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 FOR RESPONDENT**


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## QUESTION PRESENTED

The question framed by petitioner Houston Community College System (HCC) is whether the First Amendment restricts the authority of an elective body to issue a censure in response to a member's speech. But as we explained in the brief in opposition, there is an essential constitutional distinction between speech in the legislative sphere (where the Speech or Debate Clause applies and the First Amendment does not) and speech outside that unique context (where the First Amendment unquestionably applies). In this case, respondent David Wilson spoke *outside* the legislative sphere—in statements to the press, phone calls, and lawsuits—and there is no dispute that his speech was protected by the Free Speech Clause.

Nor is this case about a bare statement of official disapproval, without more. The censure here was not an exercise of the Board of Trustees' general resolution power to take institutional positions on matters of public importance. The Board instead invoked its *disciplinary* power to punish asserted rule violations. Thus, not only did the censure publicly castigate and shame Wilson for his speech and advocacy, but it also revoked several of his privileges of office, impeding his ability to function as a member of the Board. Beyond that, the censure expressly "directed" Wilson "to immediately cease and desist" his advocacy against policies adopted by the Board's majority, upon threat of "further disciplinary action" for noncompliance. Pet. App. 45a.

Thus, the question actually presented is whether an elective governmental body violates the First Amendment when it invokes its disciplinary power to formally censure one of its members in response to the member's extra-legislative speech, disqualifying him from the privileges of office and commanding compliance upon threat of further punishment.

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES**

**Cases**

**Cases—continued**

**Cases—continued**

**Cases—continued**



**Constitutions, statutes, and rules**

**Constitutions, statutes, and rules—continued**



**Legislative materials**



**Other authorities**

**Other authorities—continued**

**Other authorities—continued**

## INTRODUCTION

From 2013 through 2019, respondent David Wilson served as a publicly elected trustee on the Houston Community College System (HCC)'s Board of Trustees. In the years immediately prior to Wilson's election and throughout his tenure, the Board was plagued by accusations of corruption and other malfeasance, culminating in the longest-serving trustee's conviction on federal bribery charges. Wilson was an outspoken critic of the Board's pay-to-play culture, and he actively aired his criticisms of the Board in the press and telephone campaigns. He also filed two declaratory judgment actions against the Board in state court.

Wilson's criticisms struck a nerve with his colleagues on the Board. But rather than engaging with the substance of his criticisms in speech of their own, they invoked their disciplinary power (JA33-34), declaring his speech "reprehensible" and "warrant[ing] disciplinary action." Pet. App. 44a. And discipline is what they delivered: In addition to officially denigrating him, the censure revoked his privileges as a duly elected trustee to (1) receive reimbursements for college-related travel, (2) access his share of discretionary community-affairs funds, and (3) seek an officer position on the Board. The censure also expressly "directed" Wilson "to immediately cease and desist" from continuing his public oppositions of the Board's decisions and admonished that "any repeat" of his public criticisms would lead to "further disciplinary action." Pet. App. 45a.

HCC does not deny that Wilson's speech and lawsuits were protected by the First Amendment. It therefore rightly concedes (Br. 11) that the Board was constitutionally prohibited from "punish[ing]" Wilson for having criticized the Board in the ways that he did. Backed into a corner by these concessions, HCC is made to argue that the Board's censure of Wilson was not a punishment

at all. As HCC sees it (Br. 12), the censure "was only a pointed expression of the body's official disapproval" of Wilson's message, coupled with an innocuous expression of its "desire" that Wilson "should speak and act differently in the future."

That blinks reality. The censure was not an exercise of the Board's Article B § 1 power to adopt a resolution announcing an institutional position on a matter of public importance. See JA35-38. It was instead an exercise of the Board's Article A § 11(f) *disciplinary* power, used to punish rule violations. JA34. The censure thus did more than stake out an institutional position concerning Wilson's speech; it disciplined him, revoked his privileges of office, and commanded his silence.

As then-Representative James Madison explained early in the Nation's history, an official governmental censure of this sort is not an expression of opinion, but rather a "severe punishment." 4 Annals of Cong. 934 (1794). And to enter a censure in response to political expression is a manifest threat to the "liberty of speech." *Ibid.* The great weight of historical and contemporary authorities confirm that official censures are significant penalties designed to punish and deter. That is why they are historically very rare, and why assembly rules typically afford trial-like procedural protections before they may be entered.

It is no answer to say that elected officials like Wilson must come prepared to endure the tough scrutiny of local politics. If the censure here had been entered in response to speech by an outspoken professor or student, condemning the speech as reprehensible and revoking certain privileges as punishment, no one would doubt that it violated the First Amendment. As the Court held in *Bond* v. *Floyd*, 385 U.S. 116 (1966), it is not a relevant distinction that it was directed at an elected trustee, instead. "The interest of the public in hearing all sides of

a public issue is hardly advanced by extending more protection to citizen-critics than to [elected officials]." *Id.* at 136. No, "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Wood* v. *Georgia*, 370 U.S. 375, 395 (1962).

In *Bond*, the Court held that an elective body may not exclude a member on the basis of that member's speech. Because censure is a another point on the same spectrum as expulsion, it follows that an elective body may not censure a member on that ground, either, officially rebuking him and impeding his ability to do his job by depriving him of important privileges of his office.

## STATEMENT

### A. The Board's history of corruption

**1.** HCC is a public community college district that operates community colleges in the greater Houston area. Pet. App. 2a. A nine-member Board manages and controls the system. JA6 ¶ 4. The Board's work is governed by a formal set of bylaws (JA22), pursuant to which trustees are elected by the public to serve six-year terms (JA41). Trustees are fiduciaries who "must act solely and exclusively for the benefit of" HCC. JA24.

The Board has sweeping powers and near-absolute control of the college system, including authority to levy taxes, exercise eminent domain, hire and fire the chancellor, establish and control the college system's budget and finances, sue and be sued, and control college system's police force. JA35-38.

Article B § 1 of the Board's bylaws authorizes it to adopt resolutions that establish formal policies, goals, and positions on matters of importance to HCC. JA35-38. Article A § 11, in contrast, authorizes it to investigate members for alleged rule violations and to adopt

resolutions of censure as "sanctions" when violations are found. JA33-34.

**2.** Over the past decade, many members of the Board have been the subjects of corruption investigations. One internal investigation undertaken in 2010 found compliance and procurement issues involving four former and current Board members.[1] It revealed that one trustee had "used her influence to steer work to her son's construction company and to obtain free campaign consulting services from a vendor." *Ibid.* It found that three other trustees had engaged in varying degrees of similar self-dealing.[2] These events led the *Houston Chronicle* Editorial Board to complain that HCC "board positions have too often been treated as personal fiefdoms by trustees for the benefit of friends and family members." *Ibid.*

On March 9, 2017, federal authorities indicted HCC's longest-serving trustee, Chris Oliver, on charges of extortion and bribery.[3] Oliver—one of the three trustees identified in the 2010 investigation—was accused of receiving 69 bribe payments totaling over $225,000 from at least four people seeking contracts with HCC between 2009 and 2016.[4] He pleaded guilty to the bribery charge and was sentenced to 70 months in prison.[5]

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[1] Letter from Larry Veselka to Renee Byas, General Counsel, Houston Community College (May 18, 2011), perma.cc/RA6M-LTMJ.

[2] Editorial Board, *It's About Time at HCC: Results of Investigation Should Bring Changes at Community College Board*, Hous. Chron. (Aug. 1, 2011), perma.cc/4E3D-RMLS.

[3] See Indictment at 2, *United States* v. *Oliver*, No. 4:17-cr-132 (S.D. Tex. Mar. 9, 2017) (Dkt. 1).

[4] Lindsay Ellis, *Former HCC Trustee Chris Oliver Gets 70 Months in Prison After Bribery Conviction*, Hous. Chron. (Jan. 9, 2018), perma.cc/85DJ-QRWZ.

[5] See Judgment at 2, *United States* v. *Oliver*, No. 4:17-cr-132 (S.D. Tex. Jan. 25, 2018) (Dkt. 44).

**3.** The Board also has made a series of contentious decisions over the past decade. Substantial controversy arose, for example, from the Board's 2011 decision to enter into a $45 million, five-year deal with the government of Qatar to establish the Community College of Qatar.[6] "From the beginning, * * * the partnership was plagued by misunderstandings and missteps."[7] As one journalist generously observed, the Board "might not have been fully prepared for [a] partnership" with an authoritarian foreign government.[8]

The project was seen by many as a boondoggle. Documents showed that HCC administrators were "billing Qatar for tens of thousands of dollars in business-class airfares and luxury hotels," and Board members "were flown to a graduation ceremony in Qatar—complete with a two-day stopover in Paris on the way," where they "'were wined and dined.'"[9]

In 2012, voters also approved a $425 million bond fund to expand HCC's campuses locally.[10] But by 2015, the Board had "spent millions on far-flung properties" that were unlikely ever to be developed, "drain[ing]" the bond fund with little to show for it.[11] One of the land

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[6] Michael Hardy, *The Crazy College of Qatar*, New Republic (Aug. 31, 2016), perma.cc/99TQ-3P42; Jeannie Kever, *Qatar Turns to Houston Community College for New School*, Hous. Chron. (July 26, 2011), perma.cc/D5BE-2XN2.

[7] Hardy, *Crazy College*, *supra*.

[8] Mitch Smith, *Gulf Between the Gulfs*, Inside Higher Ed. (Mar. 8, 2012), perma.cc/FJ4Z-Q6LJ.

[9] Hardy, *Crazy College*, *supra*.

[10] See Benjamin Wermund, *Years After North Forest Voted for HCC Bond, Would-Be Campus Remains Undeveloped*, Hous. Chron. (Sept. 6, 2015), perma.cc/ZM9M-W5YR.

[11] Benjamin Wermund, *Trustee Says HCC Land Deal Broke Law, Calls for Chancellor's Resignation*, Hous. Chron. (Aug. 20, 2015), perma.cc/UA4T-GRUR.

acquisitions involved a sale price of $8.5 million, which was $3.2 million more than the assessment of the property by the same appraiser just three months earlier. *Ibid.*

Renee Byas, HCC's former acting chancellor and general counsel, settled a wrongful termination claim against HCC in 2015.[12] In her suit, she alleged (among other things) that "three trustees tried to orchestrate a deal in which the college would buy property, and they would receive 10 percent of the money that HCC paid to the seller."[13]

**B. Wilson's speech and lawsuits**

**1.** Wilson ran for and won a seat on the Board in 2013 because he believed HCC was not being managed in the best interest of the community. Pet. App. 2a-3a. From the start, he opposed what he saw as unwise, unethical, and often corrupt conduct by the Board.

To that end, Wilson "spoke out" against the Qatar deal, including against his colleagues' taking favors from Qatari officials.[14] In various interviews with the press, he questioned whether a far-off campus in a repressive nation was an appropriate use of the school's time and energy, which he believed should have remained focused on the Houston community.[15]

In speaking out against the Qatar campus and expressing concern about graft, Wilson gave an interview on a radio program. JA8 ¶ 7; Pet. App. 42a. He also

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[12] Benjamin Wermund, *Former HCC Chancellor Gets Half a Million in Legal Settlement*, Hous. Chron. (Aug. 14, 2015), perma.cc/3SW6-TEBZ.

[13] Ericka Mellon, *Former HCC Head Details Alleged Corruption by Trustees*, Hous. Chron. (April 23, 2015), perma.cc/94DH-J3TY.

[14] JA8 ¶ 7; Hardy, *Crazy College*, *supra*.

[15] JA8 ¶ 7; Pet. App. 3a.

funded a telephone campaign to inform area residents of how HCC's resources were being spent. *Ibid.*

Wilson was concerned that corruption on the Board ran deeper than Chris Oliver's then-infamous bribery scheme. The chancellor agreed but, in response, retained a conflicted investigator who had made financial contributions to the election campaigns of sitting Board members. Frustrated that the investigation would be stained by its own pay-to-play dynamics, Wilson announced that he would use his own resources to hire an independent private investigator to explore malfeasance on the Board. See Pet. App. 3a, 42a-43a.[16]

**2.** In 2017, the Board held a meeting at which a trustee cast her votes remotely, via video conference.[17] At the time, the Board's bylaws permitted remote attendance at meetings but forbade remote voting.[18] The Board nonetheless ratified the votes cast remotely.

Wilson subsequently sued HCC and its individual trustees, seeking a declaration that the remotely-cast votes were void.[19] When the chair of the Board excluded Wilson from a subsequent Board meeting to discuss the lawsuit, without authorization under the bylaws, Wilson filed a second action against HCC and its individual trustees, alleging that his wrongful exclusion from the executive session had prevented him "from performing his core functions as a Trustee."[20]

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[16] See also KPRC 2, *HCC Trustee Dave Wilson Announces Dolcefino Will Lead Investigation*, YouTube (Apr. 5, 2018), bit.ly/2VzYv2h.

[17] JA9 ¶ 9; Pet. App. 3a; Dist. Ct. Dkt. 1-2, at ¶ 15.

[18] JA60, Article G § 5 ("Only Trustees present in person may vote. Absent Trustees may listen to the proceedings by electronic media, but may not vote on the proceedings.").

[19] Pet. App. 3a; Dist. Ct. Dkt. 1-2, at ¶ 18.

[20] Petition 5, *Wilson* v. *Houston Community College System*, No. 17-71693 (Tex. Dist. Ct. filed Oct. 24, 2017).

### C. The censure

The Board adopted a resolution of censure disciplining Wilson for his public advocacy and lawsuits. See Pet. App. 42a-45a. The resolution of censure found, in relevant part, that "because Mr. Wilson has repeatedly acted in a manner not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct, the Board finds that Mr. Wilson's conduct was not only inappropriate, but reprehensible, and such conduct warrants disciplinary action." Pet. App. 44a.

The resolution stated that Wilson was subject to discipline because he, among other things:

- "used public media to criticize other Board members for taking positions that differ from his own" (Pet. App. 42a);
- gave an "interview with a local radio station in which he identified Board members who voted in favor of a transaction that he opposed" (*ibid.*);
- "regularly publishes information on a website that he created and maintains, alleging that other Board members have engaged in unethical and/or illegal conduct" (*ibid.*); and
- filed two lawsuits against HCC "complaining of the interpretation of Board Bylaws and state law regarding" remote voting in the closed executive sessions (Pet. App. 43a).

As punishment for his speech and lawsuits, the resolution rendered Wilson "ineligible for election to Board officer positions" and "for reimbursement for any College-related travel." Pet. App. 44a. Accord JA11-12 ¶ 14. It provided further that "[a]ny requests for access to the funds in [Wilson's] Board account for community affairs" would require full "Board approval." Pet. App. 44a. Although the bylaws require all trustees to file a

form requesting community affairs funding (JA67, Article H § 3(c)(1)), the form is reviewed by only one person to ensure that the request meets "the public purpose requirements" (JA67-68, Article H § 3(c)(2)). The censure required that Wilson, alone among HCC's trustees, seek approval of the entire Board in addition. See Pet. App. 44a. See also JA65 ("Only Trustees in good standing are eligible to travel at College expense or have access to community funds.").

The censure concluded: "Mr. Wilson is directed by the Board to immediately cease and desist from all inappropriate conduct" and that "any repeat of improper behavior by Mr. Wilson will constitute grounds for further disciplinary action by the Board." Pet. App. 45a.

**D. Proceedings below**

Wilson amended the complaint in the first lawsuit concerning the remote voting to include First Amendment claims against HCC and its trustees pursuant to 42 U.S.C. § 1983. Pet. App. 21a. HCC and the trustees removed the case to federal court. Dist. Ct. Dkt. 1.

In the operative complaint (JA5-16), Wilson alleges that the censure violated the First Amendment, among other things. Wilson sought a declaration "of the rights and responsibilities of the parties," $10,000 in damages for mental anguish, $10,000 in punitive damages, reasonable attorneys' fees, and "any other relief, whether general or special, legal or equitable" that may be proper. JA16.[21]

The district court dismissed for lack of jurisdiction. Pet. App. 20a-28a. Relying on *Phelan* v. *Laramie County Community College Board of Trustees*, 235 F.3d 1243

[21] Wilson also sought injunctive relief (JA12 ¶ 19; JA13 ¶ 23; JA14 ¶ 27), but the district court dismissed that request as moot when Wilson's term of service on the Board expired. Pet. App. 9a.

(10th Cir. 2000), it reasoned that Wilson failed to demonstrate an injury-in-fact and thus lacked standing. Pet. App. 27a.

The Fifth Circuit reversed and remanded. Pet. App. 1a-19a. The court noted that "[t]he Supreme Court has long stressed the importance of allowing elected officials to speak on matters of public concern." Pet. App. 10a (citing *Bond* v. *Floyd*, 385 U.S. 116, 135-136 (1966)). And "a formal reprimand, by its very nature, goes several steps beyond a criticism." Pet. App. 13a. "[I]t is punitive in a way that mere criticisms, accusations, and investigations are not." *Ibid.* Thus, "formal reprimands are actionable under § 1983." Pet. App. 12a-13a.

Applying these principles, the Fifth Circuit emphasized that the censure was intended to "punish[] [Wilson] for 'criticizing other Board members for taking positions that differ from his own'" and "for filing suit alleging the Board was violating its bylaws." Pet. App. 14a. Because "[r]eporting municipal corruption undoubtedly constitutes speech on a matter of public concern," the court held that Wilson had stated a First Amendment retaliation claim. Pet. App. 14a-15a.

The court of appeals denied rehearing en banc. Pet. App. 29a-30a. Judge Jones filed a dissenting opinion, joined by four colleagues. Pet. App. 31a-38a. Judge Ho filed a separate dissent. Pet. App. 39a-41a.

## SUMMARY OF ARGUMENT

An elective governmental body may not discipline a member with a formal censure and revocation of the member's privileges of office in response to the member's constitutionally protected extra-legislative speech.

**I.** The United States and several States, but not HCC, argue that the Free Speech Clause does not constrain in any way state and local elective bodies from disciplining their members for their speech. By that

limitless logic, an elective body could impose significant fines or even expel a member simply for speaking out on a radio program or in a newspaper op-ed in opposition to the majority. This Court rejected that proposition long ago in *Bond*, holding expressly that the First Amendment prohibits a legislative body from punishing its members for their constitutionally protected speech.

That does not mean that all legislative punishments for speech are subject to First Amendment challenge. Speech within the legislative sphere—uttered on the chamber floor, in hearings, or in legislative reports and the like—may be questioned only by the lawmaking body itself. A censure for speech within that special context does not violate the Free Speech Clause. Only when a censure is issued in response to speech outside the legislative sphere, in statements protected by the Free Speech Clause, will a First Amendment claim lie.

**II.A.** HCC does not dispute that an elective body may not, consistent with the First Amendment, punish its members for speech outside the legislative sphere. It thus contends (as it must) that a formal censure is a permissible response to extra-legislative speech because censures are not punitive at all. But Founding-era history, modern precedents, and contemporary practice all refute that contention and confirm that censures may not be entered in response to speech outside the lawmaking process.

Among the clearest historical evidence is the case of John Wilkes, who became a *cause célèbre* among American revolutionaries. The Framers expressly rejected as a tool of tyranny the doctrine of "contempts" that authorized punishments of members like Wilkes for their extra-legislative speech. Equally compelling evidence is found in James Madison's rejection of President Washington's proposed censure of the Whiskey Rebellion insurrectionists. In persuading a majority of his congressional col-

leagues to reject the censure proposal, Madison insisted that censures are not merely expressions of legislative opinion, but severe punishments. And to adopt a censure in response to political dissent would be a direct threat to liberty of speech.

Modern practice confirms the same. Courts routinely hold that censures are severe penalties, and this Court itself has held in other contexts that formal censures can violate the First Amendment. Other respected authorities on parliamentary procedure explain that censures are highly punitive and reserved only for serious rule violations. That is why countless elective bodies' bylaws grant trial-like protections before permitting the infliction of a censure, entitling the accused to legal representation and a formal defense. Many such bylaws expressly state that censures may not be entered against members in response to their speech.

**II.B.** In addition to the inherently punitive nature of all formal censures, the censure here revoked Wilson's privileges of office, rendering him ineligible to receive reimbursements for college-related travel and restricting his access to his community affairs funds. The censure also disqualified Wilson from holding a Board officer position. These practical consequences impeded his ability to function as a trustee; they were stiff punishment designed to silence him. The censure was clear on this point—it expressly characterized itself as a disciplinary action and "directed" Wilson "to immediately cease and desist" his advocacy against Board policies or face "further disciplinary action." Whatever one might say about formal censures as a general matter, the censure here was thus plainly punitive.

**II.C.** Entry of the censure in response to Wilson's constitutionally protected speech thus violated the First Amendment. That follows from this Court's decision in *Bond*, which concerned a state legislature's exclusion of

a duly-elected member because of his speech. To be sure, censure is a less severe penalty than exclusion or expulsion, but it is nonetheless a significant punishment meted out in exercise of the Board's disciplinary power. Here, in particular, the censure included practical disabilities intended to prevent Wilson from performing his official functions. Under *Bond*, the censure therefore violated the First Amendment.

**III.** The censure is not protected from scrutiny by the government speech doctrine. There were multiple non-punitive means available for expressing disapproval of Wilson. Individual members could have spoken out in their individual capacities. Or the Board could have exercised its non-disciplinary authority to adopt an institutional position statement concerning Wilson's criticisms. But those are not the approaches the Board took. It instead invoked its disciplinary power to issue a censure as a penalty for rule violations.

The difference is significant. A position statement would say something like "Wilson's statements to the press and lawsuits were reprehensible and do not reflect the values of mutual respect that the Board strives to uphold," and stop there. But as a punishment, the censure went further, adding (in paraphrase) that "We therefore censure Wilson for violating Board rules, revoke his privileges of office, and command him to cease his criticisms of the Board's policies." Both approaches express opinion, but only the latter crosses the line into punishment. Many elective assemblies' bylaws expressly recognize the distinction, specifying that position statements, but not censures, are a permissible response to a member's objectionable speech.

In any event, this Court's government speech cases concern compelled speech and do not remotely suggest that a formal government censure is a mere expression of government opinion. HCC's contrary position proves too

much. If it were correct that censures are innocuous expressions of government opinion, there would be nothing to stop elective bodies (or any governmental agency) from censuring journalists for critical coverage of the government, including (so it would seem) revoking privileges like press passes in response. A censure does not change from opinion to punishment depending on the identity of the person at whom it is targeted.

**IV.A.** A ruling in Wilson's favor would protect, not stifle, free speech. Again, the Board and its members had a variety of non-punitive ways to express their "counter-speech," including in a non-punitive resolution taking a position for the institution. The problem here is not that the Board officially took a position concerning Wilson's speech or tactics—it is that it did so by means of a censure issued pursuant to the Board's disciplinary power, not only condemning and shaming Wilson but also imposing practical penalties.

If the censure here is permitted to stand, it would empower elective assemblies to use their formal censure power to chill dramatically the speech of out-of-favor elected officials. The free flow of ideas is better preserved when all individuals, including elected officials, may openly speak their minds on matters of public concern free from fear of punishment for it.

**IV.B.** The judgment below is consistent with history and tradition and implicates a very narrow range of official censures. Legislative censures are shockingly rare in the United States. And when a censure has been issued in response to speech, the speech has nearly always been within the legislative sphere—on the chamber floor or in legislative reports and the like. Outside the legislative sphere, where First Amendment protections are undeniable, censures for speech are almost unheard of. Affirming the judgment below thus would be fully consistent with longstanding practice and tradition.

## ARGUMENT

### I. THE FREE SPEECH CLAUSE PROTECTS ELECTED OFFICIALS FROM FORMAL PUNISHMENTS FOR THEIR EXTRA-LEGISLATIVE SPEECH

The United States (Br. 12-17) and the several States (Br. 6-11), but not HCC, contend that the First Amendment categorically does not limit an elective body's power to formally punish a member for his extra-legislative speech. The Court already rejected that proposition in *Bond* v. *Floyd*, 385 U.S. 116 (1966).

**A.** The First Amendment "embraces * * * the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940). It likewise protects "the liberty of citizens to petition the government for the redress of their grievances." *Van Deelen* v. *Johnson*, 497 F.3d 1151, 1155 (10th Cir. 2007) (Gorsuch, J.).

These liberties are "fundamental" to the democratic process and "may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943). Their exercise may not ordinarily be punished without satisfying strict scrutiny, for "[w]hen public officials feel free to wield the powers of their office as weapons against those who question their decisions, they do damage not merely to the citizen in their sights but also to the First Amendment liberties and the promise of equal treatment essential to the continuity of our democratic enterprise." *Van Deelen*, 497 F.3d at 1155.

HCC does not disagree with these basic premises. Nor does it appear to dispute the conclusion drawn from them, that a legislative body may not punish a member for his extra-legislative speech. See Pet. Br. 11. It con-

tends instead that a censure is not sufficiently punitive to give rise to a First Amendment injury. *Id.* at 11-12.

But the United States and State amici do not agree. The United States acknowledges (Br. 14) that a censure is "punishment" but takes the position that a legislative body's punishment of one of its members categorically "does not violate the First Amendment." The States go further, insisting (Br. 10-11) that "grievances arising from legislative discipline" imposed by state or local elective bodies on their members are not "cognizable" in federal court at all, and that "the Court should afford legislative bodies immunity for their legislative discipline" regardless of context or circumstance.

Those sweeping positions (which are not limited to censures) are incompatible with both common sense and judicial precedent. Legislative discipline has historically taken many forms, including not only censures, but also imprisonment, lashings, expulsions, and fines. See Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies*, *in* ESSAYS IN COLONIAL HISTORY 132-133 (1931); National Conference of State Legislatures, *Censure, Expulsion and Other Disciplinary Actions*, *in* INSIDE THE LEGISLATIVE PROCESS 6-2 (2010), perma.cc/9TL4-GPPA. It cannot seriously be maintained that, if a local legislative body expelled a member or fined her $50,000 for taking a disfavored policy position in a newspaper op-ed, federal courts would be powerless to find a violation of the Free Speech Clause and order relief. Such openly punitive and deterrent punishments in response to extra-legislative speech would utterly freeze political expression by elected officials in the minority, in certain violation of the First Amendment.

That is not to say that the members of a lawmaking body like the Board may not respond critically to a colleague's protected extra-legislative speech. They absolutely may—with speech of their own, and even with a

non-punitive resolution taking an institutional position on the topic at hand. See *infra* at 37-38, 40-41. But what they may not do is invoke their disciplinary power to inflict a formal punishment upon their colleague.

The Court said exactly that in *Bond*, where it considered the Georgia House of Representative's exclusion of a member in response to his outspoken opposition to the Vietnam War. In ruling for Bond, the Court held unanimously that a legislative body may not formally punish a member with exclusion for exercising "the right of legislators to dissent from national or state policy or that of a majority of their colleagues." 385 U.S. at 132. Because "there can be no question but that the First Amendment protects expressions [of an elected official] in opposition to national foreign policy," the body's exclusion resolution in response to Bond's opposition to the Vietnam War could not stand. *Ibid.*

In reaching that conclusion, the Court forcefully rejected the assertion that a "stricter" First Amendment standard should apply to elected officials on the supposed ground that they must have thicker skins than private citizens. *Bond*, 385 U.S. at 133. "Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office." *Id.* at 136. Thus, legislators must "be given the widest latitude to express their views on issues of policy," including their "statements criticizing public policy and the implementation of it." *Ibid.* Simply put, "[t]he interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators." *Ibid.* Accord *Wood* v. *Georgia*, 370 U.S. 375, 395 (1962) ("The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.").

**B.** It does not follow that all (or even most) legislative discipline entered in response to lawmakers' speech violates the First Amendment. On the contrary, the Court's cases have long recognized the constitutionally significant distinction between lawmakers' speech taking place within the "legislative sphere" and speech taking place outside of it. *Gravel* v. *United States*, 408 U.S. 606, 624-625 (1972). See generally *id.* at 623-625 (exploring the scope of the Speech or Debate Clause).

Speech within the legislative sphere encompasses statements made "in a session of the House by one of its members in relation to the business before it," including in hearings, resolutions, reports, and records. *Gravel*, 408 U.S. at 617, 624 (quoting *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1880)). In that unique constitutional context, legislative privilege applies, and lawmakers' speech may "not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The negative pregnant is that the speech and debate of an elective body's members within the legislative sphere *may* be "questioned" by the lawmaking body itself, according to its own rules of discipline. See, *e.g.*, U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings" and "punish its Members for disorderly Behavior"). In that special setting, the power to censure elected officials for disruptive or disrespectful speech is unconstrained by the Free Speech Clause.[22]

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[22] Analogous provisions to the Speech or Debate Clause and Discipline Clause (often using identical language) prevailed among state constitutions at the time of the Fourteenth Amendment's ratification. See *Tenney* v. *Brandhove*, 341 U.S. 367, 372-376 (1951); Tex. Const. art. 3 §§ 11, 21 (adopted 1876); Const. of the Rep. of Texas art. I, §§ 14-15 (adopted 1836). Thus, as the United States asserts (Br. 15), the same limits on the First Amendment's reach should be understood to apply to state and local elective bodies, too.

But outside the legislative sphere—when elected lawmakers are giving public speeches and press conferences, engaging in telephone campaigns, or filing complaints in court—the First Amendment assuredly protects them from being punished for the content of their speech. That premise is the foundation on which the holding in *Bond* rests.

Thus, outside the legislative sphere, discipline would be permissible for illegal marijuana use, but not for speech supporting the legalization of marijuana use. And it would be permissible for incitements to violence but not mere criticisms. Within the legislative sphere, members may be disciplined for both their conduct and their speech. In that unique context, "because citizens may not sue legislators for their legislative acts, legislative bodies are left to police their own members" according to their own rules of internal decorum. *Whitener* v. *McWatters*, 112 F.3d 740, 744 (4th Cir. 1997).

Beyond those familiar boundaries, however, the Free Speech Clause forbids an elective governmental body from formally punishing one of its members for engaging in protected political expression outside the legislative sphere. *Bond*, 385 U.S. at 132-133.

## II. WILSON HAS STATED A CLAIM FOR A VIOLATION OF HIS RIGHT TO FREE SPEECH

HCC does not dispute that elective governmental bodies are forbidden from "in effect punish[ing] past speech" protected by the Free Speech Clause. Pet. Br. 11 (citing *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1722 (2019)). And it does not deny that statements made by elected officials in interviews with the press, telephone campaigns to constituents, and complaints in court are presumptively protected by that clause. It instead takes the position (*ibid.*) that censures are not punitive at all, and thus they are not "adverse actions" within the meaning of the First Amendment retaliation doctrine.

To make out a claim for First Amendment retaliation, a plaintiff must show that: (1) he engaged in activity protected by the First Amendment, (2) he suffered an "adverse action," and (3) there was "a 'causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury.'" *Nieves*, 139 S. Ct. at 1722 (citing *Hartman* v. *Moore*, 547 U.S. 250, 259 (2006)).

The Court has not announced a comprehensive test for determining when a retaliatory measure is harmful enough to constitute an "adverse action" within the meaning of its First Amendment cases. But the lower courts uniformly recognize that a "retaliatory action" suffices for a First Amendment claim if it is "designed either to punish [someone] for having exercised his constitutional right" to speak or seek redress in the past or "to intimidate or chill his exercise of that right in the future." *Gunter* v. *Morrison*, 497 F.3d 868, 872 (8th Cir. 2007). Put another way, "the government infringes upon protected activity whenever it punishes or threatens to punish protected speech." *Bass* v. *Richards*, 308 F.3d 1081, 1088 (10th Cir. 2002). Accord *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 76 n.8 (1990) (state officers violate the First Amendment when an official retaliation is "intended to punish [a speaker] for exercising her free speech rights"). As HCC frames it, the standard is therefore whether a retaliatory measure "in effect punish[es] past speech." Pet. Br. 11 (citing *Nieves*, 139 S. Ct. at 1722).

The focus on punishment makes sense. A punishment is a measure designed "to deter others from offending in like manner." *Kokesh* v. *S.E.C.*, 137 S. Ct. 1635, 1642 (2017) (quoting *Huntington* v. *Attrill*, 146 U.S. 657, 668 (1892)). The First Amendment is foremost concerned to avoid "chilling political speech, [which] is central to the meaning and purpose of the First Amend-

ment." *Citizens United* v. *F.E.C.*, 558 U.S. 310, 329 (2010). And official retaliation is "a potent means of inhibiting speech." *Pickering* v. *Board of Education*, 391 U.S. 563, 574 (1968).

The inquiry whether an action is punitive is an objective one that does not turn on subjective impressions or the unique fortitude of individual plaintiffs. See, *e.g.*, *Smith* v. *Plati*, 258 F.3d 1167, 1176-1177 (10th Cir. 2001) (citing *Mendocino Environmental Center* v. *Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999)).

Sources old and new lend strong support to the conclusion that official governmental censures like the one here are highly punitive and, when entered in response to protected speech, violate the First Amendment. The practical penalties imposed as part of the Board's censure of Wilson, in particular, leave no doubt of that conclusion in this case.

### A. Formal censures adopted in exercise of official disciplinary powers are always punitive

#### *1. Founding-era history*

The founding generation considered official censures to be serious punishments, not expressions of opinion. And they rejected their imposition in response to political expression.

**a.** Official censures as we know them today were first entered as punishments in the colonial era for "contempts" of the so-called parliamentary privileges, which developed over the centuries preceding the American Revolution. Clarke, *supra*, at 127. By the mid-eighteenth century, the doctrine of contempt-of-privilege had become an oft-abused tool for punishing private individuals and politically disfavored members of the royal colonial assemblies for perceived slights of almost any kind. *Id.* at 132-133. See also *id.* at 133 ("In the colonies as in England the scope of privilege was ever growing wider

through the addition of punishable offenses."); *Kilbourn* v. *Thompson*, 103 U.S. 168, 184 (1880) (similar). Those slights came to include various forms of general speech, from seditious libel to mere "insults" against assembly members. Clarke, *supra*, at 133.

Censure was among the penalties most commonly used to punish contempts of parliamentary privilege. Individuals "had to ask pardon on [their] knees" in the chamber and pay a fee for the proceeding. Clarke, *supra*, at 132. The central goal of this early form of censure was "humiliation" (*ibid.*)—to make the accused "abas[e] themselves" and publicly "receiv[e] reprimands" (*id.* at 140).

In part because censures like this were seen as deeply punitive, the Founders rejected the British rule of parliamentary supremacy and its system of contempts. See *Kilbourn*, 103 U.S. at 189. As James Madison wrote in his denouncement of the Sedition Act, "[i]t will never be admitted that the meaning of [the freedom of speech] in the common law of England is to limit [its] meaning in the United States." 6 WRITINGS OF JAMES MADISON 1790-1802, at 389 (1906), perma.cc/LPY5-HDZS. As John Quincy Adams more succinctly put it in response to a proposed congressional censure three decades later, the "doctrine of contempts" is a tool of "tyranny." Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 164–165 (1986) (cleaned up) (quoting Letter from John Quincy Adams to the Twelfth Congressional District of Massachusetts (Mar. 3, 1837)).

**b.** Among the most notorious examples of abusive use of the contempt doctrine was the case of John Wilkes, who in 1762 "published an attack on a recent [English] peace treaty with France, calling it a product of bribery and condemning the Crown's ministers as 'the tools of despotism and corruption.'" *Powell* v. *McCor-*

*mack*, 395 U.S. 486, 527 (1969). Incensed by Wilkes's criticisms, Parliament accused him of the contempt of "seditious libel" and stripped him of his seat in the body for punishment. *Ibid.*

Wilkes' his case was frequently cited as an example of intolerable English tyranny by American colonists, so much so that he became a "*cause célèbre*" among the revolutionaries. *Powell*, 395 U.S. at 531. The widely read writings of pamphleteer Junius "bitterly attacked the exclusion of Wilkes" from Parliament for his speech and "lent considerable support to the revolutionary cause." *Id.* at 531 n.60. The case thus "had a significant impact in the American colonies" and provided essential "historical context" for the constitutional conventions (*id.* at 530-531), where the Framers rejected the notion that punishments could be imposed for political expression in this way. "During the House of Commons debates in 1781," one member of Parliament went so far as to say "that expelling Wilkes had been 'one of the great causes which had separated England from America.'" *Id.* at 531 n.60 (cleaned up) (quoting 22 Parliamentary History of England 100-101 (1781)). *Cf. Watkins* v. *United States*, 354 U.S. 178, 192 (1957) ("The history of contempt of the legislature in this country is notably different from that of England.").

HCC's puzzling citation (Br. 20-21) to the Wilkes affair as evidence of a settled American tradition of punishing elected officials for their speech thus gets matters exactly backwards. See also Pet. Br. 21-22 (discussing other pre-revolutionary punishments for speech); U.S. Br. 12 (same). The Framers' fierce objection to Parliament's punishment of Wilkes and others like him for their speech, together with their rejection of the English contempt system, strongly suggests that official cen-

sures in response to political expression are an *offense* to American legal tradition, not the other way around.[23]

**c.** That censures for political speech are offensive to the American tradition is confirmed further by James Madison's famous stand against President Washington's 1794 proposal that the House of Representatives should censure a group of citizens for their alleged role in the Pennsylvania Whiskey Rebellion. See 4 Annals of Cong. 934 (1794), perma.cc/C94V-TNVD. Following the conclusion of the Revolutionary War, the new federal Congress had adopted an excise tax on whiskey production to help offset the national war debt. Between 1791 and 1794, farmers in Pennsylvania and Kentucky had violently resisted the tax, nearly culminating in an armed conflict with a militia raised and led by Washington himself. See generally Richard H. Kohn, *The Washington Administration's Decision to Crush the Whiskey Rebellion*, 59 J. Am. Hist. 567 (1972).

When the rebellion subsided, Washington called on the Congress to censure the insurrectionists for forming "associations to engage in institutionalized political dissent," much like Parliament might have done before the Revolution. Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. Rev. 1525, 1561 (2004). Washington's proposal was ultimately rejected, but not before tipping off "America's first extensive national debate regarding the permissible scope of political dissent." *Ibid.*

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[23] Perhaps even more puzzling is the United States' favorable citation (Br. 12) to the parliamentary practice of "commit[ment]" to punish contempts. It is no wonder the Framers rejected a doctrine that allowed the legislature to "arrest[] and jail[]" its members for their religious speech and critiques of the Crown. *Ibid.*

There are two conclusions to draw from the debate that followed. *First*, the Framers believed that censures were highly punitive. Indeed, one of the first topics for debate was whether "the censure [would] have any practical significance." Chesney, *supra*, at 1562. The Federalists, supporting Washington, argued that "the purpose of the motion was [merely] to express an opinion and not to invoke the machinery of the law to silence the societies." *Id.* at 1564. But the Democratic-Republicans, led by Madison, adamantly disagreed. "It is in vain," Madison insisted, "to say that this indiscriminate censure is no punishment." 4 Annals of Cong. 934. Madison and a majority of his congressional colleagues "flatly rejected the notion that the censure was merely a meaningless expression of opinion, insisting that 'it will be a severe punishment.'" Chesney, *supra*, at 1566 (quoting 4 Annals of Cong. 934). And although the targets of the censure in that case were private citizens, that is a distinction without a difference—a censure does not change character and cease to be punitive when targeted at a member of the elective body, instead.

*Second*, it was widely believed that the proposed censure, if it had been adopted, would have chilled free speech. As one of Madison's congressional allies explained, official censures tend to "lock the mouths of men." 4 Annals of Cong. 941 (1794) (statement of Rep. Carnes). In the debates that raged in newspapers at the time, opponents of the censure thus decried Washington's proposal as an "attack" on the right "'of *speaking*, *writing*, and *publishing* the political sentiments of [America's] hitherto supposed independent citizens.'" Chesney, *supra*, at 1567 (quoting GREENLEAF'S N.Y.J. & PATRIOTIC REGISTER (Dec. 3, 1794) (emphasis in original)). See also *id.* at 1567 & notes (collecting additional examples).

Madison, who just a few years earlier had drafted and introduced the First Amendment in the first federal Congress, resolutely agreed. If a censure could be entered against citizens for their associations, he inquired, "how far will [it] go?" 4 Annals of Cong. 934. There would be nothing, he worried, to stop legislatures from adopting censures for exercises of "the liberty of speech, and of the press" (*ibid.*), as Parliament and the colonial assemblies had done abusively before the Revolution. That was not an outcome that America's new constitutional design could tolerate. *Ibid.* The Congress thus rejected Washington's censure proposal.

From these two episodes—the Wilkes affair and the proposed Whiskey Rebellion censure—two lessons emerge: The Framers understood censures to be severely punitive, and they rejected the notion that governmental bodies could adopt them in response to political expression protected by the First Amendment.

***2. Modern practice***

The punitive character of official, public censures and their incompatibility with the Free Speech Clause when adopted in response to protected speech is reflected in modern precedents and practice as well.

**a.** Modern courts have recognized that official "[p]ublic reprimands are serious sanctions" (*Mississippi Commission on Judicial Performance* v. *Brown*, 761 So. 2d 182, 185 (Miss. 2000) (en banc)) entailing substantial "stigma" for those subject to them (*Florida Bar v. Stein*, 471 So. 2d 36, 37 (Fla. 1985) (per curiam)). Thus, a "censure is a real, substantial and serious punishment." *In re Cohn*, 139 N.E.2d 301, 306 (Ill. 1956) (Bristow, J., concurring in denial of rehearing). *Cf. Millea* v. *Metro-North Railroad*, 658 F.3d 154, 165 (2d Cir. 2011) (holding that a "formal reprimand issued by

an employer is not a 'petty slight,' 'minor annoyance,' or 'trivial' punishment").

This Court has therefore repeatedly held that censures are sufficiently injurious in their own right to support a First Amendment violation. In *Ibanez* v. *Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994), for example, the Court held that a professional licensing board's "decision censuring" the plaintiff for her "constitutionally protected speech" was "incompatible with First Amendment restraints on official action." *Id.* at 139. And in *Peel* v. *Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), the Court similarly explained that "the public censure of petitioner," entered for his breach of a bar rule governing lawyer advertising, "violates the First Amendment." *Id.* at 111.

Following this Court's lead, the courts of appeals have held that "censure is a form of punishment" and that even an informal censure "coming from an authority figure" is certain to "have a tremendous chilling effect on the exercise of First Amendment rights." *Holloman* v. *Harland*, 370 F.3d 1252, 1268-1269 (11th Cir. 2004) (censure of a student by a teacher). Accord, *e.g.*, *Kirby* v. *Elizabeth City*, 388 F.3d 440, 449 (4th Cir. 2004) (holding that a public "reprimand" by a police chief "most certainly could be expected" to "have a chilling effect on the [plaintiff] and other officers"). See also FIRE Br. 3-9 (collecting and discussing additional cases arising in various contexts).

Contemporary sources recognize that censures of elected officials, in particular, can have a strong deterrent effect. One respected authority explains that the public censure of a member of an elective assembly is a "pronounced punishment" reserved only for serious offenses, and it is "aimed at reformation of the person and prevention of further offending acts." *Demeter's*

*Manual of Parliamentary Law and Procedure* ch. 19, II at 260 (1969), perma.cc/6JR7-PVF7. As the National Conference of State Legislatures describes it, censures inflict "drastic" punishment and are therefore "reserved for serious situations." NCSL, *supra*, at 6-1. Thus the point of a censure, today as in 1789, is to deter.

The U.S. District Court for the District of Columbia thus recently held that it is "beyond peradventure that being censured by the U.S. House of Representatives concretely and particularly harms a sitting Member's reputation, particularly a Member * * * who has demonstrated a desire to remain in the House." *Rangel* v. *Boehner*, 20 F. Supp. 3d 148, 160 (D.D.C. 2013), affirmed, 785 F.3d 19 (D.C. Cir. 2015). Indeed, censures are considered so punitive that the "ignominy of being formally and publicly admonished and deprecated by one's colleagues * * * has led some Members of Congress who face a potential censure * * * to resign before any official recommendation or other action is taken." Jack Maskell, Congressional Research Service, RL31382, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives* 12 (June 27, 2016). This is clear evidence that censures are punitive and chill speech.

**b.** There is also broad recognition among local elective bodies themselves that censures are highly punitive and can violate the First Amendment.

To start, local elective bodies typically accord their members trial-like protections before imposing the punishment of censure. Consider the following examples:

- The Los Angeles city council rules establish a two-stage process. At the first stage, a committee holds a hearing with testimony and evidence to determine whether a full investigation and censure hearing is warranted, akin to a grand jury proceeding. If further proceedings are deemed

necessary, a full investigation is authorized after which a censure hearing is held. At the hearing, evidence may be entered, fact witnesses may testify under oath in direct and cross-examination, and the accused is entitled to legal counsel, akin to a criminal trial. Rule 88, Rules of the City Council of Los Angeles, perma.cc/4K98-5AE5.

- Before disciplining a member, including by formal censure, the Idaho House of Representatives employs a similar two-stage process, further requiring the Committee on Ethics to "determine[] probable cause exists that misconduct may have occurred" before proceeding to a full hearing. And before the hearing may take place, "[t]he accused shall have a full and fair opportunity to obtain and review all of the evidence" against him or her and to prepare a defense. Rule 45, Idaho Legislature, perma.cc/6WTA-YNYF.
- The town council of Cary, North Carolina, requires the retention of outside counsel to find "probable cause" before holding "a quasi-judicial type hearing" to resolve a call for a formal censure. See Town of Cary, N.C., *Policy Statement 164: Ethics Policy for Town Council* § 5 (Dec. 16, 2010), perma.cc/K8HJ-797H.
- The polices of the town council of Stockton, California—which state that the purpose of censure is "to deter violations" of town rules—employ a similar two-stage process, specifying that (1) "the member subject to censure [must be afforded] adequate time to review the allegations and evidence against him or her and prepare a defense," and (2) he or she "is entitled to due process of law, which requires notice, [and] an opportunity to be heard." Policy 100-11, Stockton Council Policy Manual, perma.cc/R92U-APEM.

Procedural protections of this sort are ubiquitous in local codes and bylaws throughout the Nation—from the councils of its largest cities to the boards of education of its smallest school districts. A non-exhaustive list of two dozen additional examples is furnished in an appendix to this brief. See App., *infra*, 3a-6a. Needless to say, such protections would not be necessary if censures were merely innocuous statements of opinion and did not inflict "drastic" punishment properly "reserved for serious situations." NCSL, *supra*, at 6-1.

Indeed, the rules for censure of many municipal bodies throughout the country expressly contemplate cases just like this one, recognizing not only that censures are punitive, but that the power to adopt them is constrained by the First Amendment.

The rules of procedure for the Council of the District of Columbia, for example, provide that a "[c]ensure * * * is a punitive action, which serves as a penalty imposed for wrongdoing" and is reserved only for "serious offense[s]." D.C. Council, Rules of Organization and Procedures § 655, perma.cc/5EWR-WH86. The council's rules thus explicitly specify—consistent with Madison's stand against Washington's proposed censure of the insurrectionists in 1794—that, "[t]o protect the overriding principle of freedom of speech, the Council shall not impose censure on any Member for the exercise of his or her First Amendment right, no matter how distasteful the expression of that right was to the Council and the District." *Ibid*. This, too, is a very common provision in bodies' bylaws. See App., *infra*, 1a-2a.

Against this robust background of Founding-era history and modern practice, there is no denying that censures are serious punishment. The United States, for its part, acknowledges as much. See, *e.g.*, U.S. Br. 12-17 (describing "censure" as "punishment").

### B. The censure here was especially punitive in that it revoked Wilson's privileges of office

Whatever the Court might conclude about the punitive character of a "bare censure" (U.S. Br. 7), here there is more. The censure resolution in this case came with additional practical penalties that stripped Wilson of his official trustee privileges, impeding his ability to perform the functions of his office and commanding him to cease his public disagreement with the Board. See Pet. App. 44a-45a; JA65. These concrete penalties leave no room for doubt that the censure here was punishment. *Cf. Bart* v. *Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (seminal First Amendment retaliation case holding that courts should consider the effects of a retaliation "in gross" rather than splicing the "details" of the action and dismissing them in isolation as "trivial").

**1.** It is well settled that adverse actions withdrawing benefits may punish and chill speech and thus give rise to a First Amendment retaliation claim. *E.g.*, *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (withholding unemployment benefits); *Speiser* v. *Randall*, 357 U.S. 513 (1958) (denying a tax exemption). The censure here meets that description. In addition to the inherently punitive character of official censures, Wilson has alleged that the particular censure here deprived him of his official trustee privileges, entitling him to declaratory relief and "any other relief" (JA16) that may be warranted under Federal Rule of Civil Procedure 54(c). See JA11 ¶ 14; JA13 ¶ 20; JA14 ¶ 24. See also Pet. App. 27a. These practical penalties not only deprived Wilson of governmental privileges he previously enjoyed, but also impeded his ability to do his job.

To begin, the censure denied Wilson his entitlement to receive reimbursement for college-related travel. See JA11 ¶ 14; Pet. App. 44a; JA65-66. As a plurality of the Court observed in *Elrod* v. *Burns*, 427 U.S. 347 (1976), a

person's First Amendment "[r]ights are infringed both where the government fines [her] a penny for being a Republican and where it withholds the grant of a penny for the same reason." *Id.* at 359 n.13. That is this case: If the Board could not fine Wilson for his speech in an amount equal to his travel reimbursements, it could not produce the same result by withholding the privilege of receiving those reimbursements. "Even the denial of a minor financial benefit may form the basis of a First Amendment claim." *Ellins* v. *City of Sierra Madre*, 710 F.3d 1049, 1060 (9th Cir. 2013) (citing *Elrod*, 427 U.S. at 359 n.13 (plurality opinion)).

The district court concluded (Pet. App. 27a) that Wilson's categorical disqualification to receive travel reimbursements was not a cognizable injury because, according to HCC's motion papers, Wilson "ha[d] not made a claim for reimbursement" after the censure. But it proves nothing to say that Wilson did not seek reimbursements that he was disqualified from receiving; doing so would have been pointless. What's more, the point of disqualifying Wilson to receive reimbursements was to discourage him from traveling for his job in the first place. Even crediting HCC's outside-the-complaint factual assertion, moreover, Wilson would be entitled to declaratory relief with nominal damages. See *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 799 (2021).

The censure also restricted Wilson's access to his $5,000 share of the Board's annual community affairs funds (see JA11 ¶ 14; JA66), requiring him to obtain full board approval before he was permitted to use them (Pet. App. 44a). This penalty, perhaps more than any other, had a clear adverse impact. Community affairs funds support Board members' interactions with their constituents, staff, and the school's students. See JA67 (detailing "examples of proper" uses of the funds). Restricting

Wilson's access to those funds severely impeded his ability to function as a trustee.

In its briefing below (Pet. C.A. Br. 26-27), HCC observed that all trustee requests for community affairs funds must first be approved, as though to suggest the censure added nothing new or different. But as we noted (*supra*, at 9), the bylaws require such requests to be approved by a single person, whose job is only to ensure that the request is being made for a compliant purpose. JA67-68. The censure required Wilson, and him alone, to obtain a permission beyond that baseline requirement—the approval of the entire Board, whose discretionary review power was in no way constrained. See Pet. App. 44a. The message behind that requirement was crystal clear: Wilson would have to fall into line to regain access to his share of the funds. See JA65 ("Only Trustees in good standing are eligible to travel at College expense or have access to community funds.").

Finally, the censure disqualified Wilson from seeking a position as an officer on the Board. JA11 ¶ 14; Pet. App. 44a. To be sure, Wilson's colleagues would have been unlikely to elect him their chair or vice chair, as would have been their prerogative. But an individual "suffers a constitutionally cognizable injury by the loss of an opportunity to pursue" a position like this, "even though [he] may not be able to show that [he] was certain to" win the position if he had "been accorded the lost opportunity." *CC Distributors, Inc.* v. *United States*, 883 F.2d 146, 150 (D.C. Cir. 1989) (emphasis omitted). See, *e.g.*, *Booher* v. *Board of Regents*, No. 2:96-cv-135, 1998 WL 35867183, at *12 (E.D. Ky. July 22, 1998) (holding that a "censure" that "affect[ed] [the plaintiff's] ability to engage in the department's system of governance" and limited his "participation in departmental decision-making" was "sufficiently adverse to support a retaliation claim"). Actions like this constitute

official government punishment for past speech, intended to chill future speech. They are anathema to the First Amendment, as was the censure of Wilson.

As if the censure's inherent nature and cumulative penalties did not suffice to illustrate its deterrent purpose, it concluded with an express command "direct[ing]" Wilson to "immediately cease and desist" with his public criticisms upon threat of further "disciplinary action" for failure to comply. Pet. App. 45a. HCC acknowledges (Br. 14-15) that when an official retaliation takes the form of an express threat "that punishment, sanction, or adverse regulatory action [will] imminently follow," it violates the First Amendment. That is precisely what the censure did.

**2.** The United States (but not HCC) attempts to address the additional "restrictions" on Wilson's privileges as a trustee. It does so by brushing them aside in the view that "the district court found that respondent had not shown any retrospective injury resulting from" them. U.S. Br. 21 (citing Pet. App. 27a).

Not so. The district court's holding did not actually turn on the presence or absence of retrospective injury. It held, instead, that the censure's revocation of Wilson's trustee privileges was not an adverse action because, "[i]n spite of the censure, [Wilson remained] free to continue attending board meetings and expressing his concerns regarding decisions made by the board." Pet. App. 27a. In other words, Wilson did not establish an adverse action, in the district court's view, because "the censure [did] not prohibit him from [continuing to] speak[] publicly." *Ibid.* HCC takes the baton on this point (Br. 15), asserting that Wilson was not injured by the censure because he remained "free to respond to the government's speech with yet more of his own" even afterward.

That line of reasoning confuses prior restraints with subsequent punishments. Observing that Wilson could

technically continue to speak in the future is only to say that the censure was not a prior restraint. *Cf. Alexander* v. *United States*, 509 U.S. 544, 553 (1993) (explaining "the time-honored distinction between barring speech in the future and penalizing past speech"). We have never argued otherwise; First Amendment retaliation claims are based on "penalizing past speech" and not "barring speech in the future." *Ibid.* An elective assembly could fine a member $50,000 in response to the member's past speech, and she would technically remain free to continue speaking. But she surely would be deterred from doing so, and the fine would violate the Free Speech Clause.

By eliding this distinction and focusing exclusively on Wilson's practical ability to continue expressing himself in the future, the district court thus misunderstood how First Amendment retaliation works. Retaliation plaintiffs are almost always technically free to continue speaking, in spite of past punishment for doing so. That does not license the government to penalize individuals for their speech, and thereby deter future speech, without running afoul of the First Amendment.

### C. Because the censure was demonstrably punitive, Wilson has stated a claim

The punitive character of the Board's censure here resolves this case. HCC does not deny that Wilson's speech and petitions were protected by the First Amendment. And for his protected expression, he was officially disciplined with the punishment of a censure, including several practical penalties impeding his ability to function as a trustee.

Of course, censure is not as extreme a punishment as exclusion or expulsion, as in *Bond*. But that is just to say that censure and expulsion are at different "points on a continuum." NCSL, *supra*, at 6-1. Accord *Demeter's*

*Manual*, *supra*, at 260 (describing censure as a "lighter form" of "punishment" than expulsion). Each is still clearly punitive and an adverse action in its own right. Imprisonment is a harsher punishment than a fine, for example—but that does not mean that the government may constitutionally fine a person for her speech simply because it could have done worse by putting her in jail instead. Expulsion and censure are of a piece, and neither may be imposed in response to protected speech. *Cf. Rutan*, 497 U.S. at 75 ("[T]here are deprivations less harsh than dismissal" that give rise to First Amendment retaliation claims).

This is especially so when the formal shaming penalty of a censure is entails practical consequences like the revocation of official privileges, as it was here. Such actions are designed to accomplish just one thing: to chill opposition to the majority's views. They are not a permissible governmental response to a lawmaker's extra-legislative speech.

## III. THE CENSURE IS NOT PROTECTED BY THE GOVERNMENT SPEECH DOCTRINE

**A.** HCC will respond that *Bond* does not control this case because a censure is speech, and expulsion is not. Its censure of Wilson, HCC asserts (Br. 12), was merely "a pointed expression of the body's official disapproval" of his message and a harmless expression of "desire" that he "should speak and act differently in the future." From this perspective, "the expression of a public body's opinion through a censure" (Br. 13) constitutes protected "government speech" (Br. 31) that cannot by itself violate the Free Speech Clause. This case is therefore about only "public speech and public counter-speech." Br. 33. Accord U.S. Br. 17-21.

That is first and foremost a misdescription of the censure. The Board had the authority under Article B § 1

of its bylaws to adopt a simple resolution announcing a formal position on any matter it liked. JA35-38. And it could have invoked that power to adopt a resolution defending the merits of its decision to open a campus in Qatar, reaffirming its commitment to honest stewardship of the $425 million bond fund, and declaring that robocall campaigns and lawsuits are indecorous and regrettable methods of airing trustees' disagreements. In a different case, the Board might also invoke its general resolution power to declare that "disparag[ing]" and "inappropriate" words uttered by a trustee prone to objectionable discrimination "do not represent the position of the institution." Pet. Br. 31-32.

But that is not the approach the Board took here. It instead invoked its separate disciplinary power under Article A § 11(f) of the bylaws (JA34) not just to express an institutional position, but to issue a censure for speech that it said violated its rules. Pet. App. 44a. Far from engaging in "counter-speech" (Pet. Br. 33), the censure concluded that Wilson's "lack of respect" for the Board's authority violated the Board's code of conduct, and it thus revoked his privileges of office and commanded him to cease and desist. Pet. App. 43a-45a. That is not opinion—it is a declaration of guilt accompanied by punishment.

Many state and local elective assemblies' rules and bylaws expressly recognize the distinction between a *censure* on the one hand, and a *position statement* on the other. Like the policy for the D.C. Council, the censure policy for the city council of Oakland, California, states that, because a censure is a "punitive measure" reserved for "a serious offense," a council member may not be censured "for the exercise of his or her First Amendment rights." See Oakland City Council Resolution No. 87044, *Censure Policy*, at 23 (Feb. 2018), perma.cc/-JW42-6B6J. At the same time, it states that "nothing

herein shall be construed to prohibit the City Council from collectively expressing their strong disapproval of [distasteful] remarks" in a non-punitive resolution. *Ibid.*

This is a familiar, manageable distinction reflected in the bylaws of many other local elective bodies. See App., *infra*, 1a-2a. In New York, for example, the state department of education has long recognized the difference between local board resolutions that merely "criticize the exercise of poor judgment by [a] member[]" and those that take the form of "formal disciplinary charges." N.Y. State School Boards Association, Legal Issues School Board Members May Encounter 17 (2018), perma.cc/KTS5-MJGF (collecting cases).

The difference is not subtle. A permissible position statement might say "Member Smith's words to the press are reprehensible and do not reflect the values of mutual respect that our elective body strives to uphold," and stop there. An impermissible punishment would invoke the body's disciplinary authority to go further, adding that "We therefore conclude that Smith's speech violates the code of conduct and expel her," or fine her $50,000, or censure her and revoke her privileges of office. Both options permit the body to express itself, but only one is disciplinary, crossing the line into the realm of punishment and deterrence.

**B.** HCC's and the United States' contrary position is a distortion of the government speech doctrine, and it is not compatible with basic First Amendment principles. True enough, it is sometimes the "business of government to favor and disfavor points of view." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 468 (2009) (citation omitted). But the cases in which the Court has made that observation do not remotely endorse governmental authority to censure disfavored policy positions and order expressions of public support for those positions to "immediately cease." Pet. App. 45a.

The Court held in *Summum* and *Walker* v. *Texas Division, Sons of Confederate Veterans*, 576 U.S. 200 (2015), for example, that private citizens may not compel the government to adopt particular messages on public monuments or specialty license plates. Wilson's position is not that the Board had to adopt a resolution agreeing with him; his point is only that it was forbidden from punishing him for his views. And in *Johanns* v. *Livestock Marketing Association*, 544 U.S. 550 (2005), the Court held only that there is "no First Amendment right not to fund government speech" on packaging labels. *Id.* at 562. This case is not about a supposed right to avoid compelled speech on consumer products.

The United States' assertion (Br. 18) that the censure here "easily qualifies as governmental speech under those precedents" is thus unsupportable. Indeed, if HCC and the United States were correct, cases like *Ibanez*, 512 U.S. 136, and *Peel*, 496 U.S. 91—both of which found that formal censures by state licensing boards violated the First Amendment (see FIRE Br. 3-4)—would have been wrongly decided.

HCC's and the United States' position is also limitless and would lead to intolerable results. If they were correct that censures are innocuous expressions of government opinion, there would be nothing to stop elective bodies (and government agencies of all kinds) from censuring students, faculty members, journalists, and outspoken citizens for their speech and lawsuits, revoking privileges in response. *Cf.* Compl. ¶ 2, *Cable News Network* v. *Trump*, No. 1:18-cv-2610 (D.D.C. Nov. 13, 2018) (revocation of press-pass privileges for speech that "failed to 'treat the White House with respect'"). If a censure entered for a trustee's speech is mere government "counter-speech," a censure entered for speech by those other individuals would be, too. Again, a censure does not convert from a permissible expression of opin-

ion into an impermissible imposition of punishment depending only on identity of the person against whom it is targeted.

The United States is correct (Br. 24) that "this case does not involve any of those [other] circumstances." But the point is that its and HCC's government-speech argument has no logical limit. It thus cannot be squared with *Ibanez* and *Peel*, which held that censures against licensed professionals are punitive and can violate the First Amendment, and it would mean that governmental bodies of any kind could chill the speech of dissenters by issuing censures with impunity. That ahistorical, anti-speech result is a powerful reason to reject the government-speech argument.

## IV. HCC'S REMAINING ARGUMENTS ARE NOT PERSUASIVE

### A. Affirming the judgment below will not stifle local political debate

HCC asserts (Pet. Br. 29-38) that a holding in Wilson's favor will inhibit rather than promote speech and the exchange of ideas. That is backward.

We already have explained that there were at least two other traditional methods for the Board majority to address Wilson's speech in non-punitive ways—methods that would have been just as "speech-rich" (Pet. Br. 36) as any other. First, individual members of the Board could have spoken out in their individual capacities against Wilson's views. As HCC rightly notes, the statements of individual elected officials are not punishments and thus cannot constitute adverse actions. See Pet. Br. 12 (citing *Standard Computing Scale Co.* v. *Farrell*, 249 U.S. 571, 575 (1919)). An exchange of antagonistic statements by rival trustees in the press, explaining their grounds of disagreement, would have been true "public speech and public counter-speech" (Pet. Br. 33). And

holding that an official governmental censure is punitive would not threaten the availability of that non-punitive avenue of expression.

Second, a conclusion that the Board's punishment of Wilson violated the Free Speech Clause would not prevent the Board from adopting a non-punitive resolution taking an official position on either the substance of Wilson's criticisms or the propriety of his methods of expression. See *supra* at 37-38. Adoption of such a resolution in theory would have entailed all the same hearings and community engagement that HCC envisions (Br. 34-36) take place in "local censure debate[s]." The problem is not that the Board took an official position (see Pet. Br. 31, U.S. Br. 20)—it's that it did so in a resolution issued under the Board's disciplinary power, meting out formal punishment.

Ruling in Wilson's favor would do nothing to restrict the opportunities for the Board majority to speak out in opposition to Wilson's views in these other ways. The judges dissenting below were thus wrong to worry that it would inhibit the "duty of legislators" to address objectionable statements by their colleagues. Pet. App. 36a.

But the inverse is not true. A ruling for HCC—one upholding an elective body's authority to formally discipline its members for their protected speech—would be extraordinarily damaging to the open exchange of ideas and the First Amendment's concern for a well-informed electorate. The express purpose of the censure was to chill Wilson's speech, to bully him (and others like him) into silence. Concern for the free flow of ideas thus counsels strongly in Wilson's favor.

### B. The judgment below is consistent with history and tradition and implicates a very narrow range of official censures

Upholding Wilson's right not to be censured for speech uttered outside the legislative sphere is also consistent with history, tradition, and modern practice.

**1.** Official censures by elective bodies against their own members are very rare. In the 232 years since the first Congress, more than 12,400 individuals have served as a U.S. Representative or Senator. See Office of the Historian, U.S. House of Representatives, *Total Members of the House & State Representation* (Jan. 21, 2021), perma.cc/8KVV-ZPWL. In all that time, with all those members, the House of Representatives has formally censured just 23—most occurring in the two decades immediately before, during, and after the Civil War. See Maskell, RL31382 at 11, 20-21 (listing instances through 2012); H.R. Res. 1074, 116th Cong. (2020). The Senate has censured just nine. See Anne M. Butler & Wendy Wolff, *United States Senate Election, Expulsion, and Censure Cases* 1793-1990, at xxix (1995).

The States' post-Revolutionary experience demonstrates an even more guarded approach to formal censures. "In fact, disciplinary actions in general are fairly uncommon" among American state legislatures. NCSL, *supra*, at 6-3. Just 21 state legislative chambers have ever censured a member. *Ibid.* And those that have done so, have done so infrequently. The New York legislature, for example, has censured just six assemblymen and senators over the past two centuries. See *List of New York State Legislature Members Expelled or Censured*, Wikipedia, perma.cc/HQ4K-ZHD5.

The cautious and infrequent use of formal censures by federal and state legislative assemblies is powerful evidence that freewheeling censures for extra-legislative speech are not, in fact, a part of the American tradition.

**2.** Although the United States asserts (Br. 7) that "the House and Senate have throughout their histories disciplined Members for their speech," it omits that each of those censures was for speech taking place *within* the legislative sphere. In 1834, for instance, William Stanbery was censured for "us[ing] words insulting to the Speaker * * * during debate" on the House floor. 2 Ascher C. Hinds, *Hind's Precedents of the House of Representatives of the United States*, ch. XLII, § 1248, at 799 (1907). So too of all the rest.[24]

For its part, HCC points (Br. 23) to the censure of Senator McCarthy, but that is no help, either. To the extent that McCarthy's censure concerned his objectionable "characterizations and charges" made in his speech "to the public press" (S. Res. 301, 83d Cong., 100 Cong. Rec. 16,392 (1954)), the speech was brought within the legislative sphere when the senator personally "inserted" it as a written statement into "the Congressional Record" (*ibid.*). See 100 Cong. Rec. 15,948 (1954). As we have explained, this case does not implicate the power to censure for speech within the legislative sphere. And none of the congressional censures cited by HCC or the United States turned on speech taking place outside the legislative sphere, as here.

At the local and municipal level, HCC asserts (Pet. 19 & n.11) that elective assemblies issue censures at a rate of 20 or more every month. And it claims (Br. 9) that those local censures are "often in response to

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[24] See the censures of Joshua R. Giddings in 1842 (*id.* at § 1256, at 807), Alexander Long in 1864 (*id.* § 1252, at 803), John W. Hunter in 1867 (*id.* § 1249, at 801), Fernando Wood in 1868 (*id.* § 1247, at 798), Edward D. Holbrook in 1869 (*id.* § 1305, at 867), John Y. Brown in 1875 (*id.* § 1251, at 802), William D. Bynum in 1890 (*id.* § 1259, at 810), and Thomas L. Blanton in 1921 (Maskell, RL31382, at 20).

speech by individual members that some in a given community find offensive."

HCC's evidence does not bear out its claim. Assuming it is correct that local bodies issue censures at a rate 20-or-more per month, there are many tens of thousands of censures throughout American history from which to draw examples of official discipline for extra-legislative speech. Yet HCC has been able to identify just 15 examples (see Pet. Br. 25-28; Pet. 20-21)—at least four of which, so far as we have been able to determine, involved censures for speech uttered within the legislative sphere and are thus inapposite.[25] As for the remaining 11 examples, all occurred in recent years, and just about half resulted in federal lawsuits asserting violations of the First Amendment. See Pet. Br. 25 n.15. Meanwhile, the appendix to this brief identifies (at 1a-2a) the codified policies of 21 municipalities across the Nation specifying that it is never appropriate to impose a censure in response to a member's speech.

Those are indications that formal legislative censures for speech outside the legislative sphere are anomalous, objectionable, and not at all part of "settled and established practice" (*Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2326 (2020)) among elective assemblies in

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[25] See Michael Brun, *River Falls City Council Censures Member for 'Derogatory and Unprofessional' Comments in Face Mask Debates*, RiverTowns (Aug. 11, 2020), perma.cc/HV5V-FY5Z (censure for use of "deragotory and unprofessional" language "at the July 28, 2020 meeting of the River Falls Common Council"); Jenny Berg, *St. Cloud City Council Censures Brandmire for 'Yellow Star' Remark in Mask Debate*, St. Cloud Times (Aug. 17, 2020), perma.cc/FTS7-H3XH (censure for offensive statements made "[at a] meeting" of the council); *LaFlamme* v. *Essex Junction School District*, 750 A.2d 993, 994 (Vt. 2000) (censure for "offensive" speech at the "May 1995 meeting of the Village of Essex Junction Board of Trustees"); *Butler* v. *Harrison*, 124 Ill. App. 367, 368 (Ill. App. Ct. 1906) (censure for indecorous accusations "on the floor of the council").

America. That is not surprising in light of the extensive historical evidence that the Founders intended to reject the English doctrine of contempts and thus to restrain the authority of legislative bodies to punish their members for protected speech.

* * *

The Board and its members had multiple non-punitive avenues for expressing their disagreement with Wilson's views. They chose a different path, instead finding him guilty of rule violations and disciplining him with a formal censure that revoked his privileges of office and commanded him to "cease and desist" his public disagreements with the Board. That is not government counter-speech; it is punishment, imposed pursuant to the Board's disciplinary power.

Because it was adopted in response to Wilson's protected speech and petitions, the censure violated the First Amendment.

## CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted.

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# APPENDICES

**APPENDIX A**

Non-exhaustive list of municipal codes and bylaws forbidding the adoption of formal censures by elective bodies in response to members' speech:

- Alamogordo, N.M. Code of Ordinances § 2-03-570-(b)(4)(a)(3) (Dec. 2, 2014), perma.cc/JX9A-J3CZ
- City of Havre de Grace, Md. Code § 67-7(G)(2)(c)(3) (May 20, 2019), perma.cc/RER3-SMT8
- City of San Jose, Cal., *Council Conduct Policy* (Nov. 30, 2004), perma.cc/C8AK-BSVX
- City of Yorba Linda, Cal., *City Council Policies—Policy: Code of Conduct for Elected and Appointed Officials*, at C-12 Issue 3 (June 2, 2020), perma.cc/-E5P6-QZAA
- Coronado Unified School District, *Bylaw 9005: Governance Standards* (Mar. 11, 2021), perma.cc/2TBL-JFXP
- D.C. City Council, *Rules of Organization and Procedure for the Council of the District of Columbia* § 655 (2019-2020), perma.cc/2UT8-Q73D
- D.C. Board of Education, *Bylaws of the D.C. State Board of Education* § 8.5 (Dec. 21, 2016), perma.cc/-VQ27-NFXM
- DeSoto, Tex. Integrated School District, *DeSoto ISD Board of Trustees Operating Procedures 2020-2021*, at Part C(5)(c) (Jan. 19, 2021), perma.cc/PWC3-PGK2
- Elsinore Valley, Cal. Municipal Water District, *Elsinore Valley Municipal Water District's Commitment to Board's Best Management Practices*, at Part IX(A)(ii) (May 27, 2021), perma.cc/RNX9-C2R4
- Milpitas Unified School District, *Board Bylaws 9005.1—Governance Standards: Censure and Procedures* (Jan. 14, 2020), perma.cc/JXJ3-PEXY

- Mountain View Wishman School District, *Bylaws of the Board 9272—Censure Policy and Procedure* (Oct. 3, 2013), perma.cc/7625-HMMT
- Newark Unified School District, *Board Bylaws 9280—Censure Policy and Procedure* (May 19, 2015), perma.cc/8GRD-3MGG
- Oakland, Cal., City Council Resolution No. 87044, *Oakland City Council Censure Policy and Procedures*, at 23 (Feb. 2018), perma.cc/JW42-6B6J
- Orange Unified School District, *Bylaws of the Board 9005(a)—Governance Standard and Censure Policy and Procedure* (Dec. 2005), perma.cc/J25D-J5EX
- Pasadena Unified School District, *Board Bylaws 9271—Code of Ethics* (May 10, 2011), perma.cc/-HJN6-SX7Z
- San Diego County Office of Education, *Bylaws of the Board 9006—Censure* (Sept. 20, 2020), perma.cc/-SBN9-FDTG
- Santa Maria Airport District, *Official Administrative Code of the Santa Maria Public Airport District* § 14 (July 9, 2020), perma.cc/5SDJ-UM2T
- Springfield, Ill., *City Council Rules and Procedures—10. Violations of Rules* (Apr. 2013), perma.cc/RFY3-CB5F
- Thermalito Water & Sewer Dist., *Policy and Procedures—Code of Ethics* (Nov. 19, 2019), perma.cc/-5KVK-CEA4
- Ukiah Unified School District, *Board Bylaws 9011—Disclosure of Confidential/Privileged Information* (Nov. 12, 2013), perma.cc/VC8K-GGC9
- Valley Sanitary District, *Policy Manual* § 2.8.3, perma.cc/V7CS-N7AS

## APPENDIX B

Non-exhaustive list of state and municipal codes and bylaws that grant members trial-like protections as a precondition to the imposition of a censure:

- Ala. Code § 16-1-41.1 (requiring 30-day written notice and opportunity to request a hearing and to respond prior to censure)
- Alamogordo, N.M., Code of Ordinances § 2-03-570-(b)(4)(a)(3) (entitling members to notice, the right to file a written answer, to appear at a hearing with counsel, to submit testimony, and to examine and cross-examine witnesses as a precondition to discipline, including censure)
- Bristol, R.I., Code of Ordinances pt. II, art. 13 § 1315 (entitling members to be heard at an open hearing and to call witnesses as a precondition to discipline, including censure)
- Buncombe County, N.C. Schools, *Policy 2118—Censure of Board Members* (Sept. 5, 2013), perma.cc/-YQ8V-AJ7W (entitling members to notice, an open hearing, and to submit a written response to allegations prior to censure)
- *Castriotta* v. *Board of Education of Roxbury*, 50 A.3d 61, 63 (N.J. Super. Ct. App. Div. 2012) (describing the censure procedures in the censure of a Roxbury school board member as "conform[ing] in all material respects to a due process hearing" such that it constituted a "legal proceeding" for purposes of state law)
- Charleston, S.C., Code of Ordinances ch. 2, art ii, div. 1 § 2-29 (entitling members charged with rule violations to a public disciplinary hearing, notice of which must be published in public newspapers in advance, as a precondition to discipline, including censure)

- City of Albion, Mich., Code of Ordinances ch. 1 § 1-28 (entitling members to notice, the presence of counsel, and to present witnesses and argument as a precondition to discipline, including censure, for rule violations)
- City of Bangor, Me., Code pt. 1, art. I § 33-3 (entitling members to notice and a hearing prior to censure for violations of the Code)
- City of Bloomington, Minn., *Council Rules of Procedure*, at 10-11 (Apr. 5, 2021), perma.cc/GPF8-TTPB (entitling members to a determination of whether a censure hearing is warranted, and if so to notice, adequate time to prepare a defense, an opportunity to make argument and confront accusers, and to representation by counsel prior to censure)
- City of Dover, N.H., Code of Ordinances pt. I, ch. 21 § 21-14 (entitling members to notice and an evidentiary hearing at which they may argue and present evidence and examine sworn witnesses as a precondition to discipline, including censure, for code of ethics violations)
- City of Papillion, Neb., Code of Ordinances art. IV § 51-33 (entitling members to a public hearing during which charges must be proved by a preponderance of the evidence and at which they have the right to representation by counsel, to present evidence, and to cross-examine witnesses as a precondition to discipline, including censure, for code of ethics violations)
- Colorado Springs, Colo., Ordinance No. 16-122 (Dec. 2016) (entitling council members accused of rules violations to a hearing at which the "prosecution" bears the burden of proof by clear and convincing evidence and members may present witnesses and exhibits as a precondition to discipline, including censure)

- County of Tolland, Conn., *Charter of the Town of Tolland* (Nov. 6, 2017), perma.cc/59GD-MYRS (entitling council members to notice and the opportunity to be heard at a public hearing prior to censure for violating provisions relating to filling town positions)
- Fayetteville, Ga., Code § 43-18 (entitling members to notice and a hearing before the ethics board at which they can call witnesses and present argument as a precondition to discipline, including censure, for code of ethics violations)
- North Plains, Or., Municipal Code § 1.05.185(4) (entitling members to present a defense including rebuttal evidence, to be represented by counsel, and to have violations proved to a moral certainty prior to censure)
- Richland, Wash., Municipal Code § 2.26.064 (entitling members to prepare and present a defense at a hearing at which they may be represented by counsel and present third-party sworn testimony as a precondition to discipline, including censure, for code of ethics violations)
- City and County of Honolulu, Haw., *Rules of the Council* (Jan. 2021), perma.cc/EP79-387M (entitling members to notice and an opportunity to present evidence and to be heard in their own defense at a public hearing prior to censure)
- South Bend, Ind., Code of Ordinances Ch. 2, art. 1 § 2-10.1 (entitling members to immediate notice of any ethics complaint, to a private session to determine probable cause, to view and copy all evidence, to present testimony and evidence, to be present and represented at a full hearing, to call and examine witnesses, to introduce exhibits, and to cross-examine witnesses as a precondition to discipline, including censure, for code of ethics violations)

- Springfield, Ill., *City Council Rules and Procedures—10. Violations of Rules* (Apr. 2013), perma.cc/RFY3-CB5F (entitling members to file a written response, to a determination of good cause to proceed with a censure hearing, to be represented by counsel, and to present witnesses, and limiting censures to a one-year statute of limitations and to willful and intentional conduct proved to a substantial evidence standard prior to censure)
- Stockton City, Cal., *Policy Manual—Policy No. 100-11: Council Censure Policy* (Dec. 17, 2013), perma.cc/-2PXM-CZJS (entitling members to written notice, a public hearing, an opportunity to be heard, and adequate time to prepare a defense prior to censure)
- Town of Watertown, Mass., *Rules of the Town Council* (Feb. 25, 2020), perma.cc/KQ8V-5FE6 (entitling members to written notice, an open session, the right to speak on their own behalf, advice of counsel, and the creation of an independent record of the meeting at their own expense prior to reprimand or censure)
- Utah State Board of Education, *Bylaws of the Utah State Board of Education* (May 6, 2021), perma.cc/-FYZ9-XMJT (entitling members to "adequate due process" prior to reprimand or censure)
- Village of Newburgh Heights, Ohio, *Rules of Council* at Rule 050, perma.cc/N7N7-XUU8 (entitling members to present argument and evidence in defense and to representation by counsel prior to censure)
- Wilmington, Del., Code art. V, div. 6 § 2-345 (entitling members of the city council to notice, an opportunity to be heard, to be advised and assisted by counsel, and to cross-examine witnesses as a precondition to discipline, including censure, for code of ethics violations)