No. 20-804

IN THE

Supreme Court of the United States

HOUSTON COMMUNITY COLLEGE SYSTEM,

Petitioner,

v.

DAVID BUREN WILSON,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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

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BRIEF FOR PETITIONER

Petitioner Houston Community College System respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

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 App. 20a-28a) is unpublished, but it is available at 2019 WL 1317797.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2020. Pet. App. 1a. A timely petition for rehearing was denied on July 15, 2020. Pet. App. 29a. On March 19, 2020, this Court entered a standing order that extended the time for filing a petition for a writ of certiorari in this case to December 14, 2020. The petition was filed on December 11, 2020, and granted on April 26, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

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

STATEMENT OF THE CASE

A. Factual background

1. The Houston Community College System is a public institution serving students in the greater Houston area. Pet. App. 2a. It is governed by a Board of nine trustees representing single-member districts. *Id.* Trustees are elected for six-year terms and serve without compensation. *Id.* State law directs the Board to "preserve institutional independence," "defend its right to manage its own affairs," and "enhance the public image of each institution under its governance." Tex. Educ. Code Ann. § 51.352. Most Board decisions are made by majority vote. J.A. 61.[1]

Respondent David Wilson was elected to the HCC Board in 2013. Pet. App. 2a. His tenure was marked by controversy from the start. While in office he filed several lawsuits against HCC, helped others file suits as well, was accused of leaking confidential information, publicly denigrated parts of HCC's anti-discrimination policy, and drew media attention in a variety of other ways.[2] In 2016, the Board voted 6-1

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[1] The Joint Appendix includes the June 15, 2017, version of the HCC bylaws. J.A. 17-82. The bylaws are cited and quoted in the operative complaint, *see, e.g.*, *id.* 6-7, and portions of the June 2017 version were attached to filings below, *see id.* 17 n.*. The current version (as amended through Sept. 2, 2020) is available at https://perma.cc/J5RD-GH2T.

[2] One local newspaper created a compendium of "Dave Wilson Controversies," https://perma.cc/98UZ-G234. *See also, e.g.*, Brittany Britto, *Controversial HCC Board Member Resigns, Announces New Candidacy*, Hous. Chron. (Aug. 27, 2019), https://perma.cc/47TV-T3ZS; Alyssa Foley, *Trustee Called Out for Anti-LGBT Rant, Again*, The Egalitarian (Mar. 11,

to reprimand Wilson for violating Board rules and imposing significant legal costs on HCC.[3] Wilson responded by proclaiming that a "reprimand is never going to stop me."[4]

In 2017 the Board decided, over Wilson's opposition, to fund an overseas campus for HCC. Pet. App. 3a. Wilson then orchestrated a wave of negative robocalls targeting other members' constituents, *id.*, and gave a local radio interview accusing other Board members of "not representing the people in their district[s]," *id.* 42a. He also hired private agents to investigate both a fellow Board member and HCC itself; maintained a private website that used HCC's name in violation of Board policy and accused other Board members of illegal and unethical conduct; and filed his fourth suit against HCC after another Board member was allowed to vote by videoconference.[5] By

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2017), https://perma.cc/M2BM-8KGN; Benjamin Wermund, *HCC Trustees Plan to Censure Dave Wilson*, Hous. Chron. (June 14, 2016), https://perma.cc/BQ98-GQ2F.

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

[4] *Id.*

[5] For the private investigators, website, and two of Wilson's suits, see Pet. App. 3a, 43a. For the other two suits, *see* Britto, *supra* note 2 (discussing Wilson's lawsuit over an HCC campus in Katy), and Benjamin Wermund, *Trustee Says HCC Land Deal Broke Law, Calls for Chancellor's Resignation*, Hous. Chron. (Aug. 20, 2015, 10:54 AM), https://perma.cc/KZ4C-EKZ3 (discussing Wilson's filing of a criminal complaint against HCC).

this time, four years into his term, Wilson's lawsuits had cost HCC almost $300,000 in legal fees.[6]

By December 2017, Wilson's behavior had attracted the attention of HCC's accrediting agency. Referencing news of his investigative activities, the agency asked HCC to submit evidence that it was not violating the core accreditation requirement that its governing Board "not [be] controlled by a minority and act with authority only as a collective entity." Pet. App. 44a (describing agency letter); *see* Southern Ass'n of Colleges and Schools, Commission on Colleges, Resource Manual for the Principles of Accreditation 3, 20 (3d ed. 2020) (Core Requirement 4.1), https://perma.cc/A6CR-NFY3.

At its meeting on January 18, 2018, the Board adopted a resolution formally censuring Wilson. Pet. App. 3a, 42a-45a. The resolution recited a number of Wilson's recent actions: public criticism of other Board members with different views on HCC issues, including robocalls directed to their constituents; alleging illegal and unethical conduct by other Board members on his website "davewilsonhcc.com," which also improperly used HCC's name; filing suits against HCC and Board members over disagreements about Board procedures; and hiring his own investigators to conduct unauthorized investigations of a fellow Board member, the Board, and HCC, prompting the inquiry by HCC's accreditor. *Id.* 42a-44a. It explained that

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

these actions "demonstrated a lack of respect for the Board's collective decision-making process, a failure to encourage and engage in open and honest discussions in making Board decisions, and a failure to respect differences of opinion among Trustees." *Id.* 42a. Ultimately the Board resolved that because Wilson had "repeatedly acted in a manner not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct," his "conduct was not only inappropriate, but reprehensible," and "warrant[ed] disciplinary action." *Id.* 44a. It therefore declared that he was "PUBLICLY CENSURED for his conduct," which was the "highest level of sanction available to the Board under Texas law[.]" *Id.*

The resolution of censure further provided that Wilson was "ineligible for election to Board officer positions for the 2018 calendar year," was "ineligible for reimbursement for any College-related travel" for the 2017-18 fiscal year, and would need Board approval to access any funds in his Board "community affairs" account. Pet. App. 44a. It also "recommend[ed] that Mr. Wilson complete additional training relating to governance and ethics"; "directed" that he "immediately cease and desist from all inappropriate conduct"; and warned that "any repeat of improper behavior" would "constitute grounds for further disciplinary action by the Board." *Id.* 44a-45a.

B. Procedural history

1. Wilson responded to HCC's censure resolution by adding new claims to one of his pending state-court suits against HCC and the other trustees. Pet. App. 4a. Invoking 42 U.S.C. § 1983, he alleged that the Board's censure violated his federal rights to

freedom of speech and equal protection under the First and Fourteenth Amendments. *Id.* He sought injunctive relief, $10,000 in damages for mental anguish, another $10,000 in punitive damages, and attorney's fees. *Id.* The defendants removed the case to federal court and the district court denied a motion to remand. Pet. App. 4a-5a. Wilson then dropped his claims against the other trustees, filing an amended complaint that named only HCC. *Id.* 5a; *see* J.A. 5-16 (amended complaint).

The district court granted HCC's motion to dismiss. Pet. App. 20a-28a. It relied on *Phelan v. Laramie County Community College Board of Trustees*, 235 F.3d 1243 (10th Cir. 2000), which held that an elected community college board's censure of one of its members did not violate the First Amendment. *See* Pet. App. 26a-27a. The court reasoned that here, as in *Phelan*, HCC's censure of Wilson "d[id] not cause an actual injury to his right to free speech." *Id.* 27a. The censure neither "prevented [Wilson] from performing his official duties" nor "prohibit[ed] him from speaking publicly." *Id.* On the contrary, he remained "free to continue attending board meetings and expressing his concerns regarding decisions made by the board." *Id.* The court concluded that Wilson lacked standing to pursue a First Amendment claim because he had shown no actual injury to his right to free speech. *Id.* 27a-28a.

2. The court of appeals reversed, reinstating Wilson's claim for emotional harm. Pet. App. 1a-19a. While it concluded that Wilson's allegation of "mental anguish" was sufficient to support standing, *id.* 6a-8a, it recognized that the district court had also "effectively concluded that Wilson's censure did not

give rise to a First Amendment claim," *id.* 10a. The court of appeals held instead that "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983." *Id.* 14a.

The court based its holding exclusively on the "reprimand" conveyed by the Board's censure resolution. Pet. App. 14a; *see id.* 11a-13a. It agreed with HCC that the internal governance restrictions imposed along with the censure, such as a one-year limit on Wilson's ability to seek election as a Board officer, did not violate Wilson's First Amendment rights. *Id.* 15a n.55. It also agreed that Wilson's claims for declaratory and injunctive relief were moot because Wilson was no longer a trustee. *Id.* 2a, 9a, 18a-19a. And it agreed that Wilson could not recover punitive damages against HCC. *Id.* 18a n.63. But as to compensatory damages, the court held that Wilson's allegation of a "retaliatory censure" that "caused him mental anguish," *id.* 7a-8a, was sufficient to state a First Amendment claim, *id.* 17a-18a.

3. Eight judges dissented from the Fifth Circuit's order denying rehearing en banc. Pet. App. 29a-41a. In her dissent, Judge Jones observed that the "First Amendment was never intended to curtail speech and debate within legislative bodies." *Id.* 31a. She warned that recognizing a claim based on the Board's censure of a "gadfly" member threatened to "destabilize legislative debate" and "invite[d] federal courts to adjudicate 'free speech' claims for which there are no manageable legal standards." *Id.* She emphasized that courts have no adequate basis for entering "the hurly-burly political world of a legislative body" and

seeking "to 'balance' the public statements of one official against the retaliatory statements of his co-legislators in their capacity as 'the government.'" *Id.* 36a. Rather, in "judicializing legislative disputes," the courts would give "[p]olitical infighting" a "false veneer of constitutional protection," *id.* 37a-38a, and turn the First Amendment into "a weapon to stifle fully protected government speech at the hands of a fully protected speaker," *id.* 37a.

Judge Ho joined Judge Jones' dissent and also wrote separately. Pet. App. 39a-41a. He emphasized that "[t]he First Amendment guarantees freedom *of* speech, not freedom *from* speech. It secures the right to criticize, not the right *not* to be criticized." *Id.* 40a. "Leaders," he noted, "don't fear being booed. And they certainly don't sue when they are." *Id.* 41a.

SUMMARY OF THE ARGUMENT

The court below recognized a new kind of First Amendment retaliation claim, triggered by a censure resolution that allegedly caused an outspoken politician mental anguish. But a legislative censure, reprimand, or the like is simply an official rebuke by an elected body of certain speech or conduct by one member. Peer criticism of that sort may be voiced by other members individually or by a majority speaking for the body as a whole. Either way it does not suppress or impermissibly chill the member's own speech, compel him to espouse the majority's views, or prevent him from doing his legislative job. The circumstances here thus provide no basis for a First Amendment claim.

Indeed, elected legislatures in our tradition have disciplined their members since well before the

Founding—originally in ways much more extreme than censure. The houses of the English parliament began doing so in the 16th century, typically using imprisonment or expulsion; and the grounds included speech outside official proceedings. The power to impose some sort of discipline for conduct or speech carried over to colonial assemblies, Congress, and state and local legislatures. Today, local elected bodies maintain a robust practice of debating and enacting censure resolutions, often in response to speech by individual members that some in a given community find offensive.

This Court should not recognize a new First Amendment claim that would perversely halt that speech-rich local practice. Under the Fifth Circuit's rule, when one member of an elected body speaks in a way the majority finds repugnant, the Free Speech Clause requires the body to remain silent. But the First Amendment does not require either individuals or elected bodies to hold their tongues. A legislative censure is important government counter-speech on a matter of public concern.

Recognizing a First Amendment retaliation claim here would also be inconsistent with the proper course of democratic government, especially at the local level. Some public speech by an individual legislator may well provoke a public censure by the body's current majority, speaking in the name of the institution itself. When it does, both statements are part of the cycle of speech and counter-speech that the First Amendment seeks to foster, not constrain. As with all political speech, the ultimate audience is the people. Disputes like the one between respondent Wilson and his legislative colleagues must be

resolved by the voters. What the Constitution safeguards is the right of both sides to be heard.

ARGUMENT

The court of appeals held that "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983," Pet. App. 14a, on the ground that "elected officials are entitled to be free from retaliation for constitutionally protected speech," *id.* 13a. Wilson has likewise argued that the censure here was "not a proper response" to his "core political speech," BIO 1, and thus gave rise to "a valid claim sounding in First Amendment retaliation," *id.* at 3. As discussed below, history and tradition refute these contentions. But even if they did not, "[t]he First Amendment guarantees freedom *of* speech, not freedom *from* speech." Pet. App. 40a (Ho, J., dissenting from denial of rehearing en banc). That is, the Constitution protects Wilson's right to speak in public on policy issues. It does not prohibit the Board from responding with speech of its own.

As then-Judge Scalia put it, "[w]e know of no case in which the first amendment has been held to be implicated by governmental action consisting of no more than governmental criticism of speech's content. Nor does any case suggest that 'uninhibited, robust, and wide-open debate' consists of debate from which the government is excluded, or an 'uninhibited marketplace of ideas' one in which the government's wares cannot be advertised." *Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986).

I. There is no First Amendment claim for "retaliatory censure."

The First Amendment prohibits governments from suppressing or compelling private speech. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). That prohibition extends to retaliatory uses of government power that in effect punish past speech. *See, e.g.*, *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019). The underlying principle is that retaliation "threatens to inhibit exercise of the protected right." *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998); *see Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

To establish a retaliation claim, a plaintiff must show that the government took some "adverse action" against him because he engaged in protected speech. *Nieves*, 139 S. Ct. at 1722. Cases that have reached this Court have involved allegedly retaliatory actions that were concretely coercive, such as arrest, prosecution, or the loss of a government contract or employment. *See id.* (arrest); *Hartman v. Moore*, 547 U.S. 250 (2006) (prosecution); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996) (contract); *Perry*, 408 U.S at 595 (employment). The Court has not previously considered an alleged adverse action consisting of nothing more than a legislative censure. Precedent, first principles, and the legislative context all confirm that the Court should not create any cause of action here.

1. This Court has cautioned that only uses of government power that are "regulatory, proscriptive, or compulsory in nature," generating "specific present objective harm or a threat of specific future harm,"

can cause actionable injury under the Free Speech Clause. *Laird v. Tatum*, 408 U.S. 1, 11, 14 (1972). In contrast, "opinions and advice, even of those in authority, are not a law or regulation such as comes within the scope of the several provisions of the federal Constitution designed to secure the rights of citizens" against government acts. *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571, 575 (1919). Here, the HCC Board's censure of Wilson was not an exercise of governmental authority to proscribe, compel, or regulate his speech in any sense contemplated in *Laird*. It was only a pointed expression of the body's official disapproval and its desire that, as a fellow member of the Board, he should speak and act differently in the future.

The court below seized on the fact that censure is a legislative "punish[ment]" of a member. Pet. App. 14a; *see id.* 12a-15a. But while a censure is certainly a form of legislative discipline, in essence it only expresses the body's institutional opinion. It is an "official reprimand or condemnation; an authoritative expression of disapproval or blame; [a] reproach." *Censure*, *Black's Law Dictionary* (11th ed. 2019). Formal expression of that opinion inflicts no injury on the censured member's own right to speak and provides no basis for a First Amendment claim.

In an analogous context, this Court years ago rejected the idea of turning every potential state-law defamation claim against public officials into federal constitutional litigation. In *Paul v. Davis*, 424 U.S. 693 (1976), the Court held that even a false government accusation of misconduct, without more, did not deprive an individual of a constitutionally protected liberty or property interest. *Id.* at 695-696,

699-712. Stating a procedural due process claim requires alleging not only harm to the plaintiff's reputation but also some accompanying "alteration of legal status," *id.* at 708, such as a loss of public employment, suspension from school, or the deprivation of a legal right. *Id.* at 706, 708-710. If falsely accusing a private citizen of being a shoplifter does not inflict an injury cognizable under the Due Process Clause, then accurately accusing an elected official of "lack of respect" for fellow board members and board rules, Pet. App. 43a, does not give rise to any claim for damages to redress the official's alleged psychic injury.

Certainly there is no precedent for allowing an elected official to claim injury under the Free Speech Clause based on the expression of a public body's opinion through a censure. In cases involving claims by private plaintiffs, some courts have held that speech by a public official, without more, is simply not the sort of coercive use of government power that can amount to actionable retaliation. Rather, "where a public official's alleged retaliation is in the nature of speech," it cannot "adversely affect a citizen's First Amendment rights" unless it involves a threat that some concretely coercive "punishment, sanction, or adverse regulatory action will imminently follow." *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 687 (4th Cir. 2000) (collecting cases); *see also, e.g.*, *Gini v. Las Vegas Metro. Police Dept.*, 40 F.3d 1041, 1045 (9th Cir. 1994) ("For any defamation and damage flowing from it, Gini has a tort remedy under state law, not under the First Amendment."). Other courts have concluded that "sometimes" true defamation can "inflict[] sufficient harm on its victim to count as retaliation.'" *Echols v. Lawton*, 913 F.3d 1313, 1322

(2019) (quoting *Tierney v. Vahle*, 304 F.3d 734, 741 (7th Cir. 2002)). (In *Echols*, a senior prosecutor intentionally misrepresented that the plaintiff was under indictment, a traditional libel *per se*—thereby blocking legislation that would have compensated the plaintiff for prior wrongful imprisonment. *See* 913 F.3d at 1321-1323.) But apart from the decision below in this case, HCC is unaware of any case holding that the censure of an elected official by his legislative peers inflicts any harm forbidden by the Constitution.

2. Lower courts have required that an allegedly retaliatory act be something that in fact "adversely affected the plaintiff's constitutionally protected speech," *Suarez*, 202 F.3d at 686, or "would 'chill a person of ordinary firmness from future First Amendment activity,'" *Nieves*, 139 S. Ct. at 1721 (quoting lower court's decision in that case); *see also, e.g.*, *Naucke v. City of Park Hills*, 284 F.3d 923, 928 (8th Cir. 2002); *Thaddeus-X v. Blatter*, 175 F.3d 378, 396-399 (6th Cir. 1999) (en banc) (discussing sources of "ordinary firmness" test); *id.* at 383 (per curiam) (detailing en banc vote). And as just discussed, "the nature of the alleged retaliatory acts has particular significance where the [government's] acts are in the form of speech." *Suarez*, 202 F.3d at 687.

"Courts have not been receptive" to such claims. *Goldstein v. Galvin*, 719 F.3d 16, 30 (1st Cir. 2013). On the contrary, they have refused to impose liability for retaliation through government speech, "even if the plaintiff can demonstrate a substantial adverse impact," unless it "concerns 'private information about an individual,'" or was "'threatening, coercive, or intimidating so as to intimate that punishment,

sanction, or adverse regulatory action [would] imminently follow.'" *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 417 (4th Cir. 2006) (quoting *Suarez*, 202 F.3d at 689).

This limit to the retaliation cause of action properly recognizes that a government expression of opinion or comment on public facts, unlike coercive action, normally will *not* indirectly suppress or compel the speech of other actors in a way the government "'could not command directly.'" *Perry*, 408 U.S. at 597. Moreover, the limitation is "necessary to balance the government's speech interests with the plaintiff's speech interests." *Balt. Sun*, 437 F.3d at 417.

An elected body's censure of a member does not involve any "adverse action" of the sort recognized in these prior cases. Of course, one purpose of a censure is to urge the subject of the official rebuke to change an objectionable manner of speaking or behaving—or even to change an objectionable opinion. But if the censured legislator continues to disagree, there is nothing to force him to change either his mind or his manner. He is free to respond to the government's speech with yet more of his own. Both sides can make their positions clear not only to each other but to stakeholders, voters, and the public.

The censure here, for example, did not prevent Wilson from doing his job as a trustee. *See* Pet. App. 27a. It did not purport to impose or threaten arrest, prosecution, or loss of employment. Rather, the HCC Board responded to Wilson's provocative speech and conduct—targeting other members and the Board itself—with what might be best described as political peer pressure. Moreover, there is no reason to believe

that its action in fact chilled Wilson's speech. Indeed, the complaint makes only pro forma allegations in that regard. J.A. 12-15. And after a similar resolution in 2016, Wilson proclaimed that a "reprimand [was] never going to stop [him]." *See supra* at 3.

In the *Baltimore Sun* case, two reporters sued after Maryland's governor, unhappy with their coverage, directed staff in the state executive branch not to speak with them or answer their calls or requests other than as legally required. *See* 437 F.3d at 413-414. Rejecting their retaliation claim, the Fourth Circuit observed that it would be inconsistent with a "journalist's accepted role in the 'rough and tumble' political arena" to hold that a "reporter of ordinary firmness" could be impermissibly "chilled" by that action. *Id.* at 419. Here, it would be even more inconsistent with the role of an elected politician to hold that he could be impermissibly "chilled" by being formally called out by his colleagues for speech and behavior that they considered offensive, unjustified, and damaging to their collective ability to discharge their institutional duties.

3. The context of elective office removes any doubt about the issue here. As this Court observed well over a century ago, the common law of libel recognized that "when any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office[.]" *White v. Nicholls*, 44 U.S. 266, 290 (1845) (quoting *Commonwealth v. Clap*, 4 Mass. 163, 169 (1808)). The law allowed truthful, good-faith comment on the "'public conduct

of a public man,' which was a 'matter of public interest' that could 'be discussed with the fullest freedom' and 'made the subject of hostile criticism.'" *McKee v. Cosby*, 139 S. Ct. 675, 679 (2019) (Thomas, J., concurring in the denial of certiorari) (quoting Thomas Starkie, *Starkie on Slander and Libel* *242 (Horace Wood ed., 4th ed. 1877)). And "criticism [could] reasonably be applied to a public man in a public capacity which might not be applied to a private individual." *Id.* (quoting *Starkie* *242).

This Court's modern First Amendment cases have expanded, not contracted, protection for the criticism of elected officials. The Court has made clear that "government officials, such as elected city commissioners," must be "treated as 'men of fortitude, able to thrive in a hardy climate.'" *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964). In keeping with that principle, the Court has required such officials to meet a high standard to prevail even on traditional state-law defamation claims. *Id.* at 279-280. Recognizing an actionable First Amendment injury based on an elected legislator's allegation of "mental anguish" resulting from a censure, Pet. App. 18a, would be even more starkly inconsistent with the "profound national commitment" the Court has recognized "to the principle that debate on public issues should be uninhibited, robust, and wide-open"—even though that debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 376 U.S. at 270; *see Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1248 (10th Cir. 2000).

Certainly Wilson saw it as his right—perhaps even his duty—to criticize others, including his colleagues and HCC generally. *See, e.g.*, Pet. App. 3a, 14a, 42a-43a; *cf.* BIO 5 ("the First Amendment's 'manifest function . . . in a representative government requires that legislators be given the widest latitude to express their views on issues of policy'" (quoting *Bond v. Floyd*, 385 U.S. 116, 135-136 (1966)). But the same principle works in reverse. When Wilson's colleagues responded to his statements and actions with an official criticism of their own, their action did not inflict any legal injury that could give rise to an action under the First Amendment.

II. Recognizing a First Amendment claim based on legislative censure would be inconsistent with history, tradition, and robust local practice.

The decision below fares no better when viewed in the light of history, tradition, and contemporary practice. As this Court has made clear, "'[l]ong settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'" *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). Indeed, "traditional ways of conducting government" can themselves "give meaning to the Constitution." *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (internal quotation marks and citation omitted). *See also, e.g.*, *NLRB v. Noel Canning*, 573 U.S. 513, 524-526 (2014); *Marsh v. Chambers*, 463 U.S. 783, 786-795 (1983); *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

Legislative bodies in England and America have long exercised inherent authority over their internal affairs, including by censuring members for conduct

or speech that the body's majority considers beyond the pale. Local bodies, in particular, continue to use censures in modern practice. Such measures are an important aspect of effective self-governance. They also help the body maintain public trust by officially repudiating individual conduct or speech that could otherwise undermine the institution's reputation and policies or give rise to legal claims. And whether the speech or conduct at issue occurs inside or outside legislative halls, invocation of the censure power has never previously been thought to give rise to a First Amendment claim on the part of the censured legislator.

1. ***English background.*** The practice of legislative discipline has been a feature of English and American government since well before the Founding. In England, "it was around the mid-sixteenth century that Parliament began taking responsibility for disciplining its own members." Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 232 (2017) (Chafetz). In the early years, the "favorite method of punishing members was to expel them." Dorian Bowman & Judith Farris Bowman, *Article I, Section 5: Congress' Power to Expel—An Exercise in Self-Restraint*, 29 Syracuse L. Rev. 1071, 1074 (1978) (Bowman); *see also* Chafetz at 232-239 (discussing history from 1549 to 1782). Members could also be physically confined. *See* Bowman at 1073 & n.11; Chafetz at 232-239.[7] "[L]ess common methods of

[7] *See, e.g.*, 2 *Journal of the House of Lords, 1578-1614*, at 327-328 (1830), https://perma.cc/6CT4-FFMH (on June 25, 1604, after a speech by Lord Mountague considered offensive to the

discipline were reprimand or suspension." Bowman at 1073-1074.

Whatever the form of discipline, one accepted use of the disciplinary power was to condemn "speech that the House disdained." Chafetz at 238. Moreover, the speech in question did not have to occur on the floor. On the contrary, the first expulsion from the House of Commons, in 1581, was prompted by a member's publishing a book deemed critical of the House and some of its other members. Bowman at 1074, 1078; Chafetz at 233. And almost two hundred years later, in "[u]ndoubtedly the most prominent use of parliamentary discipline in the eighteenth century," the House in 1764 expelled John Wilkes for having published a pamphlet critical of government policy, which the House deemed "'a false, scandalous, and seditious libel.'" Chafetz at 238; *see* Bowman at 1079.

The Wilkes case was well known and widely followed, including in the American colonies. *See, e.g.*, Chafetz at 238-239. Wilkes was reelected several times, and several times the House refused to seat him. *Id.* at 238. He was finally seated in 1774, *id.* at 239, and the case came to stand for the principle that Parliament should have respected the judgment of

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established religion, the house concluded "that some Order should be taken for the Censuring of the said Lord for his presumptuous Speech"); *id.* at 329, https://perma.cc/K5KP-WUR4 (June 26, Mountague deserving "to be severely censured and punished" for his speech, ordered to be "committed to the Prison of *The Fleet*, and there remain until further Order shall be taken concerning him"); *id.* at 336, https://perma.cc/6J8Q-U89V (July 2, Mountague's apology and release).

his constituents once they had reelected him. Thus, in 1782 Wilkes "succeeded in having the records of his repeated exclusions expunged from the House's *Journals*, 'as being subversive of the rights of the whole body of electors of this kingdom' to have their choice of representative respected." *Id.*; *see also* Bowman at 1081-1083. But no one questioned that Parliament had the power to expel him in the first place based on non-legislative speech that it considered seditious.

In sum, in English parliamentary practice before the founding, members were disciplined not only "for voicing unacceptable opinions in debate on the floor of the House," Bowman at 1078, but for acts "within the House and outside the House," even if they "did not violate any statute or bear any discernable relation to the member's official duties," *id.* at 1075. In particular, they were disciplined "for speeches outside of Parliament and for writing pamphlets and books which Parliament considered 'scandalous' or 'libelous.'" *Id.* at 1078 & n.42.

2. ***Colonial, federal, and state practice.*** "[B]y the time colonial assemblies began to function," the power to discipline members "was a recognized tradition which these younger bodies were not slow in following." Mary P. Clarke, *Parliamentary Privilege in the American Colonies* 173 (1943) (Clarke). The power was "'more or less assumed' to exist everywhere, although a number of colonies also made it explicit in one way or another." Chafetz at 239 (quoting Clarke at 184). Members could be "subject to a variety of penalties, usually beginning with censure at the bar, and ending with fine or imprisonment," Clarke at 184, or expulsion, *id.* at 194-196. And like

Parliament, colonial legislatures "felt free to expel members who expressed their views both within and without the legislature." Bowman at 1084 (footnotes omitted).

Against this backdrop, the Framers spent little time debating the constitutional provision confirming that each house of the new federal Congress would have the power to "determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the concurrence of two thirds, expel a Member." U.S. Const. art. I, § 5. They did focus on the expulsion power, which allowed a house to countermand a choice made by the electorate and, in Madison's words, "'in emergencies of faction might be dangerously abused.'" Chafetz at 240; Bowman at 1085-1090; *Powell v. McCormack*, 395 U.S. 486, 536, 547-548 (1969). The requirement of a two-thirds vote for expulsion imposed a new limit on that power. Beyond that, however, the new Constitution did not "attempt to limit the legislature's discretion by defining the conduct which would warrant expulsion[.]" Bowman at 1090; *see also id.* at 1093; Joseph Story, *Commentaries on the Constitution of the United States* § 835 (1833).

The lesser disciplinary options available to a regular majority are not enumerated in the text, but they have long been understood to extend at least to censure or other forms of official reprimand. The Senate first censured a member in 1811, for reading from a confidential letter during open debate.[8] The

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[8] *See* Cong. Rsch. Serv., 93-875, *Expulsion and Censure Actions Taken by the Full Senate Against Members* 22 (2008);

House first censured a member in 1832, for insulting the Speaker.[9] Perhaps most famously, in 1954 the Senate "condemned" certain conduct of Senator Joseph McCarthy that "tended to bring the Senate into dishonor and disrepute . . . and to impair its dignity," including making statements to the press and in a "nationwide television and radio show." S. Res. 301, 83d Cong., 100 Cong. Rec. 16392 (1954).

State legislatures, too, continued the tradition of exercising disciplinary power over their members, including the power to censure. The National Conference of State Legislatures, for example, confirms that "[a] legislative body has the right to regulate the conduct of its members and may discipline a member as it deems appropriate, including reprimand, censure or expulsion."[10] In 1913, the Massachusetts Senate reprimanded a member who "in a public speech" away from the chamber accused a member of the state House of offering him a bribe, but then failed to substantiate

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id. at 1-2, 11-21 (discussing censure); *id.* at 22-25 (listing censures from 1811-1990).

[9] *See* Cong. Rsch. Serv., RL31382, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives* 20 (2016); *id.* at 2, 10-13 (discussing censure); *id.* at 20-21 (listing censures and reprimands beginning in 1832); *see also In re Adam Clayton Powell*, H.R. Rep. No. 90-27, at 24-30 (1967) (discussing censure and other measures).

[10] NCSL, *Mason's Manual of Legislative Procedure* § 561.1 (2020); *see also* NCSL, *Inside the Legislative Process*, tab 6, pt. 1 (1996), https://perma.cc/JCZ5-7GSD (actions "usually within a legislature's authority include withdrawal of privileges, . . . reprimand, [and] censure").

the accusation before a Senate committee.[11] In 1980, the Connecticut House of Representatives censured a member who used a racial slur in answering a news agency survey question on state taxes.[12] And earlier this year, the Virginia Senate censured a member for what it deemed a series of "inflammatory statements and actions," including social media posts and other public statements on political issues.[13]

3. ***Local practice.*** Elected local government bodies such as HCC likewise inherited at least the traditional power to censure members. *See, e.g.*, *Whitener v. McWatters*, 112 F.3d 740, 744 (4th Cir. 1997) ("Thus, Americans at the founding and after understood the power to punish members as a legislative power inherent in even 'the humblest

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[11] *McDevitt Upsets Reprimand Plans*, Boston Daily Globe, Mar. 13, 1913, at 1; *McDevitt Not to Apologize*, Boston Daily Globe, Mar. 14, 1913, at 1. The McDevitt reprimand resolution also suspended the Senator for several weeks, stopped his pay, and required a written apology as a condition for restoration of his rights as a member. *See McDevitt Not to Apologize* at 1.

[12] Richard Madden, *Legislator Is Censured Over a Racial Epithet*, N.Y. Times, Feb. 21, 1980, at A1. Several years later, the same chamber considered a resolution to censure a member for using a derogatory term for gay people while speaking to reporters. *See also* Nick Ravo, *Legislator Reprimanded for Remark*, N.Y. Times, Mar. 3, 1988, at B1. In an outcome that one legislator termed a "'classic compromise,'" the chamber ultimately took no action on the resolution, but accepted "as a statement of the House" a "delicately worded" committee report that "mildly reprimand[ed]" the member. *Id.*

[13] *See Chase v. Senate of Virginia*, No. 3:21-cv-00054, 2021 WL 1936803, at *1-*3 (E.D. Va. May 13, 2021) (describing factual allegations); *id.* at Comp. Ex. 2 (ECF No. 1-3) (S. Res. No. 91).

assembly of men.'").[14] And they still frequently use that power, including to respond to members' speech. The petition in this case provides several examples from recent news reports. Pet. 20-22. Further examples may be found in reported cases.[15]

Two aspects of this ongoing practice warrant special mention. First, as the petition notes (at 21-22), in many cases local legislative censures respond to statements made by individual elected members that are perceived as improperly disparaging individuals or groups. And second, the local censure process itself often involves significant community engagement and debate.

In 1967, for example, a New Jersey school board censured its vice president for giving the local newspaper a statement opposing two Jewish candidates.[16] Some "500 persons packed into the Municipal Building" for the board's final debate, and "a parade of residents both condemned and praised"

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[14] *See also* Recent Case, Wilson v. Houston Community College System, *955 F.3d 490 (5th Cir. 2020)*, 134 Harv. L. Rev. 2638, 2642-2643 (2021).

[15] *See Phelan*, 235 F.3d at 1245-1246 (community college board); *LaFlamme v. Essex Junction Sch. Dist.*, 170 Vt. 475, 476-479 (2000) (school board); *Whitener*, 112 F.3d at 741-742 (county board of supervisors); *Zilich v. Longo*, 34 F.3d 359, 360-361 & n.2 (6th Cir. 1994) (city council); *Curley v. Monmouth Cty. Bd. of Chosen Freeholders*, 816 Fed. Appx. 670, 672-673 (3d Cir. 2020) (county governing board); *Butler v. Harrison*, 124 Ill. App. 367, 370 (1906) (city council).

[16] Richard Reeves, *Official In Wayne Is Asked to Quit*, N.Y. Times, Feb. 10, 1967, at 37 ("'Most Jewish people are liberals, especially when it comes to spending for education.'").

the member before the vote.[17] Similarly, in 1979, a California school board censured a member for disparaging statements in campaign literature—in response to which the member's campaign ordered 10,000 more copies of the challenged flyer.[18]

In 1985, the Seattle school board censured a member for statements she made in a newspaper interview.[19] The colleague who presented the censure motion said the statements "'polariz[ed] the entire city along race, gender, income and philosophical lines.'"[20] At the same time, he refused to call for her resignation, describing her as "a 'highly capable and sincere woman in a leadership position,' with whom he disagree[d] on most issues."[21] The final vote came after "three weeks of acrimony and an emotional 3½ hours of testimony"; "scores of people packed the meeting to protest everything from apartheid in

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[17] *Id.*

[18] Austin Scott, *Ferraro Stands by Charge Leading to Censure Move*, L.A. Times, May 23, 1979, at E1 (The challenged statement alleged that unqualified administrators had caused a "mess" in local schools and claimed that "'[w]ith their influence [the speaker's election opponent and another board member] were able to force the selection of a number of school administrators only because they had Spanish surnames.'").

[19] Constantine Angelos, *Roe Censure: Reaction of a Divided Community*, Seattle Times, Aug. 22, 1985, at A1 (statements reported to include that member "would not hire women in positions of authority because they are too emotional and petty" and "what happens when a child whose mother is a prostitute in the Holly Park Housing Project is placed in the same classroom with a boy like hers who has been given every advantage").

[20] *Id.*

[21] *Id.*

South Africa to lack of leadership in the schools' administration."[22]

Similar local debates have continued to play out in recent years. In 2017, for example, a member of New York's St. Lawrence County Board of Legislators posted offensive comments about President Obama and his family on his personal Facebook page.[23] At the board meeting considering a censure resolution, "[c]ommunity members filled the seats" and "[m]any spoke out."[24] One resident specifically observed to the member, "'[t]he first amendment allows you to speak freely but make no mistake it does not shield you from criticism or consequences from what you decide to say.'"[25] Some residents called on the member to resign, while at least one defended him as a good person but "subject to human failings and flaws and faults."[26] In the end the board voted 12-2 to censure the member, with the board chair commenting that

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[22] *Id.*

[23] Alex Valverde, *St. Lawrence County Legislator Censured for 'Racist' Facebook Post*, Spectrum News1 (Feb. 7, 2017), https://spectrumlocalnews.com/tx/austin/news/2017/02/7/st--lawrence-county-lapierre-censured-facebook-post (last visited July 12, 2021; text only at https://perma.cc/H8SX-K54C) ("So long big ears, you and your Muslim brothers did your best to destroy this great country and you failed"; president's family "should be packed up and sent on a 'one way trip to Kenya'").

[24] *Id.* The live site in note 23 includes video clips of community members' statements at the meeting.

[25] *Id.*

[26] *Id.*

he "hope[d] they c[ould] now put the matter behind them and move forward."[27]

In a final recent example, in 2020 the city council of Fairmont, West Virginia, twice censured a member for making repeated offensive social media posts.[28] In local news reports, the mayor emphasized that "the intention of the resolution [was] to proclaim that the opinions and viewpoints of an individual council member do not represent the view, opinions or beliefs of the other council members, or the entire council as a whole."[29] *See also infra* at 35 n.34; Pet. 21-22 (citing other examples).

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Under the new rule adopted by the Fifth Circuit in this case, any American legislature that continues

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[27] *Id.*

[28] Allen Clayton, *Fairmont City Council censures one member due to controversial social media posts*, 12WBOY (July 28, 2020), https://www.wboy.com/top-stories/fairmont-city-council-ostracizes-one-council-member-over-social-media-posts/ (last visited July 12, 2021; text only at https://perma.cc/4EX2-D9MM) (posts referring to "gooks" and "towelheads" and later referring to college students as "socialists" and "scum"); Emily McNamara, *Fairmont City Council to vote on resolution that will censure one of its members due to recent social media posts*, 12WBOY (July 27, 2020), https://www.wboy.com/top-stories/fairmont-city-council-to-vote-on-resolution-that-will-censure-one-of-its-members-due-to-recent-social-media-posts/ (last visited July 12, 2021; text only at https://perma.cc/7HFQ-2TRA) (same and online meme depicting "what women looked like before and after becoming a 'feminist'" and including words such as "slut" and "raped").

[29] *See* McNamara, *supra* n.28 The live sites in note 28 include video clips of the mayor making this point.

this long tradition by censuring a member for his speech violates the First Amendment. If this Court were to adopt that view, the longstanding and active practice of legislative censures would come to a screeching halt. That is especially true at the local level, where the practice is most robust, because local governments have no sovereign immunity shield.[30]

That result cannot be reconciled with our democratic traditions. Historically, legislators who have been censured or otherwise disciplined in response to controversial speech have sometimes repented. Sometimes they have faded from public view. Sometimes they have remained defiant and turned to their constituents to seek vindication. Up to now, what they have not been able to do is turn to the federal courts, seeking to suppress any official response from their legislative colleagues by claiming victim status under the First Amendment. This Court should not give them that right now.

III. Allowing an elected legislator to use the Free Speech Clause to suppress responsive government speech would undercut, not advance, First Amendment values.

Finally, allowing elected legislators to use First Amendment retaliation claims to block censures by their peers would be fundamentally inconsistent with both respect for the legislature's own right to speak and the proper functioning of the democratic process, especially at the local level.

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[30] *Compare Chase*, 2021 WL 1936803, at *3 (dismissing claim against state senate and officers on immunity grounds).

A. A legislative censure is core government speech.

A local government body generally "has the right to 'speak for itself'" and "'is entitled to say what it wishes.'" *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009) (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000), and *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)). Moreover, "as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position," even though that will almost inevitably involve preferring one viewpoint over another—something the First Amendment forbids in many other contexts. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015). In taking such positions, the current legislative majority is entitled to determine what positions or viewpoints "the government" will adopt. In doing so, it properly "represents its citizens" and "carries out its duties on their behalf." *Id.* Indeed, in this limited but important context, "'[i]t is the very business of government to favor and disfavor points of view.'" *Summum*, 555 U.S. at 468.

The censure here, for example, expresses the view of the HCC Board that one member's actions and speech have "demonstrated a lack of respect for the Board's collective decision-making process, a failure to encourage and engage in open and honest discussions in making Board decisions, and a failure to respect differences of opinion among Trustees." Pet. App. 42a. It relates that Wilson has personally criticized other Board members, including initiating robocalls to their constituents; publicly accused them

of "unethical and/or illegal conduct, without facts to support his allegations"; hired private investigators to probe both other members and the Board; filed suits against HCC and other members; and prompted an inquiry from HCC's accrediting agency. *Id.* 42a-44a. And it condemns this conduct as "reprehensible" and "direct[s]" Wilson to stop it. *Id.* 44a-45a.

This is a core example of government speech. It is a formal act, adopted by the majority of an elected government body, expressing official condemnation of certain behavior and speech by one of its members. It states that Wilson's behavior was unacceptable and adversely affected other members, the Board as a whole, and HCC—the public institution for which they all serve as trustees. Expressing that view is part of the Board's government business for at least three reasons.

First, the Board's ability to condemn and seek a change in Wilson's behavior and speech with respect to his colleagues and the institution is integral to its ability to manage its own governance process. An effective process is, in turn, important to the Board's collective discharge of its public duties.

Second, in some circumstances it is important for an elected body such as the Board to be able to express an official institutional position specifically condemning certain speech or action by an individual member. As discussed above, for example, comments by members sometimes disparage individuals or groups in ways that others find inappropriate or

offensive.[31] It can be important to concerned constituents—voters, donors, alumni, parents, faculty, other employees, students—that the full body take pointed action to make clear that such statements, although made by an official in a position of trust and authority, do not represent the position of the institution. Indeed, in some circumstances such action could be necessary to forestall legal challenges or a loss of funding.[32] And in such situations there can be a significant difference between an official institutional act, such as formally censuring a member, and more anodyne measures such as Board-approved press releases or mere statements by other members or officials distancing themselves from the member's remarks. Whether acting to remain clearly within legal boundaries or simply to satisfy constituents, a legislative majority that censures a member to express official condemnation of the member's individual speech "take[s] a position" on behalf of the body in a way that "represents its citizens" and "carries out its duties on their behalf." *Walker*, 576 U.S. at 208.

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[31] Wilson himself sometimes made comments of this sort, although that was not a ground for the censure at issue here. *See* Foley, *supra* n.2.

[32] *See Feminist Majority Found. v. Hurley*, 911 F.3d 674, 693 (4th Cir. 2018) (vacating dismissal of Title IX sex discrimination claim against university based on alleged deliberate indifference to offensive speech by other students because complaint alleged university could have taken additional steps, including "more vigorously denounc[ing] the harassing and threatening conduct").

Finally, the Board's public response to Wilson's public conduct and speech served the critical purpose of informing the electorate on a matter important to the Board's operation. The censure made clear that Wilson's colleagues rejected his public charges of illegality or misconduct on the part of other members and the Board. And beyond the substance of particular issues, it told voters that the rest of the Board had found Wilson to be unable or unwilling to work effectively as part of a multi-member body. Of course, Wilson's constituents were not bound to credit the Board's view on these issues over Wilson's. But as this Court has emphasized, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-347 (1995). To achieve that goal, government bodies speaking collectively must have the same ability as their individual members to provide voters with information and perspectives on how those members are performing in office.

B. A speech conflict between an elected body and one of its members is a matter for the voters, not the courts.

This case is thus about public speech and public counter-speech. Wilson's activities involved (among other things) public speech by an elected official. The alleged "retaliation" is a public censure by his legislative colleagues. Allowing Wilson to speak but then suppress responsive speech would do nothing to advance First Amendment values. And courts are not

the proper arbiters of a quarrel between an elected body and one of its members.[33]

"When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker*, 576 U.S. at 207. "That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech." *Id.* "[A] government entity is ultimately 'accountable to the electorate and the political process for its advocacy.'" *Summum*, 555 U.S. at 468 (quoting *Southworth*, 529 U.S. at 235). "'If the citizenry objects, newly elected officials later [can] espouse some different or contrary position.'" *Id.* at 468-469.

This interplay between government speech and the democratic process operates most vibrantly at exactly the sort of local level involved in this case—in the "local assemblies of citizens" where government is closest to the people. *See* 1 Alexis de Tocqueville, *Democracy in America* 62 (Henry Reeve trans., 1845). Especially in that relatively contained and immediate setting, speech by both the government (determined by current majorities) and others "helps produce

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[33] Some of the behavior addressed by the censure, such as hiring private investigators (*see* Pet. App. 42a-43a), might be best categorized as conduct rather than speech. *See, e.g.*, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150-1151 (2017). Some, such as using HCC's name on a private website in violation of policy (Pet. App. 43a), might be on a border. The censure, in contrast, is pure speech. But any effort to parse "speech" from "conduct" in this context only confirms how artificial it would be for the courts to try to use the First Amendment to regulate the Board's censure power.

informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate." *Walker*, 576 U.S. at 207.

The local censure examples discussed above show, including through video, how this plays out in the public square, engaging scores or hundreds of residents with their local governments. *See supra* at 25-28 & nn.16-29. And there are other examples.[34] Proposed censures literally put the suitability of speech by a public official on the public agenda. Residents of all views can voice their own reactions and positions—and listen to those of others—in the orderly context of a formal meeting. After hearing from the community, a representative body can decide whether to adopt a censure measure, making clear the position of the current elected majority. A mayor can voice a hope of moving on, or emphasize that the point is to dissociate the council as a body from one member's statements. The local news can cover the affair, helping inform members of the public. A rebuked individual can choose how to respond—with contrition, silence, or defiance.

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[34] *See, e.g.*, Timothy Eggert, *Watch now: Bloomington council censures Ald. Jean Carrillo*, The Pantagraph (Apr. 19, 2021), https://www.pantagraph.com/news/local/govt-and-politics/watch-now-bloomington-council-censures-ald-jenn-carrillo/article_cdcce07a-7198-512b-ad26-202cd1e51fc3.html (last visited July 12, 2021; text only at https://perma.cc/4EZL-XYN8) (city council member called new members "dangerous authoritarians who got bought out by the police union" and said she "look[ed] forward to making [their] life a living hell").

At the next election, voters who have been informed by such a local censure debate can decide what to do. If a member's constituents agree with the majority and find any contrition too little or too late, they can vote the censured member out of office. Conversely, if the public verdict goes against the majority and in favor of the maverick, then in due course "newly elected officials" can "espouse some different or contrary position." *Southworth*, 529 U.S. at 235. This is how democracy is supposed to work.[35]

The new constitutional rule adopted below would shut down this speech-rich democratic process. Any censure adopted by an elected body in response to a member's speech would violate the First Amendment. *See* Pet. App. 12a-13a ("formal reprimands" are actionable "'by [their] very nature'"); *id.* 17a-18a (remanding only for determination of damages); *but see id.* 37a (Jones, J., dissenting from denial of rehearing en banc) (panel "makes no attempt to explain what happens next"). And even a rule requiring some more "fact intensive inquiry," *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000), about an official rebuke's alleged adverse effects on the member's speech rights would have the

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[35] Historically, some dissenters, such as John Wilkes, have famously triumphed in the end. *See supra* at 20-21; *see also, e.g.*, Chafetz at 245, 247 (recounting cases of censured members of Congress resigning and being reelected to their seats); *Bond v. Floyd*, 385 U.S. 116, 128 (1966) (excluded member elected again at special election and next regular election). In this case, Wilson eventually resigned the seat he held at the time of the censure. Pet. App. 5a. He then ran for the seat from a different district but was defeated in a run-off election. *Id.*

same practical effect. The prospect of expensive litigation would surely chill even the hardiest local government from continuing the long tradition of debating censure resolutions.

Moreover, if some brave body did try its luck, how would courts sensibly or objectively "balance" individual and collective speech interests in this context? *See Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 417 (4th Cir. 2006). And while this case now involves only a demand for money damages for mental anguish, in other situations how would courts grapple with demands for injunctive relief directed toward legislatures or their officers, commanding them to rescind a censure or other internal disciplinary measure, expunge legislative records, or the like? *See, e.g.*, *Rangel v. Boehner*, 20 F. Supp. 3d 148, 175-176 (D.D.C. 2013), *aff'd*, 785 F.3d 19 (D.C. Cir. 2015). As Judge Jones correctly observed in her dissent from denial of rehearing en banc, the decision below "invites federal courts to adjudicate 'free speech' claims for which there are no manageable legal standards." Pet. App. 31a; *see also id.* 36a, 37a-38a (questioning how courts could balance interests or apply "strict scrutiny").

Neither effectively banning the longstanding practice of legislative censure nor "judicializing legislative disputes," Pet. App. 37a (Jones, J.), is the way to honor the First Amendment in this case. Either approach perversely turns the Free Speech Clause into "a weapon to stifle fully protected speech at the hands of a fully protected speaker." *Id.* The solution is instead to return to the law as it had long stood before the decision below. "American politics is not for the thin-skinned, even, or perhaps especially,

at the local level." *Manley v. Law*, 889 F.3d 885, 889 (7th Cir. 2018). For elected officials, the potential for criticism, including from one's legislative colleagues, comes with the job. The First Amendment protects the speech of the "gadfly," Pet. App. 31a (Jones, J.), but it does not prevent the majority from responding with speech of its own. After hearing both, the voters can decide.

CONCLUSION

The judgment of the court of appeals should be reversed.

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