No. 20-804

IN THE

Supreme Court of the United States

HOUSTON COMMUNITY COLLEGE SYSTEM,

Petitioner,

v.

DAVID BUREN WILSON,

Respondent.

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

BRIEF *AMICUS CURIAE* OF AMERICAN JEWISH COMMITTEE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

The American Jewish Committee ("AJC") is a national organization with more than 125,000 members and supporters and 22 regional offices nationwide. It was founded in 1906 to protect the civil and religious rights of American Jews. Its mission is to enhance the well-being of Israel and the Jewish people worldwide, and to advance human rights and democratic values in the United States and around the world.

AJC frequently speaks out on issues of public concern, including both the constitutional protection of free expression under the First Amendment and the need for governmental officials and entities to name and call out antisemitism and other bigoted behaviors. Non-coercive government speech contributes to the public discourse and plays an important role in recognizing and counteracting prejudice, bigotry, and hate speech in all its myriad forms. Free expression, whether public or private, should not be stymied merely because it creates a clash of ideas between a private actor and a government actor.

AJC supports both the right of private citizens to express themselves and the concomitant authority (even duty) of governmental entities to freely express positions contrary to those held by private citizens. Private actors must remain free to speak without fear of government retribution. And government actors must equally retain the ability to disagree without

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties filed blanket consents to the filing of amicus briefs.

fear that the expression of such disagreement may trigger liability for alleged civil rights violations.

Consistent with its mission and these values, AJC believes that the decision below of the Fifth Circuit puts at risk the authority of government actors to express a viewpoint and, where necessary, to censure words and conduct with which they disagree. AJC believes the only way to strike an appropriate balance is to ensure that governmental entities such as the Houston Community College ("HCC") system are allowed to speak—including through the use of censure—without coercing or silencing the voices they censure. The decision below upsets this balance by inviting civil rights claims in reaction to an otherwise non-coercive censure that amounts to nothing more than an act of government expression.

SUMMARY OF ARGUMENT

One of the guiding principles of First Amendment law is that the solution to "falsehood and fallacies" is "more speech, not enforced silence." *United States v. Alvarez*, 567 U.S. 709, 727-28 (2012) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). The Fifth Circuit's decision below, however, lends itself to the conclusion that HCC's only available recourse to Wilson's speech, with which it vehemently disagreed, was silence—enforced by the threat of civil rights litigation.

The Fifth Circuit's holding that a mere reprimand can give rise to "an actionable First Amendment claim under § 1983," *Wilson v. Houston Cmty. College Sys.*, 955 F.3d 490, 498 (5th Cir. 2020), upsets the balance of First Amendment protections that allows the

government to speak and promote its own ideas, and even to criticize others' viewpoints, so long as it does not coerce others' free expression. The First Amendment balance this Court has carefully enforced requires that government actors and entities must be able to express their own thoughts and ideas with the same force, vigor, and conviction as any private speaker.

The Fifth Circuit's holding—allowing a civil rights action as a result of a censure—threatens the ability of government entities to express their own views because the offended subject of any such disagreement may file suit challenging the government's speech as a civil rights violation. This holding will have the inevitable consequence of chilling government speech.

This brief proceeds in two parts. First, it examines how the Fifth Circuit's decision lacks grounding in this Court's precedent, as well as the impact of this decision on *amicus curiae's* vital work in combating antisemitism, including its support of the International Holocaust Remembrance Alliance's ("IHRA") Working Definition of Antisemitism and advocacy of government speech to counteract antisemitism in the public square. Second, it examines how the Fifth Circuit's rationale could have been applied in historical circumstances to the detriment of valuable public discourse and the free exchange of ideas.

Ultimately, the far-reaching consequence of the Fifth Circuit's decision in allowing constitutional civil rights claims to proceed under § 1983 for pure expressions of government speech, unaccompanied by coercion or sanction, is starkly at odds with the government's ability to function effectively. Indeed, "[i]t is the very business of government to favor and disfavor points of view on (in modern times, at least)

innumerable subjects." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment). When the function of government requires public expression, a private speaker's recourse where they object to the government's message is in the court of public discourse, not in courts of law.

ARGUMENT

I. THERE IS NO CONSTITUTIONAL PROTECTION FROM CRITICISM BY A GOVERNMENT ENTITY AND THE RECOGNITION OF SUCH A PROTECTION DIMINISHES FIRST AMENDMENT FREEDOMS.

The Fifth Circuit's holding that a mere "reprimand against an elected official for speech addressing a matter of public concern" can give rise to "an actionable First Amendment claim under § 1983," *Wilson*, 955 F.3d at 498, undercuts the government's historical power to censure and upsets the balance of First Amendment protections that allows the government to speak and promote its own ideas, and even to criticize others' viewpoints, so long as it does not coerce others' free expression. Denying political bodies the power to censure one of their own without fear of reprisal via a First Amendment claim under § 1983 unavoidably chills the important role of government expression in speaking out on issues of public importance.

A. The Power of Government to State Its Own Views and to Disagree with Private Actors Is a Cornerstone Component of Free Expression.

This Court has long recognized the authority of a government entity "to 'speak for itself.'" *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2008)

(quoting *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000)). "[I]t is entitled to say what it wishes." *Id.* at 467-68 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 933 (1995)). The government, no less than a private actor, is free to select the views it wants to express. *Id.* at 468 (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)). The overarching principle is that government "may interject its own voice into public discourse." *Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1247 (10th Cir. 2000) (citing *Meese v. Keene*, 481 U.S. 465, 480-82 (1987)).

Because government speech is simply another form of expressive conduct, the government's own expressive conduct is distinct from the regulation of private speech prohibited by the Free Speech Clause. *See Summum*, 555 U.S. at 467 ("If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech") (citing *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny")). The First Amendment does not restrain government "from controlling its own expression." *Columbia Broadcasting Sys., Inc.* v. *Democratic Nat'l Cte*, 412 U.S. 94, 139, n.7 (1973) (Stewart, J., concurring). Meaningful free expression requires that government actors and entities must be free to express their own thoughts and ideas with the same force, vigor, and conviction as any private speaker.

B. The Fifth Circuit's Holding Undercuts the Government's Power to Censure and Upends the Balance of First Amendment Protections to Chill Government Speech.

The Fifth Circuit's holding declares that one member of a government entity is protected in expressing scurrilous criticism of the entity and its members, yet when the government entity meets this criticism with its own expression by censure, its words give rise to a § 1983 claim. The asymmetric decision to privilege one form of expression over another based on the identity of the person or entity speaking has far-reaching implications. Interjecting a private right of action against HCC's decision to censure one of its own trustees casts aside the long history of censure as an appropriate method of government self-regulation consistently upheld by the courts. Moreover, the decision below threatens and chills government bodies from expressing their own views in the face of the threat that the offended subject of any such expression may file suit challenging the government's speech as a civil rights violation.

The very notion of public discourse, including the government's ability to advocate for a particular position, to educate, or to disagree, is incompatible with what amounts to a dissenter's veto on government speech. This Court has recognized that erecting a wall between government actors and disagreeable speech would "radically transform[]" the process of government by silencing those elected and appointed to create and carry out the very policies that are the subject of such vigorous debate. *Summum*, 555 U.S. at 468. The boundaries of the government's ability to speak on matters of public concern cannot be defined

by the sensibilities of whomever is most readily offended by such speech.

1. Allowing a Private Constitutional Claim in Response to Censure is Contrary to the Long History of the Legislative Power to Censure.

The government's power to express strong disapproval of an official's words or conduct through censure has deep historical roots cut short by the Fifth Circuit's creation of a private right of action against censure under § 1983. Censure is one of the oldest mechanisms of self-governance found in English and American governing bodies. *See, e.g.*, 2 *Journal of the House of Lords*, 1578-1614, at 327-28 (1830). "Americans at the founding and after understood the power to punish members as a legislative power [as] inherent." *Whitener v. McWatters*, 112 F.3d 740, 744 (4th Cir. 1997) (holding that a board's decision to censure member for using "abusive language" did not violate the First Amendment). "This power . . . is the primary power by which legislative bodies preserve their 'institutional integrity.'" *Id.* (quoting *Powell v. McCormick*, 395 U.S. 486 (1969)). Therefore, "because citizens may not sue legislators for their legislative acts, legislative bodies are left to police their own members" and "[a]bsent truly exceptional circumstances, it would be strange to hold that such self-policing is itself actionable in a court." *Id.*

The power to censure is effectively enshrined in the U.S. Constitution, which authorizes each house of Congress to "punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." U.S. Const. art. I, § 5, cl. 2. Congress has exercised its power more than two dozen times over two centuries, including for insulting other legis-

lators, using unparliamentary language, supporting the recognition of the Confederacy, describing Reconstruction as a "monstrosity," and engaging in various acts of misconduct or ethics violations. *See* U.S. House of Representative *List of Individuals Expelled, Censured, or Reprimanded in the U.S. House of Representatives*, History, Arts, & Archives, *available at* http://history.house.gov/Institution/Discipline/expulsion-censure-reprimand/ (last accessed July 13, 2021); U.S. Senate, *About Censure*, Powers & Procedures, *available at* https://www.senate.gov/about/powers-procedures/censure.htm (last accessed July 13, 2021). The "traditional ways of conducting government" themselves "give meaning to the Constitution." *Mistretta v. United States*, 488 U.S. 361, 401 (1989).

It would be a peculiar outcome if Congress were free to express its condemnation of a member's words or actions through censure, yet the same expression were denied to other governmental bodies. Yet that is precisely what has happened here. The Fifth Circuit's ruling stands at odds with the decisions of its sister circuits, which have found that a governing board's exercise of its historical censure power against one of its own members, without the imposition of personal penalties, is not actionable under the First Amendment. *See, e.g.*, *Werkheiser v. Pocono Twp.*, 780 F.3d 172, 181-83 (3d Cir. 2015); *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543-46 (9th Cir. 2010); *Phelan*, 235 F.3d at 1247; *Zilich v. Longo*, 34 F.3d 359, 363-64 (6th Cir. 1994).

The HCC board is a public body. The decision to censure Respondent was itself the outcome of a public process and public debate, and an exercise of HCC's historical power to self-regulate. Respondent was free to speak in his own defense against censure and

suffered no material detriment or coercion—making his censure an act of pure expression. To interject a private right of action under § 1983 into these circumstances subverts a historic legislative power and silences legislative discourse. Such a rule takes sides against the censuring body on behalf of the censured member. This would serve as an unnecessary intrusion into government self-policing where, as here, there was no other material sanction.

2. The Fifth Circuit's Decision Relegates Government Speech to Inferior Status and Chills the Expression of Government Viewpoints.

The implications of the Fifth Circuit's ruling are not limited to the historical power of censure; it has far-reaching implications for government speech as a whole, insofar as it relegates speech by a government official or entity to a permanent position of inferiority relative to private expression. More than that, it subjects a government speaker to the coercive threat of § 1983 litigation as the consequence of expressing any view deemed offensive by a contrary private speaker. Such coercion and intimidation would be intolerable if exercised by the government against private expression, and is no less so when exercised by a private party against government expression.

This Court has observed it is "not easy to imagine how government could function if it lacked" the freedom to express itself. *Summum*, 555 U.S. at 468. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Id.* at 468 (quoting *Keller* v. *State Bar*

of Cal., 496 U.S. 1, 12-13, (1990); and citing *Johanns*, 544 U.S. at 574 (Souter, J., dissenting) ("To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question" (footnote omitted)). Mere "hurt feelings or reputational injuries" are "not enough to defeat constitutional interests in furthering 'uninhibited, robust' debate on public issues." *Phelan*, 235 F.3d at 1248 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

The Fifth Circuit's ruling turns these principles upside-down, granting offended persons a constitutional right of action against government speakers simply for allegedly giving offense. The dissent from the denial of *en banc* rehearing below aptly recognized the consequences of this decision. "In so holding, the panel opinion exacerbates a circuit split, threatens to destabilize legislative debate, and invites federal courts to adjudicate 'free speech' claims for which there are no manageable legal standards." *Wilson v. Houston Cmty. College Sys.*, 966 F.3d 341, 342 (5th Cir. 2020) (Jones, J., joined by Willet, Ho, Duncan and Oldham, J., dissenting from the denial of rehearing *en banc*). "Holding office in America is not for the faint of heart. With leadership comes criticism—whether from citizens of public spirit or personal malice, colleagues with conflicting visions or competing ambitions, or all of the above." *Id.* at 345. (Ho, J., dissenting from the denial of rehearing *en banc*). "'We know of no case in which the [F]irst [A]mendment has been held to be implicated by governmental action consisting of no more than governmental criticism of the speech's content.' After all, the First Amendment does not 'consider[] speakers to be so timid, or important ideas to be so fragile, that they are overwhelmed by

knowledge of governmental disagreement.'" *Id*. at 346 (quoting *Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986) (Scalia, J.)).

Taken to its logical and deleterious conclusion, the opinion below reopens to § 1983 scrutiny innumerable acts of pure government speech this Court previously held do not violate First Amendment protections. For example:

- *Walker v. Tex. Div., Sons of Confederate Veterans*, 576 U.S. 200 (2015) (holding Texas Department of Motor Vehicles Board's rejection of a proposed specialty license plate design featuring a Confederate battle flag constituted government speech)
- *Sunnum*, 555 U.S. at 460 (holding that rejection of the placement of a permanent monument in a public park was protected government speech)
- *Johanns*, 544 U.S. at 550 (upholding government requirements for beef producers to contribute money to support a government advertising message over objections of producers who objected to the message).
- *Rust*, 500 U.S. at 173 (upholding new government regulations that limited speech on the subject of abortion for those receiving government funding).

These far-reaching consequences are unwarranted and unsupported by any competing principle. When government speaks, and does so without coercion or material sanction, its expression merits protection in equal measure to private speech. Here, the government spoke; nothing more. It spoke vigorously and its

speech was no doubt disagreeable to Respondent as the subject of the censure, but the existence of clashing viewpoints does not support a constitutional claim under § 1983.

C. The Direct and Indirect Consequences of Silencing Government Speech Further Support a Rule Promoting Robust Government Discourse.

Allowing government officials and government bodies to have a free and robust voice in the marketplace of ideas is an issue of special concern, as silencing government voices both thwarts an important governmental function and carries the potential for unintended consequences incentivizing more coercive action. This Court has long adhered to the dual principles that the remedy to "falsehood and fallacies" is "more speech, not enforced silence," and "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Alvarez*, 567 U.S. at 727-28 (quoting *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring); *Abrams*, 250 U.S. at 630 (1919) (Holmes, J., dissenting)).

This principle requires that government not impose coercive consequences upon free speech, even offensive speech. Yet it equally demands that government speakers, expressing themselves without coercing their opponents, retain the ability to disagree. To subject government speakers to a claimed civil rights violation each time they reprimand, censure, or otherwise condemn an opposing voice—even when they do so without material consequence—is to suppress valid government speech and, in consequence, may encourage efforts at content-based mandates.

Illustrating both points is the role government speech has come to play in identifying and calling out antisemitism and hate in the public square and on college campuses, as through the IHRA *Working Definition of Antisemitism*, adopted in 2016. *See* IHRA, *Working Definition of Antisemitism* (May 26, 2016), *available at* https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism (last accessed July 12, 2021) (the "Working Definition").[2] The IHRA created the Working Definition to build international consensus around the meaning of antisemitism as an "example of responsible conduct for other international fora" and to provide "an important tool with practical applicability for its Member Countries" to "equip[] policymakers to address th[e] rise in hate and discrimination at their national level." *Id*. Its primary function is to enable governments to identify and to call out antisemitism.

The Working Definition demonstrates the compelling role and power of government speech to advance positive ends, as it has become part of the government discourse on antisemitism. More than 30 countries and international organizations have formally adopted the Working Definition. *Id*. The U.S. Department of State uses the Working Definition to fulfill its statutory obligation to monitor and combat antisemitism internationally. *See* Special Envoy to Monitor and Combat Anti-Semitism, U.S. Dept. of State, *Fact Sheet* (June 8, 2010), *available at* https://2009-2017.state.

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[2] The Working Definition states: "Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities."

gov/j/drl/rls/fs/2010/122352.htm (last accessed July 13, 2021) (adopting Working Definition). Likewise, Executive Order 13899 on Combating Anti-Semitism adopts the Working Definition and mandates the U.S. Department of Education and other federal agencies employ the Working Definition to enforce Title VI and to combat prohibited forms of discrimination rooted in antisemitism. *See* 84 Fed. Reg. 68779 (Dec. 11, 2019).

Government adoption of the Working Definition is more than a symbolic step. The European Commission's and IHRA's *Handbook for the practical use of the IHRA Working Definition of Semitism* (November 2020) (the "*Handbook*") compiles "good practices" for the use of the Working Definition at all levels of government. IHRA, *Handbook*, *available at* https://op.europa.eu/en/publication-detail/-/publication/d3006107-519b-11eb-b59f-01aa75ed71a1/language-en (last accessed July 18, 2021) at 6-7. Practical applications include training of government officials and employees, identification and categorization of antisemitic incidents, and support for decision-making processes. *Id.* at 7. Because the Working Definition is generally not legally binding, its use depends on adoption, public endorsement, public acceptance, and documentation in publicly available sources—in short, on vigorous and continuous government speech. *Id.*

Such public discourse giving attention to the meaning of antisemitism and calling out antisemitic words and actions is highly valuable government expression in response to a pressing need. More than one in three American Jews (37%) have reported being victims of antisemitism over the past five years, and that percentage rises to more than four out of ten (41%) younger American Jews between the ages of 18 and 49. *See* AJC, *The State of Antisemitism in America 2020*

at 3 (Oct. 26, 2020), *available at* https://www.ajc.org/sites/default/files/pdf/2020-11/The_State_of_Antisemitism_in_America_2020.pdf (last accessed July 12, 2021). Yet nearly half of Americans profess unfamiliarity with the term "antisemitism" or its meaning. *Id*. at 7. Government voices recognizing what antisemitism is and calling it out when it is observed thus serve a powerful educational and moral role in response to a rising threat of intolerance, bigotry, and hate. It is "more speech" in response to "falsehood and fallacies."

Consider the consequences, then, if any person or entity criticized or censured by a government entity for antisemitic words or actions under the Working Definition could commence a § 1983 action for alleged violations of his or her First Amendment expressive rights. Under the Fifth Circuit's framework, the antisemitic speaker's expression would retain its First Amendment protection, while the government speaker calling out and condemning antisemitism would be subject to a constitutional claim—intimidating and suppressing a strong and vocal government response.

The unintended consequences of this suppression are equally concerning. Left without their own voice in the public discourse over antisemitism, government actors alarmed by its rise would be left with two unpalatable choices: remain silent in the face of bigotry or, deprived of their own expression, seek means to silence the offensive speech. The anti-negationism laws of multiple European countries provide an example of the latter approach, where "falsehood and fallacies" like Holocaust denial are not met with "more speech," but with criminalization. *See, e.g.*, Gayssot Act of 1990, Law No. 90-615 of July 13, 1990, J.O., July 14, 1990, p. 8333 (Fra.); Denial of

Holocaust (Prohibition) Law, 5746-1986, § 2 (Isr.); Dz.U. 1998 nr 155 poz. 1016 (Pol.); Codigo Penal Português, Art. 240 sec. 2 (Por.). Such laws may be necessary and appropriate in their countries of origin, but the United States has historically chosen a distinct path grounded in an open marketplace of ideas. To silence governments voices would distort that marketplace. The better approach is to retain a protected space for free and robust government speech.

II. THE FIFTH CIRCUIT'S DECISION UNDERMINES THE GOVERNMENT'S ABILITY TO ACT BY IMPROPERLY ERODING THE LINE BETWEEN CENSURE AND CENSORSHIP.

A government entity's ability to freely "speak for itself," *Summum*, 555 U.S. at 467 (*quoting Southworth*, 529 U.S. at 229), requires a clear line between protected government speech and prohibited government regulation of free speech. That line does not require government neutrality between opposing points of view. Indeed, "[i]t is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects—which is the main reason we have decided to elect those who run the government." *Nat'l Endowment for the Arts*, 524 U.S. at 598 (Scalia, J., concurring in judgment).

The Fifth Circuit's decision below erodes this line of demarcation by holding that censure—which is simply government speech expressing an "official reprimand or condemnation"—established an injury-in-fact solely because it was issued in response to Respondent's exercise of his own free speech rights. *Wilson*, 955 F.3d at 495. Moreover, the Fifth Circuit held that Respondent's allegations of "mental anguish" or "reputational injury" are similarly sufficient to

grant him standing. *Id.* at 496. Departing from the longstanding general rule that a government entity gets to choose what views it espouses and how, the Fifth Circuit has adopted a rule creating looming liability for any governmental entity that takes a viewpoint and actively advocates for its position against contrary viewpoints.

Courts are not, and should not be, the ultimate arbiters of permissible and impermissible government expression. Such expression is part and parcel of a functioning democracy, and governmental entities in the United States have repeatedly staked out positions on relevant social, economic, and public health issues. At times, these positions have proven controversial or unpopular and have drawn the ire of a vocal opposition. In many cases, those opposed to the official government position would undoubtedly be able to assert "mental anguish" and "reputational injury" as a result of those conflicts. Examined through the lens of history, it becomes apparent how frequently exposing government entities to liability for exercising their right to speak would undercut significant policy decisions. Three examples are explored in this section:

- In 2020 through 2021, in his role as Director of the National Institute of Allergy and Infectious Diseases ("NIAID") at the National Institutes of Health, Dr. Anthony Fauci would have placed himself at risk of § 1983 claims for correcting misinformation propounded by some individuals contrary to public health advice regarding the COVID-19 pandemic.
- In December 1954, while the 67 members of the U.S. Senate who voted to censure

Senator Joseph McCarthy would not have exposed themselves to a risk of litigation, the attorneys and witnesses from the executive branch who spoke out against Senator McCarthy and whose words led to his censure would have placed themselves at risk of § 1983 claims for their speech.

- In 1945, Nelson Rockefeller, then Coordinator of Inter-American Affairs, would have created a risk of litigation as he pioneered pro-Democracy, anti-Nazi comics for distribution in South America.

In each of these examples, there are those who might see the actions of the government as akin to a "reprimand or condemnation" of their speech, the very government action which the Fifth Circuit held established injury-in-fact. *Wilson*, 955 F.3d at 495. If any of those individuals could allege "mental anguish" or "reputational injury," the Fifth Circuit opinion likewise provides standing to pursue a claim against the Government for such speech. *Id.* at 496. The only limiting burden the Fifth Circuit decision establishes to state a claim is that the Government act serve as retaliation "for speech addressing a matter of public concern." *Id.* at 498-99.

Each of the above examples could, with the proper plaintiff, open the government to litigation for simply expressing a point of view. The better option is to preserve the clear line of demarcation this Court has previously enunciated between protected government speech and impermissible censorship or indoctrination. The government should remain free to speak and express its perspective so long as it does not

exert coercive pressure to silence other voices or compel other voices to speak.

A. Dr. Fauci's Public Comments Promoting Public Health Could Support a Claim Under the Fifth Circuit Standard.

Dr. Anthony Fauci has served tirelessly as the Director of the NIAID at the National Institutes of Health. A significant portion of his daily commitment is "speaking to the press about the pandemic" in order to keep the public informed. Cory Stieg, *Dr. Fauci hasn't taken a day off in 14 months — 'I don't have any time to worry about how tired I am'*, CNBC (Apr. 4, 2021), *available at* https://www.cnbc.com/2021/04/22/dr-fauci-hasnt-taken-a-day-off-in-14-months-fight ing-covid-pandemic.html (last accessed July 13, 2021).

Dr. Fauci has maintained the importance of public health officials carrying "a consistent message as often as you possibly can, because there is so much misinformation during this very divisive time that we're in." Brian Stelter, *Dr. Anthony Fauci says some Fox News coverage of the pandemic is 'outlandish'*, CNN Business (Sept. 29, 2020), *available at* https: //www.cnn.com/2020/09/29/media/anthony-fauci-fox-news-media/index.html (last accessed July 13, 2021).

In his role as Director of the NIAID, part of Dr. Fauci's role has been to push back against misinformation. One example is his consistent advocacy in favor of getting vaccinated. This has resulted in frank and candid expressions of disagreement with some media personalities expressing a contrary message questioning the safety and efficacy of COVID-19 vaccines. *See* Mark Joyella, *Fauci Responds To Tucker Carlson On Vaccines: 'That's Just A Typical Crazy Conspiracy Theory'*, Forbes (Apr. 14, 2021), *available*

at https://www.forbes.com/sites/markjoyella/2021/04/14/fauci-responds-to-tucker-carlson-on-vaccines-thats-just-a-typical-crazy-conspiracy-theory/ (last accessed July 13, 2021) (describing a television personality's vaccine coverage as "certainly not helpful to the public health of the nation or even globally," "counter to what we're trying to accomplish to protect the safety and health of the American public," and "a typical crazy conspiracy theory").

Dr. Fauci's advocacy provides a stark example of the need to protect government speech and to permit government officials to "favor and disfavor points of view." *See Summum*, 555 U.S. at 467; *Nat'l Endowment for the Arts*, 524 U.S. at 598. Dr. Fauci, speaking for the United States government, is advocating for widespread vaccination in the face of an ongoing pandemic and challenging public figures who seek to undermine that mission. This is precisely the type of government speech generally afforded the full protection of free expression.

Nor are Dr. Fauci's public statements the only recent example of government speech and criticism being used to advance public health goals. The U.S. Surgeon General, Dr. Vivek Murthy, recently issued an advisory declaring health misinformation an "urgent threat" and criticizing technology and social media companies for failing to take adequate action to halt the spread of dangerous health misinformation. *See* Sherly Gay Stolberg and Davey Alba, *Surgeon General Assails Tech Companies Over Misinformation on Covid-19*, New York Times (July 15, 2021), *available at* https://www.nytimes.com/2021/07/15/us/politics/surgeon-general-vaccine-misinformation.html (last accessed July 18, 2021).

Under the Fifth Circuit's decision, however, those media figures or private entities subject to criticism by Dr. Fauci or Dr. Murthy could argue that their comments are akin to a "reprimand or condemnation" of their speech—sufficient to establish an injury-in-fact. *Wilson*, 955 F.3d at 495. Moreover, the "reputational injury" incurred by such figures or entities would supply a separate basis for standing to pursue a claim. *Id.* at 496. And because the speech is "addressing a matter of public concern," the complaint could be sufficient to survive a motion to dismiss, despite the fact that the only conduct at issue were public statements made in an interview. Such an action penalizes the government for having and expressing an opinion in support of public health goals. Yet to deprive the government of its opinion, or to chill its expression, would degrade the government's ability to combat a pandemic.

B. The Censure of Senator Joseph McCarthy Could Support a Claim Against Witnesses and Counsel Under the Fifth Circuit Standard.

The United State Senate censured Senator Joseph McCarthy on December 2, 1954 in a 67-22 vote. Anthony Leviero, *Final Vote Condemns M'Carthy, 67-22, For Abusing Senate and Committee; Zwicker Count Eliminated in Debate*, N.Y. Times, Dec. 2, 1954, A1, *available at* https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/1202.html. He was censured for "contempt of a Senate Elections subcommittee that investigated his conduct and financial affairs, for abuse of its members, and for his insults to the Senate itself during the censure proceeding." *Id.* After the censure vote succeeded, Senator McCarthy appeared defiant stating that he

was "happy to have this circus ended so I can get back to the real work of digging out communism, crime and corruption." *Id.*

Senator McCarthy ultimately faced censure as a result of Senator Ralph Flanders' view that Senator McCarthy's conduct as chairman of the Senate's Permanent Subcommittee on Investigations—during the so-called "Red Scare"—brought the whole body of the U.S. Senate into disrepute. *The Censure Case of Joseph McCarthy of Wisconsin (1954)* [hereinafter "The Censure of McCarthy"], United States Senate, *available at* https://www.senate.gov/artandhistory/history/common/censure_cases/133Joseph_McCarthy.htm (last accessed July 13, 2021).

Most notably, Senator McCarthy ignored parliamentary procedure to badger witnesses on live television. *Id.* Senator McCarthy began hearings into U.S. Army security in the spring of 1954. *"Have You No Sense of Decency?"*, United States Senate, *available at* https://www.senate.gov/about/powers-procedures/investigations/mccarthy-hearings/have-you-no-sense-of-decency.htm (last accessed July 18, 2021). The Army was represented during these hearings by attorney Joseph Welch. *Id.* On June 9, 1954, during the hearing, Senator McCarthy charged that one of the attorneys working with Welch "had ties to a Communist organization." *Id.* Welch responded with the immortal words: "Until this moment, Senator, I think I never really gauged your cruelty or your recklessness. . . . Let us not assassinate this lad further, senator. You have done enough. Have you no sense of decency?" *Id.*

Senator McCarthy's actions during the Army-McCarthy hearings led to Senator Flanders' July 30, 1954 censure resolution. *The Censure of McCarthy*,

supra. Senators added a total of 46 specific charges of misconduct. *Id.* The Senate referred the action to a special select committee consisting of three Democrats and three Republicans. *Id.* It was only after months of work by this committee, and at least three days of debate, that Senator McCarthy was censured. *Id.* Just as in this case, the censure was little more than an official condemnation. Leviero, *supra*.

The resolution that passed censured Senator McCarthy largely for abusing his colleagues and harming the reputation of the Senate, much like Respondent was censured for abusing his colleagues and harming the reputation of the HCC System and the HCC System Board of Trustees. *Id.* Senator McCarthy would not have an action against the Senate generally or the senators who voted for censure under the Speech and Debate Clause.[3] U.S. Const. art. I, § 6, cl. 1. Under the Fifth Circuit standard, however, Senator McCarthy may have brought an action asserting a violation of his First Amendment right to freedom of speech against Joseph Welch and other government witnesses contributing to Senator McCarthy's censure.

Ultimately, Senator McCarthy experienced precisely the same "reprimand or condemnation" of his speech as Wilson and, as such, would be capable of establishing injury-in-fact under the Fifth Circuit standard. *Wilson*, 955 F.3d at 495. From the quotes Senator McCarthy gave through the process, it appears that he would be able to allege "mental anguish"

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[3] This reinforces the point that the historical censure power and the protections given to the legislative branch to self-regulate are not compatible with allowing a § 1983 claim arising from a censure.

sufficient to provide an additional ground for standing. *Id.* at 496. Similarly, it is clear from the historical record that Senator McCarthy suffered a significant "reputational injury" and quickly lost stature in the Senate. *Id.*

The only additional burden the Fifth Circuit decision establishes to state a claim is that the Government act must serve as retaliation "for speech addressing a matter of public concern." *Id.* at 498-99. In Senator McCarthy's case, he alleged that one of Welch's attorneys had ties to a Communist organization, *The Censure of McCarthy*, *supra*, and accused the Democratic party as being "the party of treason." Leviero, *supra*. Senator McCarthy's supporters even accused Democrats of permitting communists to steal government secrets. *Id.* Senator McCarthy would have had functionally the same argument that Respondent had in his case that censure was retaliation for speech addressing a matter of public concern. *Wilson*, 955 F.3d at 498-99. Both argue that they were attempting to root out corruption.

If the Fifth Circuit decision is allowed to stand, many lesser government entities would be compelled to refrain from censure for fear of liability exposure—deterring one of the most potent expressions of government speech condemning the actions of an elected official. Moreover, witnesses and counsel may be less willing to participate in hearings where their testimony could constitute the type of "reprimand or condemnation" that the Fifth Circuit held to be capable of establishing injury-in-fact. *Wilson*, 955 F.3d at 495. The Fifth Circuit's decision, in short, cuts short the "primary power by which legislative bodies preserve their 'institutional integrity.'" *Whitener*, 112 F.3d at 744.

C. Even Pro-Democracy Messaging Published by the U.S. Government Could Create a Risk of Litigation.

In the 1940s, private organizations collaborated with the U.S. Coordinator of Inter-American Affairs, Nelson Rockefeller, on a comic book presenting the U.S. case for war with Nazi Germany to be distributed in South America. *See* Richard C. Rothschild, excerpt from *My First Fifty Years* 106-108 (undated), *available at* http://www.ajcarchives.org/AJC_DATA/Files/RS12A.PDF (last accessed July 14, 2021). The success of this comic book is highlighted in a clipping from the Daily News noting that "[o]ne of the more effective publications of the Nelson Rockefeller office is said to be a book of funnies printed in Spanish which tells Latin-American youngsters about American heroes in this war." Danton Walker, *Broadway: Manhattan Memoranda* (May 11, 1943), *available at* http://www.ajcarchives.org/AJC_DATA/Files/RS-13.PDF (last accessed July 14, 2021).

The comic book employed unusually strong language to convey its anti-Nazi messaging. For instance, the book contained a page depicting a German officer whipping a chained world with the caption "THE NAZIS PLAN SLAVERY FOR THE WORLD." *See* AJC, *English Draft of Our Future – Freemen or Slaves?* at 14, *available at* http://www.ajcarchives.org/AJC_DATA/Files/RS-12.PDF (last accessed July 14, 2021). *See also* AJC, *Nuestro Futuro-Hombres Libres, O'Escalvos?* at 20, *available at* http://www.ajcarchives.org/AJC_DATA/Files/RS-11.CV01.pdf (last accessed July 14, 2021).

Nuestro Futuro, *supra*, at 20.

Some of the scenes, however, depicted wealthy North Americans who doubted the need for U.S. involvement in World War II, saying "IT'S NOT OUR WAR!" and that "WE HAVE LAWS THAT WILL KEEP US NEUTRAL." *English Draft of Our Future*, *supra*, at 17.

Nuestro Futuro, *supra*, at 27.

This comic book demonstrates the potentially far-reaching consequences of the ruling below. The Fifth Circuit held that government speech expressing an "official reprimand or condemnation" is sufficient to establish injury-in-fact. In this case, *Nuestro Futuro* states a point of view on behalf of the United States government, directed in part at identifiable individuals expressing opposition to U.S. involvement in the war. Any prominent members of the anti-war opposition thus may have been able to concoct standing, under the Fifth Circuit's rationale, for the "mental anguish" and "reputational injury" imposed upon them as a consequence of having their views held up for mockery.

These are just three examples of historical scenarios in which the government engaged in speech directed to a matter of public importance, and in so doing, under the Fifth Circuit's rationale, potentially inflicted injury-in-fact upon a censured or criticized individual or group of individuals in the form of "mental anguish" or "reputational injury." Permitting a constitutional civil rights claim under § 1983 for pure expressions of government speech, unaccompanied by coercion or sanction, is thus starkly at odds with the government's performance of functions that entail expressive components that may give offense to those who stand in vocal opposition to the government's viewpoint. These are matters to be resolved in the court of public discourse, not in courts of law.

CONCLUSION

The First Amendment is not a zero-sum game. Quite the opposite; this Court has long adhered to the view that the solution to undesirable speech is "more speech," not less. Yet the decision below gives the opposite impression—that the expression of speech by

one individual potentially precludes the expression of contrary government speech criticizing the individual's expression, including by censure. The far-reaching implication of such a rule is to create an imbalance between government speech and private speech, to restrict the flow of expression into the marketplace of ideas, and to invite direct and indirect consequences that impede important government functions and risk more direct and coercive efforts to restrain undesired speech.

Respectfully submitted,

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