

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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HOUSTON COMMUNITY COLLEGE SYSTEM, )  
  ) Petitioner, )  
  ) v. ) No. 20-804  
DAVID BUREN WILSON, )  
  ) Respondent. )  
- - - - -

Pages: 1 through 86  
Place: Washington, D.C.  
Date: November 2, 2021

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4                            Petitioner,                    )

5                            v.                                    ) No. 20-804

6   DAVID BUREN WILSON,                    )

7                            Respondent.                    )

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10   Washington, D.C.

11   Tuesday, November 2, 2021

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13                           The above-entitled matter came on for  
14 oral argument before the Supreme Court of the  
15 United States at 10:01 a.m.

16

17   APPEARANCES:

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19       of the Petitioner.

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21       Department of Justice, Washington, D.C.; for the  
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23       Petitioner.

24   MICHAEL B. KIMBERLY, ESQUIRE, Washington, D.C.; on  
25       behalf of the Respondent.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: Justice Gorsuch has a stomach bug and, out of an abundance of caution, will participate in this morning's arguments remotely.

We'll hear argument first this morning in Case 20-804, Houston Community College System versus Wilson.

Mr. Morris.

ORAL ARGUMENT OF RICHARD A. MORRIS

ON BEHALF OF THE PETITIONER

MR. MORRIS: Mr. Chief Justice, and may it please the Court:

The Fifth Circuit recognized a new cause of action based on an elected body censuring a member. That decision is wrong for two reasons. First, it ignores this country's history and parliamentary tradition, which recognize the right of elected bodies to govern their own affairs, including censuring members for violations of governance rules. And, second, it makes the Free Speech Clause into both a cudgel and a shield. The Free Speech Clause undeniably protects a member's right to

1 criticize the body upon which they sit, but it  
2 does not insulate the member from the elected  
3 body's speech in response.

4           Wilson basically concedes the Board's  
5 right to respond to his violations of its  
6 governance rules with its own speech when he  
7 argues the Board could have passed a position  
8 statement calling his behavior inappropriate,  
9 indecorous, and regrettable as long as it didn't  
10 use the words "censure" or "punishment."

11           But the Free Speech Clause doesn't  
12 dictate what words an elected body can use to  
13 reprimand one of its members, and elected bodies  
14 enforce rules with discipline, not position  
15 statements.

16           Wilson focuses instead on three  
17 additional measures that were included in the  
18 resolution of censure, but this case involves  
19 only speech. The Fifth Circuit relied on  
20 censure alone in creating its new cause of  
21 action, and whatever might be true in other  
22 contexts, that holding is wrong in the context  
23 of this case.

24           Allowing retaliation actions based on  
25 censures will destabilize legislative

1 self-governance, forcing courts to referee local  
2 political disputes. Judges will be asked to  
3 draw unmanageable lines between a politician's  
4 speech and conduct or legislative and  
5 non-legislative speech. And boards like HCC's  
6 will have to shy away from enforcing their rules  
7 of governance because of the threat of  
8 litigation.

9           This is not the right result. As  
10 Judge Ho said, the First Amendment protects  
11 freedom of speech, not freedom from speech.

12           We ask this Court to hold that a  
13 member of an elected body may not sue for  
14 retaliation on a censure alone.

15           And I welcome the Court's questions.

16           JUSTICE THOMAS: Counsel, could a -- a  
17 -- a legislative body -- is there any limit to  
18 its authority to expel or to sanction a member?

19           MR. MORRIS: Not under the Free Speech  
20 Clause, Your Honor.

21           JUSTICE THOMAS: Is there any limit?

22           MR. MORRIS: There might be limits,  
23 for instance, if we were speaking about an  
24 Establishment Clause here --

25           JUSTICE THOMAS: Well, let's just say

1 if there's an expulsion for basically the  
2 conduct that we have here.

3 MR. MORRIS: That would be within the  
4 realm of the legislative body to police its own  
5 members.

6 JUSTICE THOMAS: What about  
7 imprisonment?

8 MR. MORRIS: I'm sorry, Your Honor?

9 JUSTICE THOMAS: What about  
10 imprisonment? What -- what can't you do? I'm  
11 just asking to see whether or not there are any  
12 limits to sanctioning.

13 MR. MORRIS: Well, I -- I think that  
14 imprisonment, which might have been common in  
15 the common law tradition of England, is not  
16 within this nation's history and tradition.

17 JUSTICE THOMAS: So are there limits  
18 at common law, as opposed to -- as I understand  
19 your argument, you're saying that you -- it's  
20 government speech and you can say what -- you  
21 can censure him. But the -- now you say the  
22 limits are based in history or tradition.

23 Why don't we just look to history or  
24 tradition to see the authority of the  
25 legislature in the first instance rather than

1 create this new doctrine?

2 MR. MORRIS: I think you can do both  
3 those things and particularly agree that you  
4 could limit your opinion to finding that history  
5 and tradition support the tool of censure  
6 without expounding on this Court's government  
7 speech jurisprudence.

8 JUSTICE THOMAS: Say that again?

9 MR. MORRIS: I think that this Court  
10 could reach a decision solely based on history  
11 and tradition, finding that censure is a tool of  
12 a legislative body and, based on that government  
13 interest, find in favor of HCC, without speaking  
14 to the issue of government speech.

15 JUSTICE THOMAS: Thank you.

16 CHIEF JUSTICE ROBERTS: Well, a lot of  
17 the history and tradition that you talk about  
18 was before there was a First Amendment, right?

19 MR. MORRIS: That's correct.

20 CHIEF JUSTICE ROBERTS: Well, I don't  
21 know how valuable that is then, particularly  
22 since, with respect to some of the episodes, it  
23 was clear that the framers didn't like the  
24 result.

25 MR. MORRIS: There certainly were



1 cases where the framers debate -- debated,  
2 particularly as it related to censuring of  
3 private citizens, whether that was not -- wise  
4 or not. But the parliamentary tradition of  
5 using censure as a tool to police members,  
6 merely a government expression of public rebuke,  
7 that predated the founding of the nation and  
8 continued through it today. If you look at  
9 almost any manual or parliamentary history in  
10 this nation, you're going to find the tool of  
11 censure included within it.

12 I represent public school districts in  
13 Texas. There are some 1100 of them. All of  
14 them govern themselves by Robert's Rules of  
15 Order, which also has the tool of censure within  
16 it.

17 To deny the tool of censure to a  
18 government body, particularly in the era of the  
19 Internet, which was far different than this  
20 Court faced when it recognized the remedy of --  
21 of a free speech retaliation claim, is no small  
22 matter. These boards have very few tools to  
23 police their members, censure being one of the  
24 predominant ones and one that's been recognized  
25 for more than 200 years in this country.

1 JUSTICE SOTOMAYOR: Justice Thomas's  
2 question begs a question here. I know that you  
3 say there should have been a cross-petition on  
4 the other sanctions imposed. But assume we  
5 disagree, just assuming, that we're looking at  
6 rendering someone ineligible for an officer  
7 position, ineligibility for travel  
8 reimbursement, and added approval required for  
9 the use of community funds.

10 Those were the three additional  
11 sanctions imposed. How do we deal with those?  
12 You've got an easy case on censure historically,  
13 but how do we approach those?

14 And I don't know that you've answered  
15 completely just the essence of Justice Thomas's  
16 question, which assume others: withholding pay,  
17 not just reimbursement, but suspending  
18 somebody's salary, fining them, jailing them,  
19 removing staff. We can -- a whole list of  
20 things.

21 What's the lens that we use to  
22 determine whether those are within some sort of  
23 non-actionable First Amendment retaliation and  
24 which aren't?

25 MR. MORRIS: I think this Court should

1 follow the Fifth Circuit's decision in that  
2 regard, as well as every other circuit that's  
3 considered the issue about other political  
4 punishments and found that elected officials  
5 don't have entitlements to those punishments,  
6 and so they're not sufficiently adverse to chill  
7 their speech.

8 JUSTICE SOTOMAYOR: Well, you have  
9 entitlement to pay.

10 MR. MORRIS: Well --

11 JUSTICE SOTOMAYOR: You have  
12 entitlement not to be jailed.

13 MR. MORRIS: -- that might be true  
14 among some elected bodies. That's not true  
15 amongst HCC. Those are all volunteer positions.

16 JUSTICE SOTOMAYOR: Tier positions.

17 MR. MORRIS: They don't have pay.

18 But I think, more importantly, what I  
19 would suggest to this Court, that when it  
20 created the remedy in Pickering, it presumed,  
21 because of the disparity of power in that  
22 employment relationship --

23 JUSTICE SOTOMAYOR: Pickering, I don't  
24 see how Pickering is relevant here. This is not  
25 an employee of the legislature, and this is not

1 someone the legislature picked. This is someone  
2 the people picked.

3 MR. MORRIS: So I would agree --

4 JUSTICE SOTOMAYOR: And so to apply  
5 Peeker -- Pickering, which had to do with policy  
6 --

7 MR. MORRIS: I agree, Justice  
8 Sotomayor, that -- that Pickering is not in any  
9 way controlling. I would simply offer that  
10 while it might have been correct in Pickering to  
11 presume that there's a chilling effect in -- in  
12 an employment situation where an employer exerts  
13 tremendous leverage in the relationship with an  
14 employee and might silence their citizen speech,  
15 that's not true in the political arena.

16 And these political punishments did  
17 not silence Mr. Wilson, and Trustee Wilson made  
18 it very clear that no reprimand would silence  
19 him. And as this Court said in New York Times  
20 versus Sullivan, elected officials are different  
21 than citizens.

22 JUSTICE SOTOMAYOR: All right. You  
23 said jail is different or might be different, so  
24 write my opinion for me.

25 MR. MORRIS: Well, I --

1 JUSTICE SOTOMAYOR: It's assuming that  
2 we're dealing with those other -- I'm not -- I'm  
3 not asking -- inviting you to write it for me in  
4 that sense, but, hypothetically, how would you  
5 say -- what are the things that legislatures can  
6 -- what are the other things that are  
7 permissible to do?

8 MR. MORRIS: Well, I would say that  
9 the three political reprimands that were  
10 included in this case just do not rise to the  
11 level --

12 JUSTICE SOTOMAYOR: Because there's no  
13 entitlement to them?

14 MR. MORRIS: There's no entitlement to  
15 them, and so -- and they would not otherwise  
16 have a chilling effect.

17 JUSTICE SOTOMAYOR: When you say  
18 "entitlement," I mean, they're part of the rules  
19 of the legislature that give you these things,  
20 so why aren't you entitled to them?

21 MR. MORRIS: Well, I -- I think that  
22 the question really becomes are the punishments  
23 -- not every punishment gives rise to a free  
24 speech retaliation claim because not every  
25 punishment creates a chilling effect.

1 JUSTICE BARRETT: Mr. --

2 MR. MORRIS: And these are fairly  
3 modest punishments.

4 JUSTICE BARRETT: -- Mr. Morris, I  
5 just wanted to clarify your answer to Justice  
6 Sotomayor. Are all of these -- are the limits  
7 that might constrain a legislature's ability to  
8 punish, you know, with imprisonment, maybe  
9 derived from other provisions of the  
10 Constitution, like maybe there are -- there are  
11 obviously going to be due process limits. Maybe  
12 even there's no historical basis for thinking a  
13 legislative body has the ability to jail a  
14 member.

15 I mean, is that -- you're -- you're  
16 framing all of this in terms of the First  
17 Amendment in your response, and I'm wondering if  
18 that's really what you mean.

19 MR. MORRIS: Well, I -- I do mean that  
20 there can -- I agree that there can be other  
21 limits, other textual limits in the Constitution  
22 and other procedural due process limits that  
23 might be afforded by state legislative bodies or  
24 local legislative bodies.

25 JUSTICE BARRETT: And I have another

1 clarifying question. Are -- are -- is it your  
2 position that the First Amendment is wholly  
3 inapplicable to the topic of legislative  
4 discipline, whether statements are uttered  
5 inside or outside of the legislative sphere, or  
6 is it that the First Amendment applies but that  
7 censure could never transgress its limits?

8 MR. MORRIS: The -- the government's  
9 discipline of its members is simply not subject  
10 to First Amendment scrutiny, and this Court  
11 should not recognize a First Amendment  
12 retaliation claim in that context.

13 Even in this Court's decision in  
14 Garcetti, the Court found that the government  
15 interest of serve -- providing services to the  
16 citizenry, coupled with concerns about  
17 separation and powers of federalism, led it to  
18 not recognize a free speech retaliation claim in  
19 that context.

20 I would suggest to the Court that the  
21 government interest here, the body's ability to  
22 police its own members, enforce -- and enforce  
23 its own rules, which protects its integrity,  
24 protects public confidence, is a far more  
25 important interest that was -- than was at stake

1 in Garcetti.

2 JUSTICE KAGAN: But, Morris, there --  
3 Mr. Morris, there is a kind of discipline which,  
4 of course, nobody would look askance at, which  
5 is to say that if a member acts inappropriately,  
6 you know, takes a bribe or misuses funds or  
7 something like that, then, of course, the  
8 legislature has it in its power to do something.

9 But the theory here is that the  
10 legislature is acting only because the -- the  
11 member has taken unpopular stance, has been  
12 critical for -- of the legislature as a whole.

13 And I guess, just to clarify the  
14 clarification, are you saying that the First  
15 Amendment has nothing to say about that no  
16 matter what the sanction is?

17 MR. MORRIS: Nothing to say about that  
18 when the -- when the sanction is either a mere  
19 censure, a government statement of its own  
20 viewpoint condemning the actions of the member.

21 JUSTICE KAGAN: No, but that's what  
22 the question is. Like, at what -- where -- and  
23 this is the same question that Justice Thomas  
24 started out with. Where is the line between,  
25 well, of course, you can censure somebody



1 versus, well, no, you can't put somebody in jail  
2 for stating an impopular -- unpopular opinion?

3 MR. MORRIS: I think it's very  
4 difficult to prejudge the issue of a body that  
5 might incarcerate an individual. I don't know  
6 that that's within the history and tradition of  
7 this country.

8 There are punishments, though, I would  
9 think that might rise to the level of an  
10 expulsion that, you know, might pose the outer  
11 limit. But even this Court recognized in Powell  
12 versus McCormack that the issues of expulsion  
13 were very different than the issues of  
14 exclusion, and maybe Bond versus Floyd sets the  
15 only outer limit, which was really about the  
16 refusal to seat a member.

17 But, once seated, the important  
18 government interest here is -- the different  
19 thing in Bond is that the -- the body has a need  
20 to be able to use the tool of censure.

21 JUSTICE KAVANAUGH: Mr. Morris, do we  
22 have to get into any of this in this case? I  
23 thought the issue, all we had to decide was a  
24 mere censure does not trigger a retaliation  
25 claim. And I think it'll be difficult,

1 potentially, to draw lines beyond that for the  
2 reasons the questions have raised.

3 Is that -- is that accurate, that all  
4 we need to resolve is the mere censure?

5 MR. MORRIS: Justice Kavanaugh, that  
6 is absolutely correct based on this Court's  
7 jurisprudence, and because the Court found in  
8 favor of HCC on these other measures, HCC only  
9 petitioned the Court relative to the censure  
10 itself.

11 And so Wilson's argument that this  
12 Court should consider the other measures would  
13 expand the judgment, and that's something this  
14 Court has said you can't do without filing a  
15 cross-petition.

16 JUSTICE KAVANAUGH: Having said that,  
17 I will ask a hypothetical, which is suppose  
18 there the censure had a resolution with it, as  
19 they do and did, and the censure resolution  
20 includes something that is false and defamatory  
21 about the censured individual.

22 Anything -- can you distinguish the  
23 censure itself from the statement in the censure  
24 resolution and can the person bring a claim  
25 about the -- the resolution, the speech and the

1 resolution?

2 MR. MORRIS: Depending on the state,  
3 there may be state law remedies for defamation,  
4 but it wouldn't be something that the First  
5 Amendment speaks to. This Court said in Paul  
6 versus Davis that sometimes there are injuries  
7 that the Court -- that the Constitution does not  
8 remedy, defamation being one of them.

9 But, here, Mr. Wilson has never  
10 contested that he did not violate the rules, and  
11 he's never contested that anything in the  
12 resolution is untruthful.

13 He simply says that the government as  
14 a whole, the majority of the body, could not  
15 respond to his speech with its own condemning  
16 speech. And we think this Court's precedent  
17 says that that's -- that's not true as a matter  
18 of history or this Court's government speech  
19 jurisprudence.

20 JUSTICE ALITO: Suppose there are --

21 MR. MORRIS: Again, the question --

22 JUSTICE ALITO: -- suppose there are  
23 two factions contesting positions on a school  
24 board and one faction narrowly wins, and when  
25 they get the majority, they say all of the

1 things that were said by the other faction  
2 during the campaign were utterly despicable,  
3 and, therefore, we are -- we -- we are expelling  
4 them all from the body.

5 Would the First Amendment permit that?

6 MR. MORRIS: The First Amendment may  
7 not allow the expulsion if that reaches the  
8 outer limits of Bond. But, certainly, the  
9 statement of condemnation that we're asking for,  
10 yes, it would certainly allow that.

11 JUSTICE ALITO: Well, would -- all  
12 right. It would allow a statement of  
13 condemnation. It might not allow expulsion.

14 Could they take away all of the normal  
15 privileges of office from the other faction, so  
16 if -- if members were allowed to use a special  
17 room, kick them out of the room, et cetera, et  
18 cetera?

19 MR. MORRIS: Yes, they could, because  
20 they police their own rules and sometimes they  
21 exact political punishments. That's just part  
22 of the hurly-burly of politics. And if they  
23 overstep, then, presumably, the voters in that  
24 jurisdiction may take them to task for it.

25 I see that I'm out of time.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel. Just one area I'd like to touch on  
3 briefly. You know, there are collective  
4 governmental bodies and there are collective  
5 governmental bodies. I mean, let's say  
6 something like the Board of Patent Appeals  
7 censures one of its three members because, say,  
8 they saw at a baseball game that, you know, he  
9 didn't stand for the national anthem.

10 Do you analyze that the same way as --  
11 as this case?

12 MR. MORRIS: It's certainly not at the  
13 -- the core of this case, where the resolution  
14 dealt with the performance of a member's duties,  
15 but I -- I do think that the First Amendment  
16 will probably still allow that speech.

17 When an elected body, in particular,  
18 the representatives, decide to make a statement,  
19 no matter how far afield we might think it is,  
20 it is a matter of public concern if the  
21 representative body and a majority of the  
22 members decide it to be so.

23 CHIEF JUSTICE ROBERTS: Well, is  
24 something like the Board of Patent Appeals a  
25 representative body? Not in the -- I mean, I --

1 I'm not recalling exactly what it's like, but I  
2 assume it's appointed by some other -- I vaguely  
3 recall that it's appointed by some other  
4 governmental officials, and its job is in no way  
5 related to policing who's standing or sitting  
6 down.

7 MR. MORRIS: Well, HCC's position is  
8 we're -- we're arguing for a rule that would  
9 govern elected bodies, and perhaps the Solicitor  
10 General has a different view about other bodies,  
11 but I would say this, Your Honor. Regardless of  
12 whether the body is elected or appointed, there  
13 are still political considerations.

14 And as the -- the Fourth Circuit  
15 recognized in Whitener, even the humblest  
16 assembly of men needs rules to govern because  
17 you have shared decision-making on positions of  
18 policy.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Justice Thomas?

22 JUSTICE THOMAS: Just one question,  
23 tangential question, Mr. Morris. Would a  
24 legislative body have the authority under your  
25 argument to censure a private citizen who

1       somehow is at odds with their rules, their --  
2       their -- within their chambers?

3               MR. MORRIS:  They very well may have  
4       the authority to do that, yes.  It's a different  
5       government interest than what we're asking for  
6       here, but, yes, under the First Amendment, they  
7       could express their own viewpoint-based  
8       condemnation of a citizen's conduct.

9               JUSTICE THOMAS:  And how far did that  
10      -- does that expression go?  And I think that's  
11      part of the question because the -- I think the  
12      -- the way that Respondent looks at it is even  
13      the censure is going to -- goes as far as a  
14      deprivation of certain privileges.

15              So, in your -- in your thinking, how  
16      far could you go with respect to a private  
17      citizen in comparison to a member of the body?

18              MR. MORRIS:  I think that this Court  
19      has never weighed the speech once it enters the  
20      marketplace of ideas, even for the government.  
21      And Justice Scalia, in *Meese versus Block*, a  
22      circuit court opinion, I think, aptly said that  
23      even citizens have to be able to endure the  
24      criticisms of government.

25              So I would not offer a rule that says

1 merely because the government speaks in  
2 condemnation of a citizen, that that would run  
3 afoul of the First Amendment. The redress for  
4 that, again, would be left to the electorate,  
5 the voters.

6 JUSTICE THOMAS: Is -- is there a  
7 historical basis for that? When we began our --  
8 our argument -- when you began your argument, I  
9 asked you about the historical basis for  
10 sanctioning the -- a member of the body. Is  
11 there a historical basis for sanctioning a  
12 private citizen?

13 MR. MORRIS: There's not much that we  
14 could find, Justice Thomas. I mean, there  
15 certainly was discussion in connection with the  
16 Whiskey Rebellion, where there was great debate  
17 between Washington, who introduced the  
18 resolution of censure, and Madison.

19 JUSTICE THOMAS: Well, and Madison  
20 wasn't particularly fond of that.

21 MR. MORRIS: He -- he was not. But no  
22 -- no rule emanated from that great debate,  
23 certainly, no rule that said that the First  
24 Amendment would have precluded the ability of  
25 bodies to censure even private citizens.



1 I imagine it would be a fairly  
2 extraordinary circumstance, and, again, if the  
3 governmental body overstepped, they'd probably  
4 pay the price at the ballot box.

5 JUSTICE THOMAS: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Breyer, anything?

8 Justice Alito?

9 Justice Sotomayor, anything? No?

10 Justice Gorsuch?

11 JUSTICE GORSUCH: No questions. Thank  
12 you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Kavanaugh?

15 Justice Barrett?

16 Okay. Thank you, counsel.

17 Mr. Joshi.

18 ORAL ARGUMENT OF SOPAN JOSHI

19 FOR THE UNITED STATES, AS AMICUS CURIAE,

20 SUPPORTING THE PETITIONER

21 MR. JOSHI: Mr. Chief Justice, and may  
22 it please the Court:

23 A censure resolution adopted by an  
24 elected body against one of its members does not  
25 abridge that member's freedom of speech.

1 Elected bodies in our Anglo-American legal  
2 tradition have long entered disciplinary actions  
3 against their members, including for those  
4 members' speech, with no suggestion that it  
5 violated principles of free speech.

6 More to the point, Congress, since  
7 1791, has censured and even expelled its members  
8 for their private speech: the 1797 expulsion of  
9 Senator Blount, the 1844 censure of Senator  
10 Tappan, and even a 2019 House resolution  
11 condemning the private speech of one of its  
12 members. In none of those instances was there  
13 any suggestion that those disciplinary actions  
14 abridged the member's freedom of speech within  
15 the meaning of the First Amendment.

16 Now, as this Court has held in a  
17 variety of contexts, including the First  
18 Amendment, that kind of constitutional history  
19 is essentially dispositive and easily resolves  
20 the question presented in this case.

21 Alternatively, you could view the  
22 censure here as a form of governmental speech,  
23 which, under this Court's cases, therefore  
24 doesn't violate anyone else's free speech  
25 rights. But, either way, this Court should

1 reverse the judgment of the court of appeals.

2 JUSTICE THOMAS: Which of the two  
3 approaches is your preference?

4 MR. JOSHI: I think -- I think we  
5 would probably prefer the first one because it's  
6 narrower. This case is really overdetermined.  
7 I think, in the briefs, I found, you know, at  
8 least five different ways in which to reverse  
9 the Fifth Circuit. And, as many members of this  
10 Court has said, easy cases sometimes make bad  
11 law.

12 And so we would recommend taking the  
13 historical approach because it is the most  
14 cabined and it is the one least likely to  
15 generate unintended consequences in -- in other  
16 areas of law, some of which we set forth at --  
17 at the back of our brief.

18 JUSTICE KAGAN: Mr. Joshi, is it clear  
19 to you that a history that's all about members  
20 of Congress applies equally to members of a  
21 local school board, part-time, unpaid? You  
22 know, there are elected representatives and then  
23 there are elected representatives. Should we  
24 try to draw any distinctions?

25 MR. JOSHI: I'm not sure that that's

1 worthwhile and for a couple of reasons.

2           First, I think, in answer to a  
3 question that had been raised earlier, I think  
4 by the Chief Justice, the reason that the common  
5 law history predating the First Amendment  
6 matters is because, just as in Tenney with  
7 legislative immunity, I think the idea is that  
8 the Constitution's grant of the disciplinary  
9 power and the expulsion power reflects a  
10 well-understood, universal, long-established  
11 tradition of legislative bodies.

12           And then the idea there between -- you  
13 know, in -- by analogy to cases like Tenney and  
14 Bogan against Scott-Harris, because it's such a  
15 well-developed and well-understood power of  
16 these elected bodies, even in states or in  
17 localities where it hasn't expressly been  
18 codified in the Constitution, we should presume  
19 that unless some provision of positive law  
20 removes the power, that it exists by virtue of  
21 there being an elected body.

22           And so I think just by analogy to  
23 legislative immunity, Tenney and Bogan, I would  
24 say the same thing should apply here.

25           JUSTICE ALITO: Is it even necessary

1 for us to take that approach? Because if we say  
2 that the First Amendment allows forms of -- of  
3 -- certain actions that have been historically  
4 taken by Congress against members of Congress,  
5 we're going down the path of drawing a line  
6 perhaps regarding the issue of which sorts of  
7 actions can be taken in retaliation for speech.

8 But, unless there's something special  
9 about the word "censure," and maybe there is,  
10 this is a very easy case. One person says  
11 something derogatory about another person, and  
12 then the other person responds by saying  
13 something derogatory about the first person.  
14 That's -- that's not a violation -- nobody's  
15 free speech rights are violated there.

16 So why not decide the case on that  
17 simple basis? Why get into the whole question  
18 of what the -- what -- what a legislative body  
19 can do, what sanctions can be taken against one  
20 of its members if it's not happy with what the  
21 member said?

22 MR. JOSHI: I think that would be a  
23 fine ground on which to decide this case. I  
24 suppose we were just taking the case as it came  
25 to the Court and as the Fifth Circuit decided --

1 decided it.

2           And our proposition is that if you  
3 were to look at it, you know, as a censure  
4 resolution adopted by an elected body, what the  
5 history tells us is, first, that is within the  
6 traditional power of an elected body, and then,  
7 second, that that exercise, even if taken in  
8 response to a member's speech, does not abridge  
9 that member's freedom of speech.

10           And so it's the combination of the  
11 power and the particular right that's being  
12 alleged to have been violated, and we're saying  
13 the history is really clear on that combination.  
14 And if that's all you say, that would not only  
15 resolve the case, but it would do so, I think,  
16 in the narrowest possible way.

17           JUSTICE BREYER: How -- how clear is  
18 our own rule that -- that we can't look at these  
19 other things that happened to him? It's true  
20 you didn't cross-petition, but you also can  
21 affirm on a ground that's in the case that's,  
22 you know, reasonably related. I think we've  
23 done that quite a lot.

24           I -- I'm curious because suppose that  
25 Mr. Wilson bought a ticket to El Paso, where

1 he's going to speak to a group of high school  
2 students, and he buys some catalogs from the  
3 community college and he wants to pass them out  
4 and criticize everybody in sight.

5 The ticket cost him \$500, it was a  
6 very expensive plane, and he spent a thousand  
7 dollars on all these catalogs, and now he asks  
8 for reimbursement. And everybody else is  
9 reimbursed. But the Board says: Read the  
10 resolutions. We're not going to pay you.  
11 You're out \$1500.

12 Now that seems more of an -- of a  
13 question. Are we -- can we not get into that  
14 and why not and -- and what's the answer to it?

15 MR. JOSHI: All right. So -- so let  
16 me take those in order.

17 I -- I think the -- the first question  
18 is, can you get into it, as in is this  
19 jurisdictional? No, it's not. This is clearly  
20 a matter of the Court's prudence.

21 The second question is, well, could  
22 you just -- is this an example of simply  
23 affirming on another ground? I'm not quite sure  
24 it is, and here's why.

25 First of all, you wouldn't be -- you

1 -- you would be reversing that portion of the  
2 Fifth Circuit's judgment that expressly said  
3 that those did not form -- that he hadn't stated  
4 a claim for those.

5           But, second, I think -- and, again,  
6 this is not a jurisdictional issue, but, for  
7 example, if you were to just affirm the judgment  
8 or if you denied cert in the first instance, I'm  
9 not sure the Fifth Circuit's mandate would have  
10 permitted him on remand to seek discovery and  
11 seek a theory of damages related to those other  
12 actions.

13           He could only, I think, seek damages  
14 for the censure itself, at least according to  
15 the Fifth Circuit's judgment. So I do think it  
16 wouldn't just be an affirmance of the judgment.  
17 It would be an expansion of it, which would  
18 ordinarily require a cross-petition.

19           But setting all of that aside, I think  
20 your question was, you know, on the merits, what  
21 if they denied him funding? That is admittedly  
22 a much more difficult case.

23           But I think what you would do in that  
24 scenario, if you adopt our first historical  
25 argument, is you would ask the same question:



1 Is this the kind of disciplinary power that has  
2 been exercised by elected bodies, and then would  
3 the exercise of that power in response to a  
4 member's speech abridge that member's freedom of  
5 speech?

6 And on this front, I guess I can offer  
7 just analogies, right? So, for example, we know  
8 that it's a long traditional power for an  
9 elected body to strip members of committee  
10 assignments and committee chairpersonships and  
11 other plum positions. That also comes sometimes  
12 with perks of the job.

13 And those have never been thought to  
14 be abridging anyone's freedom of speech. In  
15 fact, those sorts of things are often done  
16 purely on a viewpoint basis. And so it --

17 JUSTICE KAGAN: So where is the line  
18 that you would draw, Mr. Joshi? What are the  
19 impermissible responses to speech?

20 MR. JOSHI: It -- it's hard to come up  
21 with an infinite catalog of them. I will offer,  
22 you know, one. For example, this Court in  
23 Kilbourn against Thompson specifically addressed  
24 imprisonment and made clear that, although  
25 Parliament could exercise that power, in

1 America, we split apart -- one of the reasons  
2 Parliament could do that was because it also sat  
3 as a court of review.

4 Here in America, we separated out the  
5 judicial, the executive, and the legislative  
6 functions, and so that power to imprison, to the  
7 extent it remained in Congress, would be --

8 JUSTICE KAGAN: How about docking the  
9 salary of a representative?

10 MR. JOSHI: So fines have certainly  
11 been a traditional form of punishment. Indeed,  
12 in the most recent House censure in 2020, they  
13 fined the member \$50,000. My understanding, I  
14 read in the paper this morning, that the House  
15 has fined another member for violate -- you  
16 know, for violation of rules, and those fines  
17 have accrued. So, to the extent you think  
18 docking salary is analogous to fines, that would  
19 be a permissible punishment.

20 That said, candidly, we have not found  
21 a history of Congress, especially in the framing  
22 area, having imposed a fine as discipline in  
23 response to a member's speech. So I can't tell  
24 you that there is a historical justification in  
25 the same way I am for the censure that a fine

1 would be permissible, but that's the kind of  
2 argument that I think would be made.

3 JUSTICE KAGAN: How about taking away  
4 a member's staff and -- and really all the  
5 things, all the -- the ability to serve in the  
6 job, whether it's committee assignments or floor  
7 privileges or, you know, essentially just  
8 stripping the member of any ability to do the  
9 job as his representatives thought he would?

10 MR. JOSHI: Again, those -- those --  
11 those could present difficult and maybe  
12 fact-sensitive questions. But I think, at least  
13 from the historical side, you would search for  
14 analogies to those kinds of actions.

15 My guess, as I said, is that committee  
16 assignments and chairpersonships and any  
17 associated perks, you know, a bigger office,  
18 maybe a slightly bigger staff, those would  
19 probably be fine, and I think we could probably  
20 find a historical justification for it.

21 JUSTICE KAGAN: I mean, does this  
22 strike you as a fruitful endeavor as to -- as to  
23 -- as to -- as to try to figure out what they  
24 did several hundred years ago with respect to  
25 these very specific kind of punishments?

1           I mean, maybe we'll find them and  
2 maybe we won't and maybe we'll just pick out our  
3 friends in a crowd.

4           MR. JOSHI: That -- that -- that could  
5 well be right, but I -- I guess my point here is  
6 that -- and I'll just come back to -- this is a  
7 really easy case. And so, on this easy case,  
8 because there is this very obvious historical  
9 tradition of censoring and expelling members,  
10 including in response to their speech on a  
11 viewpoint basis, with no suggestion that it  
12 abridged the member's freedom of speech, that is  
13 a really easy way to decide this case.

14           And that's the kind of mode of  
15 analysis this Court employed, for example, in  
16 Minnesota Republican Party against White, Nevada  
17 Ethics Commission against Carrigan and even the  
18 concurring opinion in that case.

19           And because that history is so  
20 obvious, that is the sort of narrowest ground on  
21 which to resolve this case and we think the  
22 safest ground simply because it'll just avoid  
23 any broad statements here that might be obvious  
24 in the easy context of this case that could be  
25 lifted out of context and inadvertently have

1 some spillover effects.

2 JUSTICE ALITO: Do you think that  
3 legislative bodies are different from other  
4 multi-member government bodies with respect to  
5 all of this, for example, multi-member agent  
6 administrative agencies or multi-member  
7 appellate tribunals?

8 MR. JOSHI: So, as far as history  
9 goes, yes, because we do have a historical  
10 tradition of elected legislative bodies  
11 exercising discipline over their members.

12 I can't really say the same about  
13 multi-member appointed bodies like the -- like  
14 the Patent Board or like a -- like a  
15 multi-member court. So given that, our argument  
16 there doesn't work. Some of the other arguments  
17 in the briefs --

18 JUSTICE ALITO: Is there some  
19 conceptual reason to draw a distinction?

20 MR. JOSHI: I suppose I would turn to  
21 the distinction this Court drew in Minnesota  
22 Republican Party against White, in which it said  
23 because there wasn't a history of elected judges  
24 and because the early elected judges shortly  
25 after the founding really were sort of

1 politicians in robes, they would run judicial  
2 campaigns, that that lack of history suggested  
3 that a rule preventing the judge from speaking  
4 on important matters of public interest might  
5 violate the First Amendment.

6           And so I think that would be the sort  
7 of analysis you would say, is that, if there  
8 isn't the history to back it up, then I think  
9 you have to resort to sort of more traditional  
10 First Amendment analysis. In a case like this,  
11 I suppose it might be, would a similarly  
12 situated person or judge of ordinary firmness  
13 have been chilled?

14           But that's exactly the kind of  
15 analysis I think you don't need to get to here  
16 because, as this Court has said in a variety of  
17 contexts, when the history is clear -- and the  
18 history is clear that this sort of exercise of  
19 discipline does not abridge the member's freedom  
20 of speech -- that essentially resolves the  
21 question presented.

22           JUSTICE BARRETT: But, Mr. Joshi, to  
23 go to Justice Kagan's point, if we decide the  
24 case that way, then doesn't that suggest that  
25 the analysis for all the different kinds of

1 disciplinary measures or -- or, you know,  
2 sanctions that Justice Kagan and others have  
3 identified, that that would be the right  
4 analysis to apply, thereby getting into this  
5 question of, well, what was the history with  
6 respect to docking pay or stripping people of  
7 plum assignments, et cetera?

8 MR. JOSHI: In -- if a case were to  
9 present itself, yes, that's what you would have  
10 to analyze, because --

11 JUSTICE BARRETT: So it could have  
12 broader spillover effects?

13 MR. JOSHI: The analysis would apply,  
14 but I think this Court has applied exactly that  
15 analysis in a variety of situations, including  
16 the First Amendment, as in Nevada Ethics  
17 Commission, Minnesota Republican Party, Noel  
18 Canning. I mean, I could go on.

19 So the analysis is all you would apply  
20 here. You would apply it to the censure, and  
21 that would resolve this case. It wouldn't  
22 necessarily answer the question about fines or  
23 imprisonment or any other form of discipline,  
24 but you don't need to in this case, and we would  
25 urge you not to, precisely because we want to

1 avoid those kinds of spillover effects, and  
2 those should await a case in which they're  
3 presented.

4 Unless --

5 CHIEF JUSTICE ROBERTS: Thank you.  
6 Thank you.

7 MR. JOSHI: -- the Court has further  
8 questions?

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Justice Thomas, anything further?

12 JUSTICE THOMAS: Just one question.

13 The -- the resolution of censure, which we all  
14 agree that's the subject, right?

15 MR. JOSHI: Yes.

16 JUSTICE THOMAS: It includes: Be it  
17 further resolved that the Respondent is hereby  
18 publicly censured for his conduct. That's --  
19 you say we can resolve it on that.

20 But the next paragraph in that censure  
21 resolution is: Be it further resolved that the  
22 Respondent is ineligible. And it goes on to --  
23 to impose the other sanctions.

24 On what basis do we disaggregate the  
25 resolution?



1           MR. JOSHI: I think, first, as I  
2 answered Justice Breyer earlier, because that  
3 was the ground on which the Fifth Circuit  
4 decided the case, and that's the question before  
5 you here.

6           In terms of, like, why would we  
7 disaggregate --

8           JUSTICE THOMAS: So the -- the -- the  
9 confusion is we have one document that is the  
10 resolution of censure, but you're saying that we  
11 only dispose of it on the first paragraph, on  
12 the basis of the -- the first paragraph I read?

13          MR. JOSHI: Yeah, because I think the  
14 constitutional analysis should turn on  
15 substance, not on form, or, as this Court has  
16 said, the Constitution considered substance, not  
17 shadows. So you have to look at each form of  
18 punishment. And -- and you might consider them  
19 together if you think together they're sort of  
20 chilling as a whole.

21          But, in this particular case, the  
22 substance of the censure resolution on which the  
23 Fifth Circuit reached its decision was just the  
24 pure censure. The other elements are -- are not  
25 before you but I think would require separate

1 analysis, as -- as -- as I discussed with --  
2 with Justice Breyer and -- and Justice Barrett  
3 earlier.

4 JUSTICE THOMAS: Well, I think the  
5 confusion is that the resolution doesn't make  
6 that clean distinction. It's one -- all part of  
7 the censure resolution.

8 MR. JOSHI: That's true. But -- but I  
9 -- I think, you know, if -- I don't think the  
10 analysis would necessarily or ought to turn on  
11 if the body imposed four forms of discipline in  
12 four resolutions or imposed all four of them in  
13 one resolution in four paragraphs. That  
14 shouldn't change the constitutional analysis.

15 I think you still need to look at each  
16 form of substantive punishment and ask: Is this  
17 the kind of punishment that was thought to have  
18 abridged a member's freedom of speech if done in  
19 response to the member's speech? And if the  
20 answer is no, then no, and then you move on to  
21 the next one and -- and you go down the line.  
22 And it doesn't matter if they're contained in  
23 one document or -- or four documents.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Breyer?

1 JUSTICE BREYER: No.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 Justice Sotomayor, anything further?

4 Justice Kagan.

5 Justice Gorsuch, anything further?

6 JUSTICE GORSUCH: No, thank you.

7 CHIEF JUSTICE ROBERTS: Justice

8 Kavanaugh?

9 And Justice Barrett?

10 Okay. Thank you, counsel.

11 Mr. Kimberly.

12 ORAL ARGUMENT OF MICHAEL B. KIMBERLY

13 ON BEHALF OF THE RESPONDENT

14 MR. KIMBERLY: Thank you, Mr. Chief

15 Justice, and may it please the Court:

16 The question here boils down to  
17 whether the resolution of censure adopted by  
18 HCC's Board of Trustees was merely an expression  
19 of government opinion concerning the content of  
20 Mr. Wilson's speech or instead a punishment for  
21 it.

22 We submit that it was punishment for  
23 three principal reasons.

24 First, the resolution imposed concrete  
25 penalties. These were baked into the censure

1       itself both by its express terms at Petition  
2       Appendix 44a and also by operation of the  
3       Board's bylaws at JA 66. As a consequence, Mr.  
4       Wilson was, among other things, denied travel  
5       reimbursements and access to \$5,000 in community  
6       affairs funds for a period of one year.

7                 Second, the censure concluded with an  
8       express command that Mr. Wilson must immediately  
9       cease and desist from further criticisms of the  
10      Board, upon threat of further punishment that  
11      would have extended the period during which his  
12      privileges of office were denied to him.

13                And, finally, the censure imposed  
14      these penalties pursuant to the Board's official  
15      disciplinary authority.

16                The resolution thus recited several  
17      rules codified in the Board's code of conduct.  
18      It made formal findings that these rules had  
19      been violated by Mr. Wilson's speech. And it  
20      concluded that he was, therefore, worthy not  
21      just of a verbal response but of formal  
22      discipline, of sanction, and that is precisely  
23      what it delivered.

24                Against this background, Your Honors,  
25      our submission is that HCC is simply wrong to

1 say that this resolution was merely an  
2 expression of opinion. An elected body does not  
3 -- an elected body's formal exercise of its  
4 disciplinary authority to enforce a code of  
5 conduct, its official invocation of its  
6 disciplinary authority to find rule violations,  
7 and its self-described imposition of sanctions  
8 for those rule violations is punishment and  
9 regulation. It is not expression of opinion.

10 Simply put, the censure resolution  
11 here was a serious penalty intended to chill and  
12 deter, and because it was adopted in response to  
13 concededly protected speech, it violated the  
14 First Amendment.

15 I'm happy to take the Court's  
16 questions or otherwise move on to the balance of  
17 my --

18 JUSTICE THOMAS: Petitioner seems to  
19 suggest that -- or argue that if we -- if the  
20 courts get involved in this, that we would be  
21 involved in the rough and tumble of politics and  
22 that it would not be productive.

23 What would be your -- your response to  
24 that?

25 MR. KIMBERLY: It -- it's twofold,

1 Your Honor. The first is that our theory here  
2 and what we're asking this Court to hold is  
3 limited to formal disciplinary measures in  
4 response to speech. And --

5 JUSTICE THOMAS: Now what is that?

6 MR. KIMBERLY: Well --

7 JUSTICE THOMAS: What is formal  
8 disciplinary measures?

9 MR. KIMBERLY: So formal disciplinary,  
10 I think it -- it -- it -- it has three elements.  
11 The first is there is an identification of  
12 certain rules of conduct. There is then a  
13 disciplinary process by which it is determined  
14 that those codified rules of conduct have been  
15 violated. And there is, in turn, the imposition  
16 of sanctions for those violations.

17 This is a distinction that is familiar  
18 to elected bodies at the local level throughout  
19 the country. They know the difference between  
20 disciplinary proceedings on the one hand and  
21 merely adopting a position statement on the  
22 other hand.

23 Our theory is limited exclusively to  
24 this invocation of disciplinary proceedings and  
25 sanctions for rule violations. And I should say

1 that the -- the direct answer to Your Honor's  
2 question is that sort of response to speech is  
3 extraordinarily unusual.

4 My friends on the other side can point  
5 to 11 examples in all of American history in  
6 which an elected body has censured somebody or  
7 imposed any kind of discipline for speech taking  
8 place outside of the legislative sphere.

9 And so there's no reason, Your Honor,  
10 to think that this is going to pull courts into  
11 local politics because, really, all we're  
12 talking about is the machinery of discipline,  
13 which is distinct from mere exchanges of ideas  
14 in the -- in -- in the marketplace of ideas.

15 So --

16 CHIEF JUSTICE ROBERTS: Just to make  
17 sure I understand your -- your answer there, in  
18 other words -- obviously, you take this  
19 situation where there's a formal resolution.

20 What if on the floor of the -- or  
21 however the Community College Board meets,  
22 somebody said we should make clear that we find  
23 Mr. Wilson's conduct reprehensible and think  
24 he's not acting according to, you know, the --  
25 the -- the way that a board member should act

1 and blah, blah, blah, you know, all in favor say  
2 aye, and there's aye, any opposed, you know, one  
3 or two people.

4 Does that -- would that bring you to  
5 the same position, or just because of the  
6 formality of the statement, the result is  
7 different?

8 MR. KIMBERLY: Well, what it's -- the  
9 short answer, Your Honor, I think, is no, the  
10 hypothetical that you're describing would not  
11 represent a First Amendment violation.

12 I think it -- it's critical to  
13 recognize that this is not just a formality.  
14 Bylaws of local elected bodies throughout the  
15 country recognize an important distinction  
16 between disciplinary proceedings and other  
17 proceedings, and they provide trial-like  
18 protections before censures may be imposed.

19 Robert's Rules of Order, which my  
20 friend on the other side has observed is  
21 incorporated into a great many such bylaws,  
22 recognizes the same, that when a censure is  
23 proposed on the basis of conduct taking place  
24 outside of the lawmaking body itself, that  
25 formal charges must be made, that notice must be



1 given, a trial must be held. There's a right to  
2 cross-examine witnesses. There's a right to  
3 representation by counsel.

4 All of these very serious procedural  
5 measures intended to protect the rights of  
6 individuals accused of violating a code of  
7 conduct are reflective of an understanding that  
8 an official censure is, in fact, a very serious  
9 issue.

10 CHIEF JUSTICE ROBERTS: So what you're  
11 saying is that they could do, putting aside the  
12 second paragraph, everything in the first  
13 paragraph so long as they didn't do it under a  
14 formal procedure?

15 MR. KIMBERLY: Your Honor, I --

16 CHIEF JUSTICE ROBERTS: Anybody who  
17 wants to censure Wilson, you know, vote aye and  
18 all that? In other words, it's the formality  
19 that makes a difference?

20 MR. KIMBERLY: It -- it's not the  
21 formality, Your Honor. It's the fact that this  
22 resolution recited three rules of conduct and  
23 made findings officially on behalf of the  
24 elected body itself, a governmental body, that  
25 Mr. Wilson's speech transgressed these codified

1 rules.

2           If -- if the resolution in Your  
3 Honor's hypothetical does the same, I don't  
4 think what's important for -- for our purposes  
5 is whether or not the -- the steps are actually  
6 followed.

7           I think the question is, in form and  
8 substance, is the resolution a disciplinary  
9 resolution? Does it rely on a codified rule?  
10 Does it hold that speech protected by the First  
11 Amendment violates that rule? And does it, in  
12 turn, impose a sanction in consequence?

13           That is, I think, exactly what the  
14 Court had in mind in Laird against Tatum when it  
15 said that what the First Amendment is concerned  
16 about is regulatory governmental actions. And  
17 that's precisely what we have here.

18           We have the invocation of a rule of  
19 conduct and a formal determination that speech  
20 protected by the First Amendment violates that  
21 rule. We also have broad contextual indications  
22 that this kind of censure has a real chilling  
23 effect.

24           We have, as -- as I said, the sort of  
25 procedural protections that are recognized all

1 throughout the country and historically have  
2 been. In addition, we have the Congressional  
3 Research Service, cited at page 28 of our red  
4 brief, indicating that many lawmakers, before  
5 suffering the indignity of a censure, will  
6 decide to resign instead.

7 That's a clear indication that this is  
8 a serious -- this -- that lawmakers, whose  
9 speech are the ones we're -- we're concerned  
10 about being chilled by such measures, are,  
11 indeed, chilled by such measures, so much so --

12 JUSTICE KAGAN: Mr. Kimberly --

13 MR. KIMBERLY: -- that sometimes they  
14 resign.

15 JUSTICE KAGAN: -- I -- I -- I think  
16 I'm still stuck on the distinction you're  
17 drawing, so let me give you a contrasting set of  
18 examples.

19 In one, the legislature says: You  
20 know, we think he's walking around saying these  
21 terrible things about the Board, and we're going  
22 to pass a resolution, call it a resolution, that  
23 just says he's fomenting distrust of the Board  
24 and he should be censured for that.

25 Then, in the other, they say the exact

1 same thing except they find a rule, and they  
2 say: You know, in fomenting distrust of the  
3 Board, he's violating Rule ABCD against  
4 fomenting distrust of the Board.

5 Are you saying that the two should be  
6 treated differently?

7 MR. KIMBERLY: Your Honor, historic --  
8 yes, to answer the question directly, and I  
9 think, historically, bodies have recognized a  
10 significant difference between those two things.

11 It -- it's the difference that the  
12 Fifth Circuit recognized when it -- when it said  
13 that a resolution of censure goes several steps  
14 beyond just accusation and investigation.

15 In your first hypothetical, I would  
16 take that as an accusation. What we have in the  
17 second example is a determination that, in fact,  
18 a rule of conduct has been violated. That is  
19 regulatory. It -- it is punitive in a way that  
20 the first, which really does, I think, take more  
21 the form of an opinion, it can't be described of  
22 -- of -- of the second example.

23 I -- I would say also that the -- the  
24 hypothetical is in important ways counterfactual  
25 because, as -- as I note, before an elected body

1 can adopt this sort of resolution that Your  
2 Honor has described in the -- in the second half  
3 of your hypothetical, virtually all provide the  
4 sort of procedural protections which imply a --  
5 a certain gravity to the situation that we think  
6 is importantly reflective of the very serious  
7 nature of a formal disciplinary censure.

8 I -- I -- I would add, Your Honor,  
9 that the line that we're proposing to the Court,  
10 which is that when there is an invocation of an  
11 exercise of formal disciplinary power, the  
12 identification and recitation of a code -- of a  
13 rule of conduct, a formal determination that  
14 speech has violated that rule, and the  
15 imposition of sanctions as a consequence, even  
16 when the sanction is only a censure, is a clean  
17 and administrable rule.

18 My friends on the other side offer two  
19 different versions of -- of the way that you can  
20 reverse the Fifth Circuit, and both implicate  
21 really terrible line-drawing questions.

22 In -- in the first, if -- if a censure  
23 is merely speech -- and -- and, by the way, I'd  
24 like to come back to this. This censure plainly  
25 is more than speech because it does impose

1 practical penalties on Mr. Wilson. But, if a  
2 censure is merely speech, Justice Alito, to come  
3 back to your question, there is no basis for  
4 distinguishing between a censure by one -- by a  
5 non-elected body versus an elected body.

6           There's also no difference between,  
7 Justice Thomas, coming back to your question,  
8 the difference between a censure leveled against  
9 a private citizen and a censure leveled against  
10 a member. It's all just government speech  
11 according to my friends on the other side, and  
12 -- and so there would be no reason to think that  
13 it wouldn't be free from First Amendment  
14 scrutiny in those other circumstances as well.

15           If you buy the federal government's  
16 argument instead and you think that these sorts  
17 of disciplinary issues are simply beyond First  
18 Amendment reach, you -- you have all kinds of  
19 problems with determining, well, I -- I -- I  
20 think the Court would -- I -- I certainly would  
21 hope that the Court would say that an elected  
22 body like HCC's Board of Trustees can't imprison  
23 Mr. Wilson. Well, can it fine him \$50,000?  
24 Sure.

25           JUSTICE BREYER: Well, this isn't

1 exactly imprisonment. I mean, it's a question  
2 of the political organization of the United  
3 States. There are legislatures, there are  
4 committees, there are state governments, and we  
5 are a court, which is just part of it. We don't  
6 run it. And since we don't run it, the other  
7 parties also have to have some powers, and one  
8 of the powers typically is power of  
9 administration, power to control the kinds of  
10 things others say within the body, what's  
11 appropriate, what isn't. And I think that's  
12 what the Fifth Circuit was driving at.

13 Reimbursing expenses, how you get  
14 elected to a committee, I mean, when people are  
15 on the committee, who's going to be the chairman  
16 or who's going to be this or who's going to be  
17 that? People can vote for any reason they want  
18 --

19 MR. KIMBERLY: Sure.

20 JUSTICE BREYER: -- who are members of  
21 that committee. And the same is true on which  
22 expenses you can run, which expenses you can't  
23 run. So, if we get into the business of  
24 starting to really oversee this, then -- then  
25 we've changed the government structure

1 significantly. I think that lies at the bottom  
2 of the argument.

3 MR. KIMBERLY: Sure, Your Honor, but  
4 that's precisely the distinction that I'm  
5 drawing. Votes get --

6 JUSTICE BREYER: All right. So, if  
7 you're drawing that distinction, we've had -- I  
8 mean, Senator McCarthy was censured, destroying  
9 his political career. Well, that was up to the  
10 Congress.

11 And in terms of administrative  
12 expenses, every day of the week the committees  
13 over in Congress vote as to what's going to be  
14 paid and what isn't going to be paid, who's  
15 going to be paid it, et cetera.

16 I think that's what the Fifth Circuit  
17 had in mind. So, if there is a line, why  
18 doesn't this pretty clearly fall on the  
19 legislative responsible part?

20 MR. KIMBERLY: Your Honor, those --  
21 those questions about how to constitute  
22 committees and who holds leadership positions on  
23 the committee are all matters of internal  
24 governance to the -- to the elected body.

25 They are not -- decisions about, for



1 instance, who is elected chair of the Board are  
2 not disciplinary matters -- are not disciplinary  
3 matters.

4 Our -- our theory, I think, draws a  
5 very neat and -- and clear line around formal  
6 disciplinary measures.

7 JUSTICE BREYER: You say formal. So,  
8 when the committee all votes not to reimburse  
9 Senator X and it does it because he says: Well,  
10 why did you all vote against me? Oh, we do not  
11 like you, Senator X. I mean, you know? Okay?

12 But, if they say, oh, no, it's a  
13 formal matter, not okay, and we're judging that?

14 MR. KIMBERLY: Well, I -- I -- I don't  
15 understand most bodies to view things like  
16 reimbursements for travel to be discretionary  
17 matters. To be sure, Your Honor, I think  
18 pocketbook injuries in response to First  
19 Amendment expression probably are a violation of  
20 the First Amendment.

21 And if I may, I -- I'd like to turn to  
22 that element of this case because, as Justice  
23 Thomas was describing, the censure here is -- it  
24 -- it's -- it's a single document, and it -- it  
25 includes not only the words "he is, therefore,

1 publicly censured." It includes all of the  
2 words that precede that paragraph, which find  
3 that he violated rules of conduct, and, in turn,  
4 it revokes privileges of his office, including  
5 his right to receive reimbursements, his right  
6 to access community affairs funds, \$5,000 worth,  
7 a significant amount of money.

8 JUSTICE BARRETT: Mr. Kimberly, if I  
9 could just interrupt for a second. As -- as you  
10 might guess, one issue is, why didn't you  
11 cross-petition then? Because, as Justice  
12 Breyer's pointing out, the Fifth Circuit said  
13 that those additional penalties were fine, they  
14 weren't the business of the court to get into,  
15 and you didn't cross-petition.

16 But I think you lean on them pretty  
17 heavily here insofar as it bolsters your  
18 argument that the censure is punitive. So why  
19 didn't you cross-petition?

20 MR. KIMBERLY: Your Honor,  
21 respectfully, I don't think that's -- that's  
22 what the Fifth Circuit said about these things.  
23 It said instead that they were not a basis for  
24 finding a violation of the First Amendment.

25 But it -- it held instead -- so we

1 offered before the Fifth Circuit two reasons to  
2 find that this censure was a violation of the  
3 First Amendment. We said censures generally are  
4 punitive, and, therefore, it is a retaliation,  
5 and we pointed to these practical impediments as  
6 well.

7           The Fifth Circuit said yes for the  
8 first reason, no for the second reason. But the  
9 upshot, its judgment, was that we had stated a  
10 claim upon which relief could be granted on the  
11 ground that the resolution violated the First  
12 Amendment.

13           That was all that we had asked for.  
14 It's all that we wanted. We're not asking this  
15 Court to do anything more by looking to these  
16 additional impediments.

17           Nor does it expand the relief that we  
18 would be entitled to on remand. As I say, the  
19 -- the censure resolution is a single document.  
20 If it's unconstitutional, it all goes. It isn't  
21 as though some parts fall and others don't. The  
22 point is this resolution could not have been  
23 adopted consistent with the First Amendment.

24           And under Rule 54(c) of the Federal  
25 Rules of Civil Procedure, we're entitled on

1 remand to any damages that are proven in the  
2 evidence. We're not limited to what's just pled  
3 in the complaint.

4 So the -- the Fifth Circuit held that  
5 the way that this claim was alleged, it had  
6 stated a claim upon which relief could be  
7 granted. That's great. Now we move to on  
8 discovery, and -- and we are entitled to prove  
9 up damages however we -- we may.

10 The fact that something doesn't amount  
11 to a breach of a violation, that -- that it  
12 isn't a basis for liability, doesn't mean that  
13 it can't, in turn, be the basis for an injury on  
14 basis of the liability on other facts. And  
15 that's the position that we would take, so --

16 JUSTICE ALITO: That's a lot of words,  
17 but I -- I -- I really don't understand it. The  
18 Fifth Circuit said that these additional  
19 measures did not violate the First Amendment.  
20 And the question you asked us to review and that  
21 we agreed to review simply refers to a censure  
22 resolution --

23 MR. KIMBERLY: Well, it --

24 JUSTICE ALITO: -- a generic censure  
25 resolution, not a censure resolution that

1 includes in -- in some of its paragraphs things  
2 that go beyond merely censuring but impose  
3 tangible punishments or deprivations on the  
4 subject of the resolution.

5 MR. KIMBERLY: Well, the -- so there  
6 are two things to say about this, Your Honor.

7 First, in our brief in opposition, we  
8 made exactly this point. We said this wasn't a  
9 suitable vehicle for the pure censure question  
10 precisely because this censure did include these  
11 additional penalties.

12 In their cert reply, my friends on the  
13 other side said nothing about the need to  
14 cross-petition and, in fact, described this as  
15 an issue going to the merits. And as counsel  
16 for the government noted, this is not a  
17 jurisdictional issue.

18 JUSTICE KAVANAUGH: If we reverse on  
19 the censure as mere speech premise, that that's  
20 all we're deciding, if we reverse on that basis,  
21 do you think something's left on remand then?

22 MR. KIMBERLY: I mean, the Fifth  
23 Circuit has already said what it has to say  
24 about the other issues, so I -- I mean, I would  
25 be happy for a remand to try to rebrief the

1 issue, but I -- it's hard to see the Fifth  
2 Circuit taking a different view.

3 I would say our -- our argument on  
4 this front, Your Honor, is directly responsive  
5 to the question presented. The question  
6 presented is: Does the First Amendment restrict  
7 the authority of an elected body to issue a  
8 censure resolution in response to a member's  
9 speech?

10 And our answer is yes when the censure  
11 resolution represents an exercise of  
12 disciplinary authority, finds rule violations,  
13 and imposes sanctions in consequence. If you  
14 don't think that that's enough when it's just  
15 the censure by itself, then the answer is yes  
16 when the censure in addition, as -- as the  
17 censure resolution here did by automatic  
18 operation of the Board -- of the Board's bylaws,  
19 implies additional penalties that limit the --  
20 the censured person's privileges of office.

21 And -- and on -- you know, on that  
22 front, I would point the Court to JA 66, which  
23 states that trustees must be in good standing to  
24 travel -- travel at college expense and trustees  
25 must be in good standing to access community

1       affairs funds.

2                       These additional penalties follow  
3 automatically by -- in consequence of the  
4 adoption of the censure resolution. So there's  
5 -- coming back again to Justice Thomas's point  
6 at the conclusion of the last argument, there's  
7 no disaggregating these things. This is all one  
8 response to Mr. Wilson's speech.

9                       It was to find that he violated rules.  
10 It was to -- to accuse him of reprehensible  
11 conduct not just because a majority of the Board  
12 disagreed with what he had to say but because  
13 they concluded that he -- his speech had  
14 violated objective rules of conduct. And, in  
15 turn, he was subject to censure and the  
16 revocation of his official privileges of office  
17 for a period of one year, again, on threat, if  
18 he did not immediately cease and desist, that  
19 the Board would continue that impediment for  
20 another year by adopting yet further censures.

21                      The evidence that we've put before the  
22 Court is that these sorts of resolutions have  
23 significant chilling effects. Again, they force  
24 individuals -- they oftentimes will compel  
25 individuals to resign. We have also historical,

1 through today, evidence that authorities view  
2 censures as serious punishments. We have then  
3 Congressman Madison's speech on the floor of the  
4 Third Congress declaring censures severe  
5 punishments. We have contemporary authorities  
6 saying the same thing, including the National  
7 Conference of State Legislatures describing  
8 censures as serious punishments and the --

9 JUSTICE KAGAN: Which side of your  
10 line does Senator McCarthy's censure fall on?

11 MR. KIMBERLY: Oh. Well, I -- I -- I  
12 mean, I think it would be -- I think it matches  
13 the description of the censure in this case. I  
14 think what sets that censure apart and what  
15 makes it different is that it --

16 JUSTICE KAGAN: It -- it matches the  
17 description, meaning that it's similarly  
18 disciplinary?

19 MR. KIMBERLY: Yes.

20 JUSTICE KAGAN: He was accused of  
21 violating certain rules, there was a formality  
22 in the disciplinary proceeding --

23 MR. KIMBERLY: Correct.

24 JUSTICE KAGAN: -- et cetera?

25 MR. KIMBERLY: Yes. And -- and the



1 reason that it was not a violation of the First  
2 Amendment, however, is because the speech in  
3 that case was speech within the legislative  
4 sphere. Mr. McCarthy had himself put his speech  
5 into the Congressional Record. It was not put  
6 there by those who were censuring him.

7 So it's within the legislative sphere.  
8 And within the legislative --

9 JUSTICE KAGAN: So everything would  
10 have been different if -- if it were a question  
11 of Senator McCarthy's public speeches?

12 MR. KIMBERLY: Public speeches outside  
13 of the legislative sphere, yes, I think that --  
14 I think that's so. And, indeed, the -- the  
15 lengthy, months-long proceedings leading up to  
16 the adoption of that censure were all focused on  
17 his conduct within the legislative sphere and  
18 specifically his conduct at committee hearings,  
19 which would fall within that same scope.

20 Within that scope, the free speech  
21 right of elected officials is defined by the  
22 Speech or Debate Clause, which -- and -- and its  
23 corollary, the Discipline Clause, which make  
24 clear that speech within that context may be  
25 disciplined.

1           We're not quarreling with that at all.  
2           And I think that is responsive to my friend on  
3           the other side and his position about history  
4           and tradition. We don't dispute that one bit,  
5           and the Court needn't say anything about that.  
6           That certainly is consistent with tradition to  
7           censure legislative -- legislators for speech  
8           within the legislative sphere.

9           But not a single one of the examples  
10          cited by the United States is a censure for  
11          speech that is protected by the First Amendment  
12          outside of the legislative sphere. It is --

13                 CHIEF JUSTICE ROBERTS: Well, it seems  
14          to me that -- and, certainly, this is the  
15          argument that your friends on the other side  
16          stress -- I mean, if -- if you prevail, then  
17          whenever there's a censure resolution, the  
18          response is going to be a lawsuit against the  
19          board for defamation, libel, and that would then  
20          go to the courts and they would have to resolve  
21          that.

22                 And it seems to me, once that remedy  
23          becomes widely known and available, it would  
24          become automatic because, otherwise, it would  
25          seem as if you're accepting the factual

1 recitation in the resolution.

2           And so the, you know, traditional  
3 legislative body debates would all end up in  
4 court, and then the court would have to decide a  
5 essentially political question that's divided  
6 the members of the -- of the board. And that  
7 seems an unsatisfactory result.

8           MR. KIMBERLY: Your Honor, I'd -- I'd  
9 -- I would -- would have to disagree with the  
10 characterization. I don't think anything about  
11 ruling in our favor and affirming the Fifth  
12 Circuit would open the doors to defamation and  
13 libel suits. This Court in Paul against -- Paul  
14 against Davis said that those sorts of suits are  
15 generally off the table, that mere offense from  
16 defamation generally does not arise to a  
17 constitutional level. And we don't disagree  
18 with that.

19           I think, again, what separates and --  
20 and really limits our principle here is that  
21 it's got to be disciplinary. That is what makes  
22 it a regulatory issue, the fact that it -- that  
23 there is a code of conduct that is not just  
24 alleged but formally found to have been  
25 violated.

1           Here, this -- you know, it's perfectly  
2           conceivable that HCC could have adopted a  
3           censure resolution here that did not punish him  
4           for his speech. They could have focused just on  
5           non-speech conduct. We wouldn't be here if they  
6           had done that.

7           CHIEF JUSTICE ROBERTS: Well, I think  
8           maybe we talked about this a little earlier. I  
9           just want to clarify your answer. So you think  
10          it makes a difference if, during the legislative  
11          proceeding, they file a motion to censure a  
12          particular individual and they're going to have  
13          a vote on it and there's a vote on it and that's  
14          the result, as opposed to a code of conduct that  
15          says this is what you should do and there's a --  
16          a -- a vote on whether he violated that  
17          particular code of conduct provision?

18          MR. KIMBERLY: Yeah. Your Honor, the  
19          -- the word "censure" is not a label. The --  
20          the -- the idea of a censure in the sense that  
21          we mean it cannot be disaggregated from the  
22          power exercised to adopt it and the proceedings  
23          that lead -- that culminate in its adoption.

24          CHIEF JUSTICE ROBERTS: Now what --  
25          I'm sorry, what -- what does that mean, "can't

1 be disaggregated"?

2 MR. KIMBERLY: "Can't be  
3 disaggregated" means, if -- if all that happens  
4 is there's a motion to adopt a resolution that  
5 uses the word "censure," but there's no  
6 self-aware invocation of the power to discipline  
7 members for rule violations, then that is not  
8 the sort, I think, of resolution that would give  
9 rise to a First Amendment claim.

10 What ultimately in this context this  
11 Court's cases teach is the First Amendment is  
12 concerned to avoid chilling speech. And what  
13 all of the evidence that we've put forward in  
14 our red brief shows is that lawmakers, elected  
15 officials, understand and appreciate that formal  
16 disciplinary measures, not just a -- a  
17 resolution by a majority saying I disagree with  
18 what this person has said, but charges of rule  
19 violations and formal findings of rule  
20 violations have a chilling effect.

21 CHIEF JUSTICE ROBERTS: Well, but your  
22 -- your position is it causes a chilling effect  
23 the other way. A majority of a board wants to  
24 say something about what they regard as whatever  
25 reprehensible or offensive conduct, and yet

1 their speech is going to be chilled if you  
2 prevail today.

3 MR. KIMBERLY: I -- I -- respectfully,  
4 Your Honor, I have to disagree. I don't -- I  
5 don't see how that could be the case. All we're  
6 saying is they cannot invoke disciplinary  
7 authority to exercise the mechanisms in the  
8 Board's own bylaws for enforcing a code of  
9 conduct on the one hand. We're not saying that  
10 they couldn't adopt a resolution that says many  
11 of the same things concerning their reaction to  
12 Mr. Wilson's speech.

13 They could say, exactly as we said in  
14 our briefing, Mr. Wilson's speech is in --  
15 indecorous, it is -- it is rude, we don't like  
16 it, and we disagree with him.

17 JUSTICE BARRETT: So, Mr. Kimberly,  
18 does that mean that censure is just not  
19 permissible except for things that happen inside  
20 the legislative chamber, in the legislative  
21 sphere, as you put it, or for conduct that's  
22 reprehensible or illegal, that it's just never  
23 -- censure's just never permitted? Because I  
24 think the -- the answer that you're getting at,  
25 I mean, it -- it would always be -- let's

1     imagine that a member engages in really  
2     offensive speech full of racial slurs that --  
3     that he said on the floor, let's say, in -- in  
4     the debate about some civil rights legislation.

5             The member says all kinds of horrible  
6     racial slurs on the floor, that is censurable,  
7     and then walks out onto the steps and gives a  
8     press conference and repeats those exact same  
9     racial slurs, that is not subject to censure  
10    ever? That could be subject to a resolution  
11    saying what he said is reprehensible, but that  
12    -- that could never be censured? That has to be  
13    your position, right?

14            MR. KIMBERLY: That's correct. Yes,  
15    Your Honor. But -- but I -- it -- I -- I --  
16    insofar as what HCC is concerned about here is  
17    being able to take a position in opposition to  
18    the particular issues being raised, they are  
19    fully free to do that. There is nothing about  
20    affirming the Fifth Circuit on our theory here  
21    that would prevent them from adopting a  
22    resolution.

23            And, indeed, I -- I invite the Court  
24    to visit HCC's website. The third item on the  
25    news on that website is the adoption of a

1 resolution by HCC's Board concerning the  
2 importance of diversity in the school and its  
3 commitment to seeing that through. There's --  
4 that sort of resolution is in the heartland of  
5 the sort of statements on matters of public  
6 concern that are appropriate for  
7 non-disciplinary resolutions.

8 Our point is simply that there is a  
9 meaningful distinction between disciplinary  
10 resolutions on the one hand and those that  
11 simply stake out positions on --

12 JUSTICE KAGAN: I --

13 CHIEF JUSTICE ROBERTS: That's a very  
14 -- I was going to say that seems to me a very  
15 artificial distinction. So, under your view,  
16 the Board could say everything it said in the  
17 resolution, except at the end say, you know, and  
18 we would adopt a resolution of censure, you  
19 know, but for that crazy Supreme Court decision  
20 in the Houston Community College System, which  
21 said we can't do that.

22 MR. KIMBERLY: But -- but, Your Honor,  
23 there are significant consequences that follow  
24 from the "this is what we would do but won't do"  
25 conclusion there. And -- and, for example, most



1 obviously, Mr. Wilson would not be denied access  
2 to Board funds or travel reimbursements and --

3 CHIEF JUSTICE ROBERTS: Well, that  
4 gets to the whole disaggregation question that  
5 we've addressed.

6 MR. KIMBERLY: Right, and as I say, it  
7 follows automatically from adoption of a  
8 censure, so, really, there is no way to  
9 disaggregate these things. The one follows  
10 automatically.

11 So I guess my -- my -- my point is, in  
12 addition, there are significant -- those  
13 significant procedural protections are designed  
14 to ensure a certain solemnity to the  
15 proceedings, that it's not just done  
16 willy-nilly, that it isn't -- you know, it's  
17 reflective also of the fact that members of  
18 elected boards throughout the country take these  
19 things proceedings seriously.

20 It just is not something that is done  
21 routinely the way that my friends on the other  
22 side describe it, or otherwise they'd be able to  
23 come up with more than 11 examples in 115 years  
24 of this sort of thing happening. It just  
25 doesn't happen precisely because bodies

1 understand, members of elected bodies  
2 understand, that it is a serious matter to  
3 activate the disciplinary machinery of a -- of a  
4 formal governmental body and impose sanctions in  
5 response to speech protected by the First  
6 Amendment.

7 JUSTICE KAGAN: I mean, just to go  
8 further with -- with the questions that Justice  
9 Barrett and the Chief Justice raised, your  
10 position makes two distinctions critical, and  
11 it's not clear that either can carry the weight  
12 that you would put on it.

13 The first is I say something on the  
14 floor of the body, and then I step outside and  
15 say something on the steps. That's one  
16 distinction. And the second is the Board, the  
17 legislature, says he said terrible things, we  
18 hate them, we disapprove of them, we censure  
19 them on the one hand and then says the exact  
20 same thing, except add the -- adds the words  
21 "and he violated provision XYZ."

22 And, you know, it's just not clear  
23 that either of those distinctions should matter  
24 in the end.

25 MR. KIMBERLY: Well, I -- I think the

1 question whether they matter has to turn on the  
2 question whether one will chill and the other  
3 won't. The -- the first question has more, I  
4 think, to do with the extent of the  
5 constitutional authority of the Board, and I'll  
6 come back to that in a minute. But the  
7 distinction in -- in -- the second distinction  
8 that you raised, I mean, the most that I can  
9 point you to, Your Honor, is, again, the  
10 Congressional Research Service suggesting that  
11 elected lawmakers resign before facing the  
12 ignominy of this kind of proceeding.

13           They don't resign because a majority  
14 of the board or the elected body disagree with  
15 them. And even when they're willing to express  
16 that in a resolution, they -- there is evidence  
17 that they do resign and, again, are entitled to  
18 all sorts of protections when it's presented as  
19 a formal disciplinary matter.

20           In -- in the second example, I --  
21 excuse me, in the first example, I -- I would  
22 say that this is -- I mean, this is a critical  
23 limit on the constitutional discipline  
24 authority, both recognized at the federal level  
25 but, more importantly, in federal common law

1 applicable to state and local elected bodies.

2           They have authority to discipline --  
3 to maintain order within the jurisdiction of  
4 their -- of their -- of their body when they're  
5 doing official work and holding meetings. That  
6 authority has -- is effectively unlimited within  
7 that context but outside of that context is  
8 circumscribed by the First Amendment. I don't  
9 think that's a radical idea.

10           I would say -- I would say, overall,  
11 Your Honors, that the -- the pressing theme here  
12 on the other side is that Mr. Wilson is free to  
13 continue speaking notwithstanding the censure  
14 resolution in this case. But the upshot of the  
15 United States' and HCC's arguments is that he  
16 has to simply accept that he would be subject to  
17 discipline for violating the code of conduct to  
18 -- in order to continue engaging in the speech  
19 that he has.

20           And this is speech on matters of  
21 public concern. This is a board with an  
22 extremely checkered history. Airing these  
23 issues is extraordinarily important. And there  
24 is no question, we submit, Your Honors, that to  
25 reverse would be to chill this sort of speech

1 moving forward.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Justice Thomas?

6 Justice Breyer, anything further?

7 Justice Alito?

8 JUSTICE ALITO: I'm not sure I -- I  
9 understand exactly where you come down on a  
10 number of the issues that have been raised.

11 Does everything that you say apply  
12 whenever the word "censure" is used, or does it  
13 depend on an allegation and a finding that there  
14 was a violation of a rule?

15 MR. KIMBERLY: It's the second, Your  
16 Honor. It depends on exercise of disciplinary  
17 authority to find a rule violation and impose  
18 sanctions.

19 JUSTICE ALITO: So if they -- if a --  
20 a body issues a censure, a public censure,  
21 without alleging that there was a violation of a  
22 rule, then there's no First Amendment violation,  
23 they're simply speaking?

24 MR. KIMBERLY: If -- if -- if -- if  
25 that censure is not properly considered an

1 exercise of disciplinary authority, yes, Your  
2 Honor. I don't think there's a constitutional  
3 rule against use of the word "censure" in  
4 response to speech.

5 JUSTICE ALITO: And the reason for  
6 drawing a distinction between those situations  
7 is your assertion that the -- the -- that a  
8 censure issued after an allegation and a finding  
9 of a rule violation has a greater chilling  
10 effect than anything that can be said, any  
11 derogatory statement that can be said about a  
12 member without alleging and finding a violation  
13 of a rule?

14 MR. KIMBERLY: Yes, it -- it's -- it's  
15 a tiger of a different stripe for two reasons.  
16 One, we know historically that it has a chilling  
17 effect that mere counter-speech does not, but I  
18 think it also slots us into what the Court  
19 recognized in *Laird against Tatum*, that when the  
20 government action is regulatory and punitive,  
21 regulatory, we have a code of conduct here, we  
22 have an alleged violation, and it's being  
23 applied to speech, that is a violation.

24 JUSTICE ALITO: But it comes down to  
25 the degree of chilling effect, is that correct?

1                   MR. KIMBERLY: I -- I -- I --  
2                   certainly, that -- that is a -- a principal  
3                   consideration.

4                   JUSTICE ALITO: And that's an  
5                   empirical question. And what basis would we  
6                   have for thinking -- put aside the question of  
7                   how the public would react to the censure of a  
8                   member of Congress, but what basis would we have  
9                   for thinking that the -- the citizens within the  
10                  Houston Community College, whatever the -- the  
11                  geographical section would be, that people who  
12                  are interested in that would draw that kind of  
13                  distinction?

14                  MR. KIMBERLY: Well, Your Honor,  
15                  respectfully, I don't think that's the right  
16                  question so far as chilling is concerned. The  
17                  question is when the --

18                  JUSTICE ALITO: All right. Let me  
19                  phrase it a different way. What reason is there  
20                  to think that a member of this body would feel  
21                  more chilled if it was done after a disciplinary  
22                  proceeding, as opposed to the most horrible  
23                  condemnation you can imagine done without a  
24                  disciplinary proceeding?

25                  MR. KIMBERLY: Well, it -- it's the

1 three things that I've said, Your Honor.

2 One, it's the Congressional Research  
3 Service, cited at page 28 of our red brief,  
4 detailing that oftentimes this will compel  
5 members to resign rather than deal with the  
6 ignominy of the process.

7 The second is, again, the adoption of  
8 these sorts of protective procedures I don't  
9 think is -- is the test, but it is certainly  
10 reflective of the importance of the procedure  
11 that the lawmakers themselves, who are the ones  
12 who adopt these procedures, understand  
13 disciplinary proceedings to take on.

14 And, finally, it's all of the sources  
15 that we've cited that indicate a near universal  
16 understanding that censure is highly punitive.  
17 It's the National Conference of State  
18 Legislatures. It's Demeter's Manual, which is,  
19 along with Robert's Rules, one of the best  
20 respected parliament -- parliamentary procedure  
21 authorities.

22 And it harkens all the way back to the  
23 debate in the Third Congressional Congress about  
24 -- excuse me, in the Third Congress about  
25 adoption of a censure in response to the Whiskey



1 Rebellion.

2 JUSTICE ALITO: All right. Thank you.

3 JUSTICE SOTOMAYOR: So what do we -- I  
4 don't quite understand your distinctions. Let's  
5 assume they don't say you -- they just get  
6 together and say, we don't like what you did.  
7 We don't like you going to community events and  
8 lying about the Board. We don't like you and  
9 what you did.

10 You say that's okay, correct?

11 MR. KIMBERLY: Correct.

12 JUSTICE SOTOMAYOR: But, if they say,  
13 because we don't like you, we're not going to  
14 put you on as a Board member, is that okay, as a  
15 Board officer?

16 MR. KIMBERLY: Yes, that's okay,  
17 because, of course, the body has -- it's a  
18 matter of internal governance and --

19 JUSTICE SOTOMAYOR: And is it okay for  
20 the Board to then say, because you act so  
21 inappropriately, assume that you go off and use  
22 curse words, we're not going to let you  
23 automatically access community affairs funds,  
24 but you have to come and get our approval? Is  
25 that okay?

1                   MR. KIMBERLY: I think -- I think  
2                   that's a harder case. It's -- it's not  
3                   presented here without the disciplinary element  
4                   to it. I think that may well be a claim because  
5                   we're talking --

6                   JUSTICE SOTOMAYOR: What's the  
7                   disciplinary element? Both he was not permitted  
8                   to incur travel costs unless he got permission  
9                   and he wasn't permitted to access community  
10                  funds without permission. What's wrong with  
11                  that?

12                  MR. KIMBERLY: The fact is that, and  
13                  what I'm saying, the distinction is --

14                  JUSTICE SOTOMAYOR: If -- if there  
15                  isn't the sort of formal process that you were  
16                  talking about.

17                  MR. KIMBERLY: Yeah. Right. Right.  
18                  And so that's, I think, an -- an important and  
19                  substantive distinction. But I think, even on  
20                  its own, the injury that you've just described  
21                  may well give rise to a First Amendment --

22                  JUSTICE SOTOMAYOR: Why?

23                  MR. KIMBERLY: -- retaliation claim,  
24                  because it is a -- a hard and fast pocketbook  
25                  injury inflict --

1 JUSTICE SOTOMAYOR: So how is it hard  
2 and fast? What the Fifth Circuit said was he's  
3 not entitled to these funds. He always has to  
4 seek approval. The fact that they've changed  
5 the manner of approval, he still wasn't entitled  
6 to them without approval.

7 MR. KIMBERLY: Well, I -- I -- I guess  
8 the point, Your Honor, is that one doesn't need  
9 to be entitled to something for -- for it to  
10 give rise to a First -- you know, like a  
11 government contractor is not entitled to win a  
12 contract, but if it's denied a contract for  
13 reasons protected by the First Amendment, that  
14 would still give rise to a First Amendment  
15 retaliation claim.

16 JUSTICE SOTOMAYOR: Thank you,  
17 counsel.

18 CHIEF JUSTICE ROBERTS: Justice Kagan,  
19 anything further?

20 Justice Gorsuch?

21 JUSTICE GORSUCH: Nothing here. Thank  
22 you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Kavanaugh?

25 JUSTICE KAVANAUGH: Just to be

1 crystal-clear, your argument would be the same  
2 even if the last paragraph of the resolution  
3 were not there?

4 MR. KIMBERLY: I think the case is  
5 easy because it's there. Our argument would be  
6 the same if it -- well, our argument -- we would  
7 still be urging the Court to affirm, and I think  
8 the Fifth Circuit got it right.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Barrett?

12 Thank you, counsel.

13 MR. KIMBERLY: Thank you.

14 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.  
15 Morris?

16 REBUTTAL ARGUMENT OF RICHARD A. MORRIS  
17 ON BEHALF OF THE PETITIONER

18 MR. MORRIS: If -- if I understand my  
19 -- excuse me. If I understand my friends on the  
20 other side's argument, it's that the Board was  
21 free to excoriate Mr. Wilson in a general  
22 statement, but if it tethered that to a rules  
23 violation, then somehow that crossed the line of  
24 the First Amendment.

25 But the Board offers two interests

1 here. It offers as interest to be able to speak  
2 in response to Mr. Wilson, who was no stranger  
3 to the hurly-burly of politics and who was  
4 publicly using a website to accuse his fellow  
5 trustees of crimes and violations of law without  
6 supporting evidence. But, if you tethered that  
7 to a rules violation, then that would violate  
8 the First Amendment.

9           The upshot of the position that's  
10 being offered to you as a neat and tidy solution  
11 of line-drawing in this case is that the Board  
12 can't enforce its own rules through the tool of  
13 censure, something that history says this Court  
14 has allowed, that legislative bodies of all  
15 types have done since the founding of the  
16 nation.

17           That's a problem. Elected officials  
18 these days can be their own independent  
19 misinformation machines, and they can do great  
20 damage to institutions, all on social media.  
21 And to say that bodies cannot point to their  
22 rules and say that violates our rules of conduct  
23 and we want to punish you for that, that somehow  
24 it becomes a First Amendment violation precisely  
25 because the government relies upon its rules

1 when asserting its interests is problematic.

2 Mr. Wilson also didn't assert a due  
3 process challenge here. He merely complains  
4 that he could not have been censured. And  
5 censure in and of itself is nothing more than a  
6 form of public condemnation.

7 As -- as to what will be the impact if  
8 this Court were to affirm the Fifth Circuit's  
9 ruling, to the Chief Justice's concern, it will  
10 spawn lawsuits, and courts will have to engage  
11 in reviewing the sausage making of, to Justice  
12 Thomas's concern about resolutions, where things  
13 are not disaggregated.

14 If affirmed, this case will go back to  
15 the Fifth Circuit, and I presume the Fifth  
16 Circuit would have to give a limiting  
17 instruction under its ruling asking a jury to  
18 answer the question of whether Mr. Wilson was  
19 entitled to mental anguish damages solely on the  
20 basis of the words in the censure but not on the  
21 other measures because the Fifth Circuit said  
22 those can't give rise to a free speech  
23 retaliation claim.

24 There's a Harvard study, a note about  
25 this case, and we've cited some data as well in

1 our briefing. While it may be unusual in the  
2 U.S. Congress to censure, local bodies do it  
3 about once every other day in any given year,  
4 and they do it for all number of reasons,  
5 including for conduct that takes place outside  
6 the body.

7 I see that I'm out of time.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel. The case is submitted.

10 (Whereupon, at 11:27 a.m., the case  
11 was submitted.)

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