of decorum," *id.* at 745. But a combination of "unpopular opinion," *id.* at 742, "uncivil behavior," *id.* at 745, and intemperate speech, whether or not "during an official meeting," *id.*, is typical of censure cases. Indeed, the same terms could be used to describe the present case. *See, e.g.*, Pet. 4-5 (describing factual background). The Fourth Circuit recognized that deliberative bodies must have the right to discipline members in such circumstances, because "personal invective or other offensive remarks" can "unleash personal hostility and frustrate deliberative consideration." 112 F.3d at 745 (citation omitted). That reasoning applies with full force here.

As to other cases cited in the petition (at 13-15), respondent suggests factual distinctions. BIO 20-21. He does not contest, however, that other courts have consistently ruled against members of local elected bodies who have sought to raise First Amendment retaliation claims. And those cases, like this one, have involved censures or other actions that might be characterized at worst as "play[ing] political hardball in response to [a member's] advocacy," or perhaps more often as simply "the ordinary functioning of the

democratic process." *See Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 544 (9th Cir. 2010). Meanwhile, the Fifth Circuit has persisted in its position that "a reprimand against an elected official for speech addressing a matter of public concern," Pet. App. 14a, without more, establishes "an actionable First Amendment claim," *id.*; *see* Pet. App. 30a (denying en banc review). Those sharply contrasting approaches reflect an entrenched and acknowledged conflict that only this Court can resolve. *See* Pet. 16-17.

c. Significantly, respondent nowhere contests the fundamental practical importance of the question presented to thousands of elected governmental bodies across the country. *See* Pet. 18-22. He suggests that this case would not be a good vehicle for its resolution, BIO 22, but his points in that regard are not well taken. That the case was dismissed on the pleadings appropriately presents the legal question in its cleanest form. Pet. 17. Indeed, for purposes of protecting both elected bodies and the courts from meritless but burdensome litigation, it is important that cases like this one *not* require any "fact intensive inquiry," BIO 22 (citation omitted), including extensive discovery or trial. Moreover, as respondent ultimately acknowledges, the decision below recognizes a First Amendment claim based solely on the imposition of a public censure, without regard to any collateral measures. *Id.*; Pet. 18; Pet. App. 14a-15a & n.55.[3] This case is thus an excellent vehicle for consideration of the issue.

---

[3] In any event, there is no ambiguity in the record with respect to the Board's actions. *See* Pet. App. 4a n.7; *id.* 15a n.55; *id.* 42a-45a (reprinting entire resolution).

d. Ultimately, respondent falls back on observing that the Court previously denied review in some of the conflicting cases cited in the petition. BIO 11 & n.4, 19. Of course, his suggestion that the cases are "similar" for this purpose, *id.* 11, is in some tension with his attempts to minimize the conflict. More importantly, however, the presentation of the issue is quite different now. In prior cases, lower courts had properly *rejected* First Amendment claims against local elected bodies or officials based on allegedly retaliatory censures, and there was no clear division of authority on the issue. The Fifth Circuit's decision in this case squarely *recognizes* such a claim, and in the process crystallizes a conflict over the constitutionality of censures based in part on a member's speech. The petition clearly demonstrates that conflict, which the decision and other opinions below acknowledge; and the brief in opposition makes clear that the issue is fairly joined on the merits. Review is therefore warranted in this case.

2. Respondent devotes much of his brief in opposition to contesting HCC's position on the merits. BIO 1-3, 13-18. That choice only underscores the significance of the issues.[4]

Respondent begins by asserting that, "[o]f course," a legislative censure "is an 'adverse action' within the

---

[4] Respondent observes that HCC "barely defends" the district court's dismissal of his complaint for lack of standing. BIO 12. As the petition explains, however, in this case the lack of a cognizable claim and the corresponding lack of any legal injury are two sides of the same coin. Pet. 7 n.7. For present purposes, the only important point is that there is no jurisdictional issue that could interfere with this Court's ability to reach and resolve the question presented.

meaning of the First Amendment retaliation doctrine." BIO 13. No doubt a censure may often be characterized linguistically as a "punishment" or "shaming penalty," *id.*, in the sense of being an official expression of disapproval. But whether or how the sort of censure at issue here, imposed in part in response to a member's speech, may violate the First Amendment is the very question in this case. For that legal purpose, as the petition explains, a censure of a member is not the sort of coercive governmental action that can cause cognizable First Amendment harm. Pet. 28-31; *see also, e.g.*, *Phelan*, 235 F.3d at 1248; *Zilich*, 34 F.3d at 363-364 (critical resolutions "do not control the conduct of citizens or create public rights and duties like regular laws"); Pet. App. 32a-35a (Jones, J., dissenting from denial of rehearing en banc).

Indeed, with respect to some broad swath of speech or conduct "within the 'legislative sphere,'" respondent now seems to concede that the power to censure "is virtually without limit." BIO 1; *see id.* 17-18. Moreover, he agrees that a legislature may censure a member for "non-expressive conduct" (and for the narrow categories of unprotected speech, such as actionable slander or "true threats"), even "*outside* the legislative process." *Id.* 1, 18. He asserts that these various boundaries are "settled," *id.* 18, and intimates that they are clear and workable for the purpose of guiding local elected bodies. And of course his premise is that he was impermissibly censured for "outside" speech and "[]expressive" conduct, *id.* 1.

This interesting new proposal for an over-arching legal framework on the merits has little to do with the Fifth Circuit's actual analysis or resolution of this case. *Cf., e.g.*, Pet. App. 16a (rejecting HCC's argument

that it had a right to censure as part of its "internal governance as a legislative body"); *id.* 14a (holding broadly that "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983"). Certainly, the decision below says nothing that would limit potential First Amendment liability in the ways respondent now suggests. Thus, whatever the merits of respondent's new submission, it only underscores the need for review by this Court.[5]

Respondent further argues that this Court's decision in *Bond v. Floyd* "resolves this case." BIO 14. As noted above, however, *Bond* addressed whether the Georgia legislature could refuse to seat a newly-elected representative. *See supra* at 3. Whether a body may exclude an elected member from sitting at all is quite a different question from what latitude it has to use a censure to express official disapproval of a sitting member's disruptive or objectionable speech. *Id.*

Respondent criticizes HCC's contention that an elected body's censure of a member is a form of government speech. BIO 15-17. Again, however, he begins his critique with an incantation of the term "punishment," *id.* 16, which in this context merely

---

[5] Even if respondent's proposed distinction between legislative and other activity were the law of the Fifth Circuit (which it is not), it would not reconcile this case with the law in other circuits. *Phelan* upheld a censure passed in response to "an advertisement in the local newspaper encouraging the public to vote against [a] measure." 235 F.3d at 1245. And *Zilich* sustained a censure passed in alleged retaliation for being "a thorn in the side of the mayor and his administration," 34 F.3d at 361, with no apparent concern for whether his opposition was expressed "on or off the floor," *id.* at 363.

restates the question whether the First Amendment permits a majority of the body to counter a member's speech with its own. *See, e.g.*, Pet. App. 33a (Jones, J., dissenting from denial of rehearing en banc) (official counter-speech through censure or reprimand is "not a *violation* of the First Amendment, but its *embodiment*"). He goes on to suggest that there is something wrong with "the individuals who control government"—in this case, the majority of the HCC Board—"pass[ing] off their own political views as the official opinions of the government itself." BIO 16. Even if the censure here involved only "political disagreement," *id.*, it is difficult to understand who would have "the right to speak officially" for HCC as "a governmental body" if not "[t]he majority of HCC's Board," *id.* 17.

Respondent seeks to distinguish for this purpose between a censure resolution and other government speech. BIO 16-17. But that distinction makes no sense—*especially* if, as respondent contends, the basis for the censure is some policy disagreement playing out in the public square. That may be where respondent's individual First Amendment interests are at their strongest; but by the same token, it is also where a majority of the elected Board members, as such, must be entitled to speak officially on behalf of the Board. "Otherwise, as in this case, the First Amendment becomes a weapon to stifle fully protected government speech at the hands of a fully protected speaker." Pet. App. 37a (Jones, J., dissenting from denial of rehearing en banc); *Zilich*, 34 F.3d at 363.

Of course, these arguments all go to who is right on the merits. For reasons discussed here and in the petition, HCC is confident of its position. But

whichever side may ultimately prevail, the case warrants review by this Court. As the petition demonstrates (and respondent does not dispute), what constitutional latitude an elected local government body has to censure a sitting member is an important and recurring question across the Nation. Pet. 18-22. The decision below demonstrates a clear conflict on that issue among the lower courts. This case presents the question cleanly, and the Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey L. Fisher
Edward C. DuMont
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Richard Alan Morris
Counsel of Record
Jonathan G. Brush
ROGERS, MORRIS &
GROVER L.L.P.
5718 Westheimer Road
Suite 1200
Houston, TX 77057
(713) 960-6019
rmorris@rmgllp.com

March 31, 2021