No. 20-____

IN THE

Supreme Court of the United States

HOUSTON COMMUNITY COLLEGE SYSTEM,

Petitioner,

v.

DAVID BUREN WILSON,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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?

RELATED PROCEEDINGS

Wilson v. Hous. Cmty. Coll. Sys., 2019 WL 1317797 (S.D. Tex. Mar. 22, 2019)

Wilson v. Hous. Cmty. Coll. Sys., 955 F.3d 490 (5th Cir. 2020)

Wilson v. Hous. Cmty. Coll. Sys., 966 F.3d 341 (5th Cir. 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Houston Community College System respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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 order denying rehearing en banc, with its dissenting opinions (Pet. App. 29a-41a), is published at 966 F.3d 341. The district court's memorandum opinion and order (Pet. App. 20a-28a) is unpublished but available at 2019 WL 1317797.

JURISDICTION

The court of appeals entered its judgment on April 7, 2020. Pet. App. 1a. The court denied a timely petition for rehearing en banc on July 15, 2020. *Id.* at 29a. On March 19, 2020, this Court entered a standing order, the effect of which extends the time within which to file a petition for a writ of certiorari in this case to December 14, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

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

STATEMENT OF THE CASE

Elected bodies at all levels of American government have long had the power to "censure"—that is, to express official disapproval toward—their own members. The Houston Community College System Board of Trustees is one of those bodies. Following an increasingly chaotic series of events sparked by trustee David Wilson, the Board voted to censure him. The Fifth Circuit, breaking from five federal courts of appeals and one state court of last resort, held the First Amendment prohibits an elected body from censuring a member when the censure responds to the member's speech. This Court should resolve whether the First Amendment's Free Speech Clause limits a local government's censure power.

A. Historical background

From early modern times, elected bodies have set standards for their own members' speech and conduct and have responded to violations of those standards. Resolutions of censure emerged in the seventeenth century as the mechanism for expressing disapproval. *Whitener v. McWatters*, 112 F.3d 740, 743 (4th Cir. 1997) (noting that Parliament "could censure [members]"). Then, as now, censure is "[a]n official reprimand or condemnation" expressing a deliberative body's sense that one of its members has engaged in wrongdoing. *Censure*, *Black's Law Dictionary* (11th ed. 2019).

Throughout American history, elected bodies at all levels of government have exercised the authority to censure their own members. Joseph Story explained that even "[t]he humblest assembly of men" possesses the power to determine rules for its members, and that such power "would be nugatory, unless it was coupled

with a power" to address, among other things, "disobedience to those rules." 2 *Commentaries on the Constitution of the United States* § 835 (1833).

Today, censure remains a common tool for addressing disobedience by a member of a governing body. *Robert's Rules of Order*, the most widely used manual of parliamentary procedure in the United States, explicitly authorizes the practice. Henry M. Robert, *Robert's Rules of Order: Newly Revised* § 10, at 120 (Sarah Corbin Robert et al. eds., 10th ed. 2000). Congress and state legislatures have repeatedly censured their members.[1] And in a typical month, local bodies issue dozens of censures. See *infra* at 20.

In certain circumstances, a censure resolution may include additional consequences beyond the statement of condemnation. But the defining feature of a censure resolution is its official expression of disapproval. And this case concerns only that expression. Pet. App. 14a.

B. Factual background

1. Petitioner Houston Community College System (HCC) is a public institution that serves students in the Houston area. Pet. App. 2a. It is governed by a Board of nine elected trustees who are responsible for providing policy direction that, among other things,

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[1] For cases involving Senators, see U.S. Senate, *Powers & Procedures: Censure*, https://perma.cc/RXS5-WF69. For cases involving Representatives, see Jack Maskell, Cong. Rsch. Serv., RL31382, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives* 20 (2016). For cases involving state legislators, see Nat'l Conf. of State Legislatures, *General Legislative Process: Censure, Expulsion, and Other Disciplinary Actions* 6-3 (1996), https://perma.cc/ADK7-CF9T.

enhances the public standing of HCC. *Id.*; *see* Tex. Educ. Code Ann. § 51.352.

After a controversial campaign, respondent David Wilson was elected to HCC's Board in 2013. Wilson's tenure was marked by immediate and constant turmoil. In a span of three years, he filed multiple lawsuits against HCC, helped others to file additional lawsuits, was accused of leaking confidential information, publicly denigrated HCC's antidiscrimination policy, and sparked media attention for a laundry list of other controversies.[2]

Individual board members repeatedly expressed concern that Wilson was creating discord detrimental to the community college system. Nevertheless, he persisted. And he proclaimed that a "reprimand is never going to stop me."[3]

2. Events came to a head in 2017. Against Wilson's opposition, the Board voted to fund an overseas HCC campus. Pet. App. 3a. In response, Wilson orchestrated a wave of negative robocalls to other members' constituents. *Id.* 42a. Shortly thereafter, Wilson also hired private investigators to probe the

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[2] Wilson's activities prompted one local newspaper to provide a compendium of "Dave Wilson Controversies." https://perma.cc/98UZ-G234. For additional news coverage, see, 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, 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.

college and a fellow trustee (to find out where she lived), and filed yet another lawsuit against HCC—his fourth in four years—because a fellow trustee voted via videoconference.[4] By that point, Wilson's four lawsuits had cost HCC almost $300,000 in legal fees.[5]

What's more, Wilson's actions posed a direct threat to HCC's accreditation. Pointing to a news article about Wilson's antics, HCC's accrediting agency sent a letter expressing its concern that HCC had violated a "Core Requirement" regarding institutional "leadership" and "governance": that its governing board "act with authority only as a collective entity" and "not [be] controlled by a minority." *See* Pet. App. 44a (describing the letter); Southern Association of Colleges and Schools Commission on Colleges, *Resource Manual for the Principles of Accreditation* 3, 20 (3d ed. 2018), https://perma.cc/D2GR-S9KR (setting out the Core Requirement). The letter demanded "evidence establishing that Mr. Wilson's actions were not indicative of a failure to comply with" that requirement. Pet. App. 44a. If HCC were in violation, it could face sanctions up to loss of its accreditation. *Principles*, *supra*, at 178.

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[4] For the private investigators and two of Wilson's lawsuits, see Pet. App. 3a. For the other two lawsuits, 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).

[5] *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).

Concerned about its accreditation, and having concluded that Wilson's "lack of respect for the Board's collective decision-making process" undermined "the best interests of the College [and] the Board," the Board publicly censured Wilson. Pet. App. 42a, 44a. Under the circumstances, the censure was the most appropriate option the Board could take under Texas law for repudiating Wilson's activities. *See id.* 44a.[6]

C. Proceedings below

1. Wilson responded to the censure by adding new claims to an already pending state-court lawsuit against HCC and the other trustees. *See* Pet. App. 4a. Invoking 42 U.S.C. § 1983, he alleged that the censure violated his rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Id.* Wilson sought compensatory damages of $10,000 for mental anguish, punitive damages of $10,000, and attorney's fees. *Id.*

HCC and the trustees removed the case to federal court. Pet. App. 4a. After Wilson's motion to remand was denied, he dropped the claims against the individual trustees. *Id.* 5a.

The district court granted HCC's motion to dismiss. It based its ruling on the Tenth Circuit's decision in *Phelan v. Laramie County Community College Board of Trustees*, 235 F.3d 1243 (10th Cir.

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[6] In addition to the core condemnation that the censure resolution conveyed, the Board also imposed a few additional conditions involving matters like eligibility for Board officer positions. Pet. App. 4a n.7. But those other matters are not at issue here: the Fifth Circuit based its holding exclusively on the "reprimand" conveyed by the Board's condemnation, *id.* 14a, dismissing in a footnote the other conditions as irrelevant, *id.* 15a n.55.

2000). That decision held that an elected community college board's censure of one of its own members did not violate the First Amendment because censure is simply a "statement" of the board's disapproval. *Id.* at 1248; *see* Pet. App. 27a.[7]

Applying *Phelan*'s reasoning, the district court found that HCC's censure of Wilson similarly did "not cause an actual injury to his right to free speech." Pet. App. 27a. Wilson was "not prevented from performing his official duties," nor did the censure "prohibit him from speaking publicly." *Id.* To the contrary, Wilson remained free to "attend[] board meetings and express[] his concerns regarding decisions made by the board." *Id.*

2. On appeal, a panel of the Fifth Circuit reversed the district court's decision and reinstated Wilson's damages claim.[8] The panel 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. The panel believed that the district court had "improperly

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[7] Although *Phelan* had determined that the claim at issue there should be dismissed under Rule 12(b)(6) for failure to state a claim, the district court here dismissed the complaint under Rule 12(b)(1) for lack of standing. Pet. App. 5a. In a case like this, the analysis of the merits and standing "quickly become[] blended" because the reason the complaint fails to state a claim is that the plaintiff has suffered no injury to a legally protected interest. 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.4 (3d ed. 2020). This "blend[ing]" commonly occurs in the First Amendment context. *Id.* at n.10, n.13.

[8] By this time, Wilson's claims for declaratory and injunctive relief had become moot because he was no longer a trustee. Pet. App. 2a.

endorsed the Tenth Circuit's decision in *Phelan*." *Id.* 10a. Instead, the panel relied on Fifth Circuit precedent holding that judges whose protected speech triggered censure by the Texas Commission on Judicial Conduct—an independent state agency responsible for overseeing and punishing judicial misconduct—could raise First Amendment retaliation claims. *See id.* 11a-13a. Because Wilson had been censured for speech that would generally be protected by the First Amendment, the court held that Wilson had stated a claim under Section 1983. *Id.* 9a-10a, 18a.

3. The Fifth Circuit denied HCC's petition for rehearing en banc by an eight-to-eight vote. Pet. App. 30a.

Chief Judge Owen and Judges Elrod and Higginson voted to rehear the case but did not elaborate their reasoning. Judge Jones filed a dissent joined by Judges Willett, Ho, Duncan, and Oldham. She charged that "the panel's holding is out of step with four sister circuits, all of them in agreement that a legislature's public censure of one of its members, when unaccompanied by other personal penalties, is not actionable under the First Amendment." Pet. App. 32a & n.3 (citing *Werkheiser v. Pocono Twp.*, 780 F.3d 172 (3d Cir. 2015); *Blair v. Bethel Sch. Dist.*, 608 F.3d 540 (9th Cir. 2010); *Phelan v. Laramie County Community Coll. Bd. of Trustees*, 235 F.3d 1243 (10th Cir. 2000); and *Zilich v. Longo*, 34 F.3d 359 (6th Cir. 1994)).

In addition, Judge Jones warned that the panel's decision "threatens to destabilize legislative debate" and "invites federal courts to adjudicate 'free speech' claims for which there are no manageable legal standards." Pet. App. 31a. And in her view, the panel had erred by not distinguishing between legislative

censures, which take place "in the hurly-burly political world of a legislative body," and cases involving "judicial discipline." *Id.* 35a-36a.

Judge Ho filed a separate dissent. In addition to reiterating the primary dissent's concern about the panel's departure from other circuits, he maintained that the First Amendment "guarantees freedom *of* speech, not freedom *from* speech," and "secures the right to criticize, not the right *not* to be criticized." Pet. App. 40a. "Tough scrutiny" of our elected officials "is not a bug, but a defining feature of our constitutional structure." *Id.* 39a. And Judge Ho endorsed then-Judge Scalia's declaration that in "no case" had the First Amendment ever "been held to be implicated by governmental action consisting of no more than governmental criticism of the speech's content." *Id.* 41a (quoting *Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986)).

REASONS FOR GRANTING THE WRIT

Censure is an essential, time-honored tool for self-governance by elected bodies. In rendering this tool unavailable when a censure responds to a member's speech, the Fifth Circuit's decision sharply conflicts with the rule adopted by three federal courts of appeals and one state court of last resort. And it is irreconcilable with an even more government-protective rule in two other circuits. This conflict generates deep uncertainty about the continued availability of this frequently used tool. The Court should use this case to resolve the uncertainty.

What's more, the Fifth Circuit's rule disregards three separate lines of this Court's precedent. It fails to apply the presumption of constitutionality accorded to longstanding historical practice; it wrongly bars a

quintessential form of government speech; and it implausibly holds that elected officials suffer a constitutional injury when they are criticized for their performance in office. The Fifth Circuit's rule threatens to impede local democracy and embroil federal courts in issues best left to the political arena.

I. The Fifth Circuit's decision squarely conflicts with decisions from other federal courts of appeals and a state court of last resort.

Both the panel (Pet. App. 10a) and the dissenters from the denial of en banc review (*id.* 32a-33a) recognized that allowing Wilson's First Amendment claim to proceed was inconsistent with the Tenth Circuit's decision in *Phelan v. Laramie County Community College Board of Trustees*, 235 F.3d 1243 (10th Cir. 2000), *cert. denied*, 532 U.S. 1020 (2001). But this is only the beginning of the conflict. The Fifth Circuit's decision also squarely conflicts with decisions of the Fourth Circuit, Sixth Circuit, and Vermont Supreme Court. Moreover, it is irreconcilable with the even more government-protective rule adopted by the Third and Ninth Circuits.

1. The Fourth, Sixth, and Tenth Circuits and the Vermont Supreme Court have all held that the First Amendment does not restrict an elected body's authority to express its view of a member's speech by issuing a censure resolution.

Fourth Circuit. The Fourth Circuit has offered the most comprehensive discussion of this rule. In *Whitener v. McWatters*, 112 F.3d 740 (4th Cir. 1997), an elected county board of supervisors censured a member for using "abusive language" toward other members of the board in private conversations. *Id.* at 741. The Fourth Circuit held that the board's decision

did not violate the First Amendment. *Id.* at 745.

Citing the historical roots of censure in Parliament, colonial assemblies, the Articles of Confederation, and the Constitution, the court explained that censure is among the "primary power[s] by which legislative bodies preserve their 'institutional integrity.'" *McWatters*, 112 F.3d at 744 (quoting *Powell v. McCormack*, 395 U.S. 486, 548 (1969)). Because citizens cannot sue legislators for legislative acts, "bodies are left to police their own members," and it is "well-established" that this includes "disciplin[ing] members for speech." *Id.* at 744. Censure exists to "protect the public reputation of legislative bodies," to make "orderly operation possible," and to enable bodies to respond to members' speech that "threaten[s] the deliberative process." *Id.* at 745.

In light of censure's history and importance, the court concluded that the Board's censure of Whitener was not only constitutional, but represented a core legislative act. *McWatters*, 112 F.3d at 744-45. As an elected official, Whitener could not claim protection from the mere expression of the "legislative body's judgment." *Id.* at 744.[9]

In reaching this conclusion, the Fourth Circuit expressly aligned itself with the Sixth Circuit's decision in *Zilich v. Longo*, 34 F.3d 359 (6th Cir. 1994),

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[9] The panel's First Amendment analysis and holding were necessary to the court's conclusion that the suit against the individual members should be dismissed on grounds of legislative immunity. *See McWatters*, 112 F.3d at 741, 744 ("Because we hold that a legislative body's discipline of one of its members is a core legislative act, we affirm" the district court's conclusion that "the Board members enjoyed absolute legislative immunity.").

cert. denied, 514 U.S. 1036 (1995). *See McWatters*, 112 F.3d at 745.

Sixth Circuit. In *Zilich*, the Sixth Circuit held that the First Amendment did not restrict a city council's ability to express its views through a censure resolution responding to a member's speech. 34 F.3d at 364. A city council member criticized the city's mayor and law department, and the city council responded by passing a resolution expressing its "disapproval and outrage." *Id.* at 361, 364. The council member sued, alleging the censure violated his First Amendment rights.

The Sixth Circuit recognized that elected bodies "frequently" adopt resolutions "condemning" their members. *Zilich*, 34 F.3d at 363. Likening censure to legislators "vot[ing] every day for or against the position of another legislator because of what other members say on or off the floor," the court explained that censures are "simply the expression of political opinion." *Id.* at 363-64. It followed that the First Amendment protects *both* "Zilich's right to oppose the mayor" and the council's "right to oppose Zilich." *Id.* at 363. The First Amendment is "not an instrument designed to outlaw" political opinion expressed through "legislative resolutions," especially, where, as here, the censure is merely "hortatory." *Id.* at 363-64.

Tenth Circuit. Expressly endorsing *Zilich*, the Tenth Circuit also held that an elected body's censure of one of its members does not give rise to an actionable First Amendment claim. *Phelan*, 235 F.3d at 1247. There, a community college board voted to censure a fellow trustee who, in opposition to a proposed tax measure, ran a newspaper advertisement that was "potentially detrimental" to the college. *Id.* at 1245-46.

The court began its analysis with the well-established proposition that the government "may interject its own voice into public discourse." *Phelan*, 235 F.3d at 1247. The government can speak so long as its speech does not "punish, or threaten to punish" private speech. *Id.*

Applying these principles, the court concluded that the censure imposed on Phelan was "not a penalty," but "simply" the Board's "statement" expressing its disapproval of her speech. *Phelan*, 235 F.3d at 1248. The censure in no way "restrict[ed Phelan's] opportunities to speak." *Id.* Rather, she "remained free to express her views publicly and to criticize the ethics policy and the Board's censure." *Id.* Accordingly, the court held that the censure did not abridge Phelan's First Amendment rights.

Vermont Supreme Court. The Vermont Supreme Court has also held, in a case involving both due process and First Amendment claims, that an elected official cannot bring a Section 1983 suit in response to being censured. *LaFlamme v. Essex Junction Sch. Dist.*, 170 Vt. 475, 476 (2000). Given the nature of the plaintiff's claims, the court concluded that he could demonstrate a Fourteenth Amendment-protected liberty interest only if he showed "a deprivation of a First Amendment right." *Id.* at 482. LaFlamme could not. Censure alone did not interfere with his ability to speak, as determined at trial, and the court saw no other First Amendment interest at issue. *Id.*

In none of these jurisdictions could Wilson have successfully maintained a First Amendment-based challenge to HCC's censure resolution.

2. The Third and Ninth Circuit have relied on *Zilich* and *Phelan* to adopt an even more government-

protective rule: They have held that the First Amendment permits elected bodies to express their disapproval through actions far more tangible than censure.

Third Circuit. In *Werkheiser v. Pocono Township Board of Supervisors*, 704 Fed. Appx. 156 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 1001 (2018), an elected board responded to a member's comments about township hiring and compensation practices by declining to reappoint him as the township's roadmaster. *Id.* at 157-58. Citing *Zilich*, the Third Circuit held that the board's decision did not give rise to a First Amendment claim. *Id.*[10]

The court began by declaring that the First Amendment does not "guard against every form of political backlash" that arises out of "hardball politics." *Werkheiser*, 704 Fed. Appx. at 158 (quoting *Werkheiser v. Pocono Township*, 780 F.3d 172, 181 (3d Cir.), *cert. denied*, 577 U.S. 956 (2015)). As such, an elected body can respond to its members' speech without fear of a First Amendment claim, so long as the body's response does not "imped[e]" an elected official's "ability to carry out his basic duties." *Id.* Because the decision not to reappoint Werkheiser did not in any way interfere with his "duties as an elected Supervisor," he had no actionable First Amendment claim. *Id.* at 159-60 (citing *Werkheiser*, 780 F.3d at 183). Earlier this year, the Third Circuit relied on

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[10] Earlier in the case, the Third Circuit held that the individual commissioners were entitled to qualified immunity because no law clearly established that an act like the Board's "violates the First Amendment if it is taken in retaliation for speech made in [plaintiff's] capacity as an elected official." *Werkheiser v. Pocono Township*, 780 F.3d 172, 181 (3d Cir. 2015).

Werkheiser to hold that a censure resolution prompted in part by a board member's sexist comments did not give rise to a First Amendment claim. *See Curley v. Monmouth Cty. Bd. of Chosen Freeholders*, 816 Fed. Appx. 670, 675 (3d Cir. 2020) (terming *Werkheiser* "our relevant precedent").

Ninth Circuit. Similarly, in *Blair v. Bethel School District*, 608 F.3d 540 (9th Cir. 2010), the Ninth Circuit held that a school board member who was removed from an appointed position for his public criticism of the school's superintendent had no First Amendment claim. *Id.* at 542.

Explicitly noting its "agree[ment] with the analysis of the Sixth Circuit in *Zilich* and the Tenth Circuit in *Phelan*," the Ninth Circuit found that Blair's removal was, "for First Amendment purposes, analogous" to the censures in those two cases. *Blair*, 608 F.3d at 546. Like the censures, Blair's removal did not violate the First Amendment because he still "retained the full range of rights and prerogatives that came with having been publicly elected." *Id.* at 544. Moreover, presaging Judge Ho's dissent in this case, the Ninth Circuit explained that both the censures and the removal occurred in the "political arena," *id.* at 543, where "[d]isagreement is endemic," *id.* at 546, and that "more is fair in electoral politics than in other contexts," *id.* at 544.

In the "political arena," *Blair*, 608 F.3d at 543, the Ninth Circuit held that the First Amendment protected *both* free speech interests implicated—the member's "right to criticize" and the body's "corresponding right" to respond, *id.* at 545-46. The First Amendment does not provide a right of action for "casualties of the regular functioning of the political process." *Id.* at 545.

3. By contrast, the Fifth Circuit held in this case that, standing alone, "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. Both the panel and the judges who dissented from the denial of rehearing en banc agree that this holding differs from the holdings of other circuits that have addressed the question. *See* Pet. App. 10a (the district court "improperly endorsed the Tenth Circuit's decision in *Phelan*"); Pet. App. 32a ("the panel's holding is out of step with four sister circuits").

The panel's cursory discussion of *Zilich* and *Blair* does nothing to dispel the circuit conflict. The Fifth Circuit thought *Zilich* was "inapposite" here because the action in *Zilich* "did not concern a censure, but [rather] a city council resolution." Pet. App. 16a. This is a distinction without a difference. The resolution at issue here was entitled a "Resolution of Censure." Pet. App. 42a. The resolution in *Zilich* was entitled "A Resolution expressing the disapproval and outrage of the Council." 34 F.3d at 361 n.2. The two are materially identical: after all, "censure" is defined as an "authoritative expression of disapproval." *Censure*, *Black's Law Dictionary* (11th ed. 2019).

As for *Blair*, the panel thought it was "inapposite" because the Fifth Circuit, like the Ninth, does not permit First Amendment-based challenges to removals from appointed board positions. Pet. App. 16a. But the Ninth Circuit declared that Blair's removal was, "for First Amendment purposes, analogous to the condemning resolution in *Zilich* and the censure in *Phelan*." 608 F.3d at 546. In a clash over whether censure—the act at issue in this case—can give rise to a First Amendment claim, it's clear on

which side the Ninth Circuit stands: That court expressly "agree[d] with the analysis" of the Sixth and Tenth Circuits. *Id.*

4. This conflict will not resolve itself. The Fifth Circuit clearly rejected the reasoning of other circuits that have considered the question presented.

At the same time, the courts of appeals that apply the opposite rule and reasoning have done so for years, if not decades, and there is no reason to believe they will revisit the question either. To the contrary, courts within those circuits regularly adhere to that rule. *See Curley*, 816 Fed. Appx. at 675 (applying *Werkheiser*); *Aquilina v. Wrigglesworth*, 298 F. Supp. 3d 1110, 1116 (W.D. Mich.), *aff'd*, 759 Fed. Appx. 340 (6th Cir. 2018) (applying *Zilich*); *Glass v. Forster*, 2020 WL 3077868, at *5 (D. Or. June 10, 2020) (applying *Blair*); *Aris v. Ward*, 2020 WL 3498751, at *4 (D.N.M. June 29, 2020) (applying *Phelan*). Only this Court's intervention can resolve the question presented by this petition.

II. This case is an excellent vehicle for resolving the split.

1. Whether the First Amendment prohibits an elected body from censuring one of its members in response to his speech was fully briefed and decided at every stage of the proceedings. *See* Pet. App. 1a-2a (court of appeals); *id.* 20a, 26a-27a (district court). And because the case comes before this Court on a motion to dismiss, *id.* 5a-6a, it presents the legal issue cleanly, without confounding factual disputes.

Moreover, this case is an ideal vehicle because petitioner is HCC itself, rather than individual trustees in their personal capacities. *See* Pet. App. 5a. As a municipal body, HCC cannot raise a qualified immunity defense. *See Owen v. City of Independence*,

445 U.S. 622, 638 (1980). Nor does the case present questions of legislative immunity. *Cf. Bogan v. Scott-Harris*, 523 U.S. 44, 53-54 (1998) (extending that doctrine to individual *members* of local legislative bodies). Therefore, there is no risk that the Court will find itself resolving the case without reaching the question presented.

2. The question presented is outcome determinative of this case. The Fifth Circuit panel reversed the district court's dismissal of the complaint solely on the grounds 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. Had this case arisen in the Third, Fourth, Sixth, Ninth, or Tenth Circuits, or in Vermont, the dismissal of Wilson's claim would have been affirmed.

III. The question presented is important to local governments across the country.

1. Thousands of elected governmental bodies across the nation need to know what constitutional constraints govern their use of the censure power.

There are more than 3,000 counties in the United States, each of them with some form of elected government. Below that, there are tens of thousands of cities, school boards, junior college districts, and the like.

Texas, where this case arose, illustrates the point. Within the state, there are thousands of political subdivisions. Each of these entities has an elected board. *See, e.g.*, Tex. Educ. Code Ann. § 11.054(a) (West 2019) (school districts); Tex. Water Code Ann. §§ 58.071-.072 (West 2019) (irrigation districts); Tex.

Loc. Gov't Code Ann. §§ 326.041, .043(b) (West 2019) (library districts).

What's more, government bodies across the nation have bylaws that authorize censure. Often, as with HCC, *see* Hous. Cmty. Coll., *Board of Trustees Bylaws* 15 (amended 2020), https://perma.cc/J5RD-GH2T, the bylaws expressly provide for the censure power as an option for addressing violations of the body's standard of conduct. *See, e.g.*, DeSoto, Tex., Ordinance No. 1946-13, § 1.1410 (2013), https://perma.cc/2M3W-WFFB; Chi., Ill., *Rules of Order and Procedure of the City Council, City of Chicago for Years 2019-2023*, https://perma.cc/DT9S-BZZB. In other cases, the bylaws simply adopt *Robert's Rules of Order*, which itself authorizes censure. *See, e.g.*, Newport Beach, Cal., *Procedural Rules for the Conduct of City Council Meetings* (2013), https://perma.cc/R72G-3772; Acton-Boxborough Regional School District, Mass., *School Committee Guidebook* (2019), https://perma.cc/JW8Z-VSCP.

2. Censure is not only on the books; it is frequently used. For example, in one recent month (August 2020) alone, local elected bodies issued more than twenty censures.[11]

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[11] This number comes from a search on the NewsBank database of local newspapers for the terms "voted to censure," "censure," "censured," and "censuring." The date range was restricted to the month of August 2020. If anything, this figure underreports the number of censures since not every censure is necessarily reported in a local newspaper. And this figure does not account for de facto censures, like the resolution in *Zilich*, that "express[] the disapproval" of the governing body without using the word "censure." *Zilich v. Longo*, 34 F.3d 359, 361 n.2 (6th Cir. 1994).

To be sure, not every reported censure responded to protected expression. But many did. For example, fifteen of the twenty-three August 2020 censures involved arguably expressive conduct.

More generally, the range of speech that triggers censure is quite broad. Consider a few recent examples.

- The school board in Lake Mills, Wisconsin censured one of its members for her Facebook posts. Sarah Weihert, *Davies Censured for Social Media Comments*, HNG News (July 27, 2020), https://perma.cc/2CWN-YGHU. In one post, the member accused a local citizen of being "racist." Sarah Weihert, *Community Members Call for Resignation*, HNG News (July 14, 2020), https://perma.cc/S49W-YEBX.
- The city council of River Falls, Wisconsin censured a city councilman for comments he made urging face mask compliance. This included an email to constituents where he demanded they stop being "rancid tub[s] of ignorant contagion and start acting like you care about the life and health of others." Michael Brun, *River Falls City Council Censures Member for 'Derogatory and Unprofessional' Comments in Face Mask Debates*, RiverTowns (Aug. 11, 2020), https://perma.cc/HV5V-FY5Z.
- Less than one week later, a city council in neighboring Minnesota censured one of its members for suggesting that a mask mandate could lead to "yellow star badges marking COVID-positive people." Jenny Berg, *St. Cloud City Council Censures Brandmire for*

'Yellow Star' Remark in Mask Debate, St. Cloud Times (Aug. 17, 2020), https://perma.cc/FTS7-H3XH.

If the Fifth Circuit's decision is correct, each of these governing bodies faces potential First Amendment liability.

3. The Fifth Circuit's unprecedented recognition of a federal cause of action when an elected body censures a member for his speech is likely to increase both the frequency and the cost of litigation.

To begin, the Fifth Circuit's decision provides renegade officials with appellate support for the proposition that the First Amendment restricts elected bodies' censure authority. The quantity of litigation in any jurisdiction where the answer to the question presented is uncertain may increase as plaintiffs invoke the Fifth Circuit's decision here.

And the costs of that litigation are asymmetric because Section 1983 lawsuits can be brought pro se by loose-cannon elected officials. So, while bringing these lawsuits may be a relatively low-cost endeavor for the plaintiff, defending against the lawsuits is costly for the elected body, which must either employ or hire counsel to represent it. Thus, the increase in risk of litigation may chill government bodies from issuing censures in the first place.

4. The question presented is especially important because of its interaction with the requirements of federal law and, for the hundreds of junior college districts like HCC, accrediting bodies.

It is an unfortunate reality that some members of local elected boards make statements denigrating members of the public because of race, sex, or religion. *See, e.g.*, Deana Carpenter, *Peters Township School*

Board Censures Member After Racist Facebook Post, Pittsburgh Post-Gazette (May 20, 2019), https://perma.cc/ASH5-SV2S (school board member posted a link to an article entitled "10 Things That Would Instantly Happen If All Negroes Left America"); Caitlin Taylor, *Bedford School Board Censures Bruning*, The Monroe News (June 23, 2020), https://perma.cc/X6B2-DGCC (school board member made social media posts "with memes mocking African Americans, immigrants, women and other groups").

Censure provides an elected body with a well-understood tool for repudiating those remarks, thereby helping to dispel any claim that the government tolerates a hostile environment in violation of federal laws like Titles VI and VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments Act of 1972. If an elected body risks a Section 1983 suit by condemning such statements, then those bodies must figure out some other way to show that they are not deliberately indifferent.

And as this case shows, certain kinds of board member dissidence can create a risk that an institution will lose its accreditation. *See supra* at 5. Here too, institutions need to know whether responding to that risk by passing a resolution of censure will plunge them into Section 1983 liability.

In short, the Fifth Circuit's rule forces elected government bodies onto a "high tightrope without a net." *United Steelworkers v. Weber*, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring) (citation omitted). On one side lies Section 1983 litigation by board members. On the other side lies litigation by employees, students, or members of the public the body serves, or a loss of accreditation. Local entities need to know where they stand.

IV. The Fifth Circuit's decision is wrong.

In the Fifth Circuit, "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. That holding is triply wrong: It invents, against centuries of history, a constraint on the longstanding practice of censure. It enables individual plaintiffs—for the first time in our Nation's history—to suppress a form of government speech rooted deeply in the common law, employed routinely at the time of the Founders, and practiced at all levels of American government ever since. And it embraces a theory of constitutional "injury" rejected by this Court for more than a century.

A. The Fifth Circuit's rule is contrary to centuries of practice.

The practice of censure in response to a legislator's speech has been exercised at all levels of American democracy for over 200 years. It is implausible that censure has been unconstitutional all this time, waiting only for a three-judge panel of the Fifth Circuit to discover the infirmity in 2020.

1. This Court has repeatedly granted "great weight in a proper interpretation of constitutional provisions" to "[l]ong settled and established practice[s]." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). Indeed, this Court has recognized that "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).

The presumption of constitutionality is particularly strong where the procedure in question

has been "practi[c]ed for two hundred years by common consent." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). *Cf. NLRB v. Noel Canning*, 573 U.S. 513, 526 (2014) ("hesitat[ing] to upset" a government practice that has been in place "more than 200 years"). And the presumption is at its apex where the procedure at issue has been "[t]he unbroken practice for two centuries in the National Congress" and for "more than a century" in the states. *Marsh v. Chambers*, 463 U.S. 783, 795 (1983).

2. That presumption applies here. Censure is both a longstanding practice and a traditional way of conducting government. The practice of censure has been fixed in English and American government since before the Founding. *See, e.g.*, 2 *Journal of the House of Lords, 1578-1614*, at 327-28 (1830), https://perma.cc/6CT4-FFMH (describing a 1604 motion to censure a member of the House of Lords for his "very offensive Speech"). And it has been deployed by legislative bodies at all levels of American government throughout our history, including (as here) in response to speech by an individual member deemed objectionable by the body as a whole.

Perhaps the most famous American example involves the Senate's 1954 censure of Senator Joseph McCarthy for comments on "a nationwide television and radio show" and "stat[ements] to the public press" that "tended to bring the Senate into dishonor and disrepute" and "to impair its dignity." S. Res. 301, 83d Cong. (1954). And Senate practice on the subject long predated the Red Scare; the Senate first censured one of its own members as early as 1811. Anne M. Butler & Wendy Wolff, U.S. Senate Hist. Off., *United States Senate Election, Expulsion, and Censure Cases: 1793-1990*, at xxix (1995). The House, meanwhile, has

censured its members for, among other things, "insulting [the] Speaker of the House" (1832), referring to a piece of legislation as a "monstrosity" (1868), and using "unparliamentary language" (1921). U.S. House of Representatives, *List of Individuals Expelled, Censured, or Reprimanded in the U.S. House of Representatives*, https://perma.cc/3J7Y-L9KE.

3. Speech-related censure resolutions have long been issued not only at the highest levels of the federal government, but in tens of thousands of de Tocqueville's "local assemblies of citizens." 1 Alexis de Tocqueville, *Democracy in America* 73 (Henry Reeve trans., 1835). In 1904, for instance, the Chicago City Council censured Alderman Hubert Butler for comments "attacking the integrity and reputation of [his] colleagues." *Butler v. Harrison*, 124 Ill. App. 367, 370 (Ill. App. Ct. 1906). Alderman Butler's resulting lawsuit met its demise in the state courts of Illinois. If Mr. Butler "feels aggrieved," the court there remarked, "his constituency is the only superior tribunal to which he can appeal," for "[i]t certainly cannot be seriously insisted, although it is suggested by counsel, that the courts should interfere in this case." *Id.* at 371.

In that respect, not much has changed since 1904. Every two days on average, a local government somewhere in the country censures one of its elected members for his or her speech. *See supra* at 21. In other words, the practice of censure is "not merely old; it is continuing," representing the current practice of local governments nationwide, as well as "a substantial number of the States" and "the Federal Government." *Burnham v. Superior Ct.*, 495 U.S. 604, 615 (1990) (Scalia, J.) (plurality opinion). *See supra* at 21-22 (discussing its contemporary frequency at the

local level). What *has* changed, with the Fifth Circuit's decision here, is the willingness of appellate courts to allow censure-related lawsuits to proceed. The Fifth Circuit's rule contravenes "a consistent and almost universal tradition that has long rejected" the rule, and which "continues explicitly to reject it today." *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997).

B. Censures involve core government speech not subject to challenge under the Free Speech Clause.

The Fifth Circuit's holding—that government bodies may not criticize their members' speech via a censure resolution—also ignores this Court's consistent admonition that the government is entitled to express its own opinion on public questions. "[C]ensure resolutions" are a form of government "counterspeech." Helen Norton, *The Government's Speech and the Constitution* 226 (2019). And the "Free Speech Clause" simply "does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009).[12]

1. A local government body "has the right to 'speak for itself'" and "'is entitled to say what it wishes.'" *Summum*, 555 U.S. at 467 (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)). Indeed, "[i]t is the very business of government to favor and disfavor points of view." *Summum*, 555 U.S. at 468 (citation

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[12] "This does not mean," of course, "that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause," *Summum*, 555 U.S. at 468, and the Equal Protection Clause, *see id.* at 482 (Stevens, J., concurring). This case implicates neither clause.

omitted). Simply put, "when the government speaks," as it routinely does via censure resolutions, "it is entitled to promote a program, to espouse a policy, or to take a position." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015).

The Court has repeatedly explained that this protection of government speech is fundamental to our system of representative government. After all, "'it is not easy to imagine how government could function if it lacked the freedom' to select the messages it wishes to convey." *Walker*, 576 U.S. at 208 (quoting *Summum*, 555 U.S. at 468) (internal punctuation omitted).

2. Government speech in the traditional form of a censure performs yet another valuable function: it provides the public with an additional, and distinctive, perspective in the marketplace of ideas. *See Meese v. Keene*, 481 U.S. 465, 481-82 (1987).

That perspective is all the more valuable where, as here, it concerns a question on which public deliberation is particularly essential and on which the elected body may have information otherwise unavailable to the public: the conduct of an elected official and his ability (or lack of ability) to work cooperatively on a multimember body. This Court has emphasized that "[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, 346-47 (1995). Those informed choices depend upon public access to "the widest possible understanding of the quality of government service rendered by all elective or appointed public officials"—an understanding that stretches to *all* officials, "from the least to the most important." *N.Y. Times Co. v.*

Sullivan, 376 U.S. 254, 304 n.5 (1964) (Goldberg, J., concurring in judgment) (quoting *Barr v. Matteo*, 360 U.S. 564, 577 (1959) (Black, J., concurring)). But the Fifth Circuit's rule undermines that goal, actively *punishing* elected bodies for providing the public with a valuable perspective about their elected officials' performance in office.

3. The Fifth Circuit ignored another, equally strange implication of its decision: the perverse interaction between its rule and the principles of legislative immunity. The panel recognized that the individual members of a governing body are "entitled to assert legislative immunity" if they are sued for voting to censure another member. Pet. App. 16a. But how can criticism by elected officials be absolutely protected if issued by individual members in their official capacity but constitutionally forbidden if issued by the collective body? By the Fifth Circuit's logic, if Members A-Y of a government body each stand up *seriatim* and read aloud an identical text criticizing Member Z, Z has no case. But if her colleagues read the text aloud in chorus, Z can bring a constitutional suit for mental anguish.

That result cannot be correct. While First Amendment law draws many distinctions, the line between solos and choruses is not among them.

C. An elected body's censure of one of its members inflicts no injury cognizable under the Free Speech Clause.

The problems with the Fifth Circuit's holding run deeper still. Standing alone, a government's expression of its opinion on an issue of public concern inflicts no constitutional injury. That principle is all the stronger when it comes to expressions of

disapproval directed at public officials. And that is precisely what censure involves: "an expression of opinion" by a government body regarding a member's speech or conduct. Laurence Tribe & Joshua Matz, *To End a Presidency* 85 (2018).

1. The government's expression of an opinion, even a critical one, inflicts no constitutional injury. The Court laid down that rule at least a century ago: "[T]he 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 as against action by the States." *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571, 575 (1919).

The Court has repeatedly affirmed that basic principle in the First Amendment context, explaining that the government's mere expression of an opinion inflicts no injury to free speech rights. On the contrary, only uses of government power that are "regulatory, proscriptive, or compulsory in nature" and which generate "specific present objective harm or a threat of specific future harm" cause constitutional injury under the Free Speech Clause. *Laird v. Tatum*, 408 U.S. 1, 11, 14 (1972).[13]

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[13] This Court's opinion in *Paul v. Davis*, 424 U.S. 693 (1976), held that even an *untrue* governmental accusation of misconduct does not deprive an individual of a constitutionally protected interest. *See id.* at 695-96, 698-99. If falsely accusing a private citizen of being a shoplifter cannot support a Section 1983 claim, then accurately accusing a public official of "lack of respect" for fellow board members and board rules, Pet. App. 43a, cannot do so either.

In short, the First Amendment bars the government from *suppressing* a viewpoint, not from *expressing* one.

2. The Fifth Circuit's theory of constitutional injury fares even worse when applied to elected officials like Wilson. HCC is unaware of a single case where this Court has held that intra-legislative criticism of an elected official, via a censure resolution or otherwise, violates the First Amendment. Indeed for 150 years the Court has said just the opposite: For elected officials, criticism from political opponents is simply part of the job.

This Court observed as early as 1845 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)).

Recognizing that political reality, the common law acknowledged that "criticism may reasonably be applied to a public man in a public capacity which might not be applied to a private individual." *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)). The law thus granted citizens a privilege to 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.'" *Id.*

The Court carried that principle forward into its modern First Amendment jurisprudence, explaining

that elected local government officials are among the public servants who must be treated by the courts as "men of fortitude, able to thrive in a hardy climate." *N.Y. Times v. Sullivan*, 376 U.S. at 273 (citation omitted).

In short, injury to an official's reputation—let alone hurt feelings (the injury Wilson alleged here, Pet. App. 18a)—"is not enough to defeat constitutional interests in furthering 'uninhibited, robust' debate on public issues." *Phelan v. Laramie County Community Coll. Bd. of Trustees*, 235 F.3d 1243, 1248 (10th Cir. 2000) (quoting *Sullivan*, 376 U.S. at 270).

That principle has full application here. Because "American politics is not for the thin-skinned, even, or perhaps especially, at the local level," a "local school board's admonishment of a member is not likely to be the stuff of constitutional violation." *Manley v. Law*, 889 F.3d 885, 889-90 (7th Cir. 2018). For elected officials, criticism—including from one's fellow officials—simply comes with the job. As Judge Ho recognized here, "[t]hose who seek office should not just expect criticism, but embrace it." Pet. App. 39a.

D. Permitting censured officials to sue the body on which they sit undermines local democracy and chills speech.

The consequences of the Fifth Circuit's error are profound: Permitting suits like Wilson's to proceed will tax the federal courts, impede local democracy, and undermine First Amendment values.

First, the Fifth Circuit's rule "judicializ[es]" political debate, Pet. App. 37a, transferring local democracy from the town square to the federal courthouse. That transfer puts federal courts in the position of refereeing wars of words between elected

officials. As Judge Jones recognized, that task "invites federal courts to adjudicate 'free speech' claims for which there are no manageable legal standards." *Id.* 31a. By injecting the federal courts into "legislative disputes" involving political speech alone, *id.* 37a, the Fifth Circuit plays Pandora, opening a box it offers no instructions for closing.

Second, the Fifth Circuit's rule deprives local bodies of an important governance tool. Local boards and commissions often have limited power to respond to rogue members. For example, HCC lacked the power to expel Wilson. Pet. App. 4a. *But cf.* U.S. Const. art. I, § 5, cl. 2 (giving Congress that power with respect to its members). In many cases, a resolution of censure may be the most powerful tool available to condemn speech or conduct that undercuts a board's ability to carry out its responsibilities. *See, e.g.*, Pet. App. 44a (explaining that censure is the maximum sanction available to the Board under Texas law). If the First Amendment is construed to strip local governments of their power to censure in response to speech, it will become increasingly challenging for those governments to operate effectively, to preserve public confidence, to avoid tolerating a hostile environment, and—in the case of local college and university systems—to maintain their accreditation. *See supra* at 23-24.

Finally, the Fifth Circuit's rule comes at a cost to speech itself. Wary of triggering Section 1983 litigation should they issue criticism that a court could construe as sufficiently similar to a "censure," local government bodies will think twice before criticizing a member—generating precisely the sort of "chilling effect" the First Amendment is designed to combat. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 872 (1997). If

the words of a censure resolution alone can expose a local government to damages under Section 1983, other forms of local government speech may well do the same. A letter of concern signed by the members of a city council, but not formally titled a "censure," could conceivably qualify. So too could a jointly signed op-ed in the local newspaper. The edges of the Fifth Circuit's rule are far from clear, only further chilling speech itself.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 11, 2020

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States
Court of Appeals
Fifth Circuit
FILED
April 7, 2020
Lyle W. Cayce
Clerk

No. 19-20237

DAVID BUREN WILSON,

Plaintiff–Appellant

v.

HOUSTON COMMUNITY COLLEGE SYSTEM,

Defendant–Appellee

Appeal from the United States District Court
for the Southern District of Texas

Before DAVIS, SMITH, and STEWART, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Plaintiff David Wilson appeals the district court's judgment dismissing his 42 U.S.C. § 1983 complaint for lack of subject matter jurisdiction under Rule 12(b)(1). Wilson, a former trustee of the Board of Trustees ("Board") of Defendant Houston Community College System ("HCC"), asserts that HCC violated his First Amendment right to free speech when the Board publicly censured him. Because, under our precedent, Wilson's allegations

establish standing and state a claim for relief under § 1983 for a First Amendment violation, we REVERSE the district court's judgment and REMAND Wilson's § 1983 claim for damages for further proceedings. As the parties agree, however, Wilson's claims for declaratory and injunctive relief are moot, as Wilson is no longer a Board trustee. Therefore, we GRANT HCC's motion for partial dismissal of Wilson's appeal and instruct the district court to dismiss Wilson's claims for declaratory and injunctive relief after remand.

I. BACKGROUND

HCC is a public community college district[1] that operates community colleges throughout the greater Houston area.[2] HCC is run by its Board, which is made up of nine trustees.[3] Each trustee is elected by the public from single-member districts to serve a six-year term without remuneration.[4] Through the resolutions and orders it passes, the Board shapes HCC's policy, enhances the institution's public image, and preserves institutional independence.[5] On November 5, 2013, Wilson was elected to the Board as the trustee for HCC District 2.

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[1] Under Texas law, a community college district is a "school district," and a school district is considered a "governmental agency," along with municipalities and other political subdivisions of the state. TEX. LOC. GOV'T. CODE ANN. §§ 271.003(4), (9).

[2] TEX. EDUC. CODE ANN. §§ 130.0011, 130.182.

[3] *Id.* § 130.084.

[4] *Id.* § 130.082.

[5] *Id.* § 51.352.

Beginning in 2017, Wilson voiced concern that trustees were violating the Board's bylaws and not acting in the best interests of HCC. After disagreeing with HCC's decision to fund a campus in Qatar, Wilson made his complaints public by arranging robocalls regarding the Board's actions and interviewing with a local radio station. When HCC allowed one trustee to vote via videoconference, Wilson contended that the bylaws prohibited such voting. He subsequently filed a lawsuit against HCC and the individual Board trustees in state court seeking a declaratory judgment that the videoconference vote was illegal under the bylaws and requesting an injunction. After the Board allegedly excluded Wilson from an executive session, he filed a second lawsuit against HCC and the trustees in state court asserting that his exclusion was unlawful and again seeking declaratory and injunctive relief.[6]

Additionally, Wilson hired a private investigator to confirm that one of the trustees did in fact reside within the district in which she was elected. He maintained a website where he published his concerns, referring to his fellow trustees and HCC by name. Wilson also hired a private investigator to investigate HCC.

On January 18, 2018, the Board voted in a regularly-scheduled session to adopt a resolution publicly censuring Wilson for his actions. In the censure resolution, the Board chastised Wilson for

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[6] Wilson ultimately amended his first lawsuit to include the claims asserted in his second lawsuit and voluntarily dismissed the second lawsuit.

acting in a manner "not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct." The censure, the Board emphasized, was the "highest level of sanction available," as Wilson was elected and could not be removed. The Board directed Wilson to "immediately cease and desist from all inappropriate conduct" and warned that "any repeat of improper behavior by Mr. Wilson will constitute grounds for further disciplinary action by the Board."[7]

Upon being censured, Wilson amended his first state-court petition to include claims against HCC and the trustees under 42 U.S.C. § 1983, asserting that the censure violated his First Amendment right to free speech and his Fourteenth Amendment right to equal protection. Wilson asserted that the Board's bylaws were overly broad and unconstitutional as applied to him and were subject to "strict scrutiny" review. He therefore requested that HCC and the trustees be enjoined from enforcing the censure. Wilson also sought $10,000 in damages for mental anguish, $10,000 in punitive damages, and reasonable attorney's fees.

HCC and the trustees subsequently removed Wilson's state-court proceeding to federal district court on the basis of federal question jurisdiction.

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[7] The Board also resolved to impose the following sanctions as part of its censure: (1) Wilson would be ineligible for election to Board officer positions for the 2018 calendar year, (2) Wilson would be ineligible for reimbursement for any college-related travel for the 2017-18 college fiscal year, and (3) Wilson's requests for access to the funds in his Board account for community affairs would require Board approval.

Wilson filed a motion for remand, which the district court denied. Wilson thereafter amended his complaint naming only HCC as a defendant and dropping his claims against the individual trustees.

HCC moved to dismiss Wilson's suit pursuant to Rule 12(b)(1) for lack of jurisdiction and Rule 12(b)(6) for failure to state a claim. The district court granted HCC's motion to dismiss under Rule 12(b)(1) for lack of jurisdiction, determining that Wilson could not demonstrate an injury in fact and therefore lacked Article III standing. Wilson timely appealed.

In August 2019, Wilson resigned as trustee for HCC's District 2. In the November 2019 election, Wilson ran as a candidate in the race for trustee of HCC's District 1. He was ultimately defeated in the December 2019 run-off election.

II. DISCUSSION

A. Standard of Review

This court's review of dismissals under Rule 12(b)(1) for lack of jurisdiction and dismissals under Rule 12(b)(6) for failure to state a claim is de novo.[8] When a party files multiple Rule 12 motions, we must consider the Rule 12(b)(1) jurisdictional attack before considering the Rule 12(b)(6) merits challenge.[9] The party responding to the 12(b)(1) motion bears the burden of proof that subject matter jurisdiction exists.[10] A district court may find a lack

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[8] *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam).

[9] *Id.*

[10] *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).

of subject matter jurisdiction on either: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."[11]

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[12] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[13]

B. Standing

Under Article III of the Constitution, federal courts can resolve only "cases" and "controversies."[14] In line with this requirement, a plaintiff must have standing—that is, a showing of (1) an injury in fact (2) that is traceable to the defendant's conduct and (3) that can be redressed by the court.[15] An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[16]

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[11] *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1384 (5th Cir. 1989) (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)).

[12] *Edionwe v. Bailey*, 860 F.3d 287, 291 (5th Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

[13] *Iqbal*, 556 U.S. at 678.

[14] U.S. CONST. art. III, § 2.

[15] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

[16] *Id.* (cleaned up).

In the context of free speech, "the governmental action need not have a direct effect on the exercise of First Amendment rights . . . [but] must have caused or must threaten to cause a direct injury to the plaintiffs."[17]

In dismissing Wilson's complaint under Rule 12(b)(1), the district court, relying on the Tenth Circuit's decision in *Phelan v. Laramie County Community College Board of Trustees*, held that Wilson had not suffered any injury in fact.[18] Specifically, the district court concluded that Wilson could not show an invasion of a legally protected interest because the Board's censure did not forbid Wilson from performing his official duties or speaking publicly.[19] The district court erred in relying on *Phelan* to determine that Wilson lacked standing, however, because the *Phelan* court held that the plaintiff in fact *had standing*, noting that the plaintiff had alleged the Board's censure tarnished her reputation.[20]

In this case, Wilson alleges that the censure was issued to punish him for exercising his free speech rights and caused him mental anguish. Under our precedent, Wilson's allegation of retaliatory censure

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[17] *Meese v. Keene*, 481 U.S. 465, 472 (1987).

[18] *Wilson v. Houston Cmty. Coll. Sys.*, No. 4:18-CV-00744, 2019 WL 1317797, at *3 (S.D. Tex. Mar. 22, 2019); *see also Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243 (10th Cir. 2000).

[19] *Wilson*, 2019 WL 1317797 at *3.

[20] 235 F.3d at 1247 n.1.

is enough to establish an injury in fact.[21] Additionally, the Supreme Court has held that a free speech violation giving rise to a reputational injury is an injury in fact.[22] A censure is defined as an "official reprimand or condemnation; an authoritative expression of disapproval or blame; reproach."[23] Wilson alleges that a public censure has caused him mental anguish. That injury stemming from his censure, like a reputational injury, is enough to confer standing.[24]

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[21] *See Colson v. Grohman*, 174 F.3d 498, 508 (5th Cir. 1999) (noting that "at least twice, this court has granted relief to elected officials claiming First Amendment retaliation") (citations omitted). Our sister courts agree that a retaliatory action resulting in a chilling of free speech constitutes an injury in fact. *See, e.g., Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc) ("[T]he harm suffered is the adverse consequences which flow from the . . . constitutionally protected action."); *Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997) ("The injury asserted is the retaliatory accusation's chilling effect on [plaintiff's] First Amendment rights . . . . We hold that [plaintiff's] failure to demonstrate a more substantial injury does not nullify his retaliation claim."). *See also Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 139 (1994) (holding, in commercial speech case, that state board of accountancy's censure of accountant violated First Amendment, thereby assuming that a censure alone constitutes an injury in fact).

[22] *Meese v. Keene*, 481 U.S. 465, 473 (1987).

[23] *Censure*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[24] In *Sims v. Young*, 556 F.2d 732, 734 (5th Cir. 1977), a firefighter brought a First Amendment claim under § 1983 against city officials after being suspended for twenty days. We held that the plaintiff had satisfied the injury-in-fact requirement of standing despite the fact he had since been reinstated because the suspension remained "a blot on his

Though not precisely a matter of standing, Wilson's claims for declaratory and injunctive relief run up against a jurisdictional problem. Wilson is no longer a Board trustee; consequently, the HCC's Code of Conduct no longer governs him. Therefore, his claims seeking declaratory and injunctive relief that the Code of Conduct, and as applied to him through the resolution of censure, is an unconstitutional prior restraint are moot. We grant HCC's motion for partial dismissal of Wilson's appeal of those claims and instruct the district court to dismiss those claims as moot after remand. Wilson's claim for damages continues to present a live controversy.[25]

C. First Amendment Claim

As we have noted, if "constitutional rights were violated, and if that violation 'caused actual damage,' then [the plaintiff] has 'stated a live claim under § 1983.'"[26] Wilson argues that the censure he suffered is an actionable First Amendment claim under § 1983. Although the district court did not technically reach this issue, having dismissed the case for lack of standing under Rule 12(b)(1) and not for failure to

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record." *Id.* A censure, like a suspension, can be characterized as a "blot."

[25] *See Boag v. MacDougall*, 454 U.S. 364 (1975) (per curiam) (although respondent complaining of solitary confinement had since been transferred, "the transfer did not moot the damages claim"); *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 (5th Cir. 2009) (claim for nominal damages avoids mootness); *Pederson v. La. State Univ.*, 213 F.3d 858, 874 (5th Cir. 2000) (graduation mooted claims for injunctive relief, not damages).

[26] *Wilson v. Birnberg*, 667 F.3d 591, 595–96 (5th Cir. 2012) (quoting *Henschen v. City of Houston*, 959 F.2d 584, 588 (5th Cir. 1992)).

state a claim under Rule 12(b)(6), it effectively concluded that Wilson's censure did not give rise to a First Amendment claim.[27] The district court followed *Phelan*, which dismissed the plaintiff's claim on summary judgment, determining that the censure did not infringe on the plaintiff's free speech rights because the censure did not punish her for exercising those rights nor did it deter her free speech.[28] Wilson argues that the district court improperly endorsed the Tenth Circuit's decision in *Phelan*, ignoring Fifth Circuit precedent and failing to recognize the protection afforded to an elected official's political speech. We agree.

The Supreme Court has long stressed the importance of allowing elected officials to speak on matters of public concern.[29] We have echoed this principle in our decisions, emphasizing that "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public

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[27] *See Wilson v. Houston Cmty. Coll. Sys.*, No. 4:18-CV-00744, 2019 WL 1317797, at *3 (S.D. Tex. Mar. 22, 2019) ("[The Tenth Circuit in *Phelan*] has established that a majority's decision to censure a member of a political body does not give rise to a First Amendment violation claim. While not binding, the court's reasoning in *Phelan*, is instructive here." (internal citation omitted)).

[28] *Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1247 (10th Cir. 2000).

[29] *See, e.g., Bond v. Floyd*, 385 U.S. 116, 135–36 (1966) ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.").

importance."[30] As a result, and as described below, this court has held that censures of publicly elected officials can be a cognizable injury under the First Amendment.

We first visited whether a censure can constitute a First Amendment violation in *Scott v. Flowers*.[31] There, a plaintiff was elected to a four-year term as a justice of the peace in Texas.[32] Concerned that the state was dismissing the majority of traffic-offense ticket appeals, the judge published an "open letter" to county officials criticizing the district attorney's office and county court.[33] The Texas Commission on Judicial Conduct ("Commission") subsequently issued a formal, public reprimand to the judge for being "insensitive" in his statement, thereby "cast[ing] public discredit upon the judiciary."[34] The reprimand was a "warning," cautioning him to be "more restrained and temperate" in the future.[35] The judge filed suit under § 1983, arguing the public censure violated his First Amendment right of free speech.[36]

This court applied the Supreme Court's two-step inquiry to assess public employees' claims of First Amendment violations set forth in *Pickering v. Board*

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[30] *Rangra v. Brown*, 566 F.3d 515, 524 (5th Cir.) (citation omitted), *dismissed as moot en banc*, 584 F.3d 206 (5th Cir. 2009).

[31] 910 F.2d 201 (5th Cir. 1990).

[32] *Id.* at 203.

[33] *Id.* at 204.

[34] *Id.*

[35] *Id.* at 205 n.6.

[36] *Id.* at 205.

of Education.[37] First, we determined that the judge's speech addressed a matter of public concern and therefore was protected speech.[38] Second, we balanced the judge's free speech rights against the Commission's countervailing interest in promoting the efficient performance of its normal functions.[39] We underscored that the judge was "not hired by a governmental employer. Instead, he was an elected official, chosen directly by the voters of his justice precinct, and, at least in ordinary circumstances, removable only by them."[40] The state consequently could not justify its reprimand "on the ground that it was necessary to preserve coworker harmony or office discipline."[41] While we recognized that the state may proscribe the speech of elected judges more so than other elected officials, the censure touched upon "core first amendment values."[42] We concluded that the state's "concededly legitimate interest in protecting the efficiency and impartiality of the state judicial system" could not outweigh the judge's First Amendment rights, and we expunged the censure.[43]

In *Colson v. Grohman*, this court reiterated there is "no doubt" that formal reprimands are actionable

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[37] *Id.* at 210; *see Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

[38] *Id.* at 211.

[39] *Id.*

[40] *Id.* at 212.

[41] *Id.*

[42] *Id.* (quoting *Morial v. Judiciary Comm'n of State of La.*, 565 F.2d 295, 301 (5th Cir. 1977)).

[43] *Id.* at 212–13.

under § 1983.[44] Reaffirming *Scott*, we explained that "a formal reprimand, by its very nature, goes several steps beyond a criticism or accusation and even beyond a mere investigation."[45] "It is punitive in a way that mere criticisms, accusations, and investigations are not."[46]

We again held that elected officials are entitled to be free from retaliation for constitutionally protected speech in *Jenevein v. Willing*.[47] That case, like *Scott*, centered on the Commission's public censure of an elected judge, this time a state district court judge.[48] The judge had given a press conference and sent a mass email to explain that he was filing a complaint against a lawyer for comments made about him in pleadings and that he therefore had to recuse himself.[49]

Breaking from *Scott*, we held that the *Pickering* balancing test did not apply to *elected* employees of the state.[50] Instead, we adopted strict scrutiny to assess the government's regulation of an elected official's speech to his constituency.[51] Noting that a

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[44] 174 F.3d 498, 512 (5th Cir. 1999).

[45] *Id.* at 512 n.7.

[46] *Id.* In *Colson*, by contrast, the court found that the plaintiff had failed to state a claim; she was "never arrested, indicted, or subjected to a recall election[,] [n]or was she formally reprimanded." *Id.* at 511 (internal footnote omitted).

[47] 493 F.3d 551 (5th Cir. 2007).

[48] *Id.* at 556.

[49] *Id.* at 553–55.

[50] *Id.* at 557–58.

[51] *Id.* at 558. In *Rangra v. Brown*, this court later clarified that the *Pickering* balancing test did not apply to elected

state's interest in suppressing the speech of an elected official is weak, we held that even though the order was "entered in good faith effort to pursue the public interest . . . [t]o the extent that the commission censured Judge Jenevein for the content of his speech, shutting down all communication between the Judge and his constituents, we reverse and remand with instructions to expunge that part of the order."[52]

The above precedent establishes that a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983. Here, the Board's censure of Wilson specifically noted it was punishing him for "criticizing other Board members for taking positions that differ from his own" concerning the Qatar campus, including robocalls, local press interviews, and a website. The censure also punished Wilson for filing suit alleging the Board was violating its bylaws. As we have previously held, "[R]eporting municipal corruption undoubtedly constitutes speech on a matter of public concern."[53] Therefore, we hold that Wilson has stated

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officials' First Amendment retaliation claims, despite its earlier use in *Scott*, because of intervening Supreme Court precedent (specifically, *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002)). 566 F.3d 515, 525 n.26 (5th Cir.), *dismissed as moot en banc*, 584 F.3d 206 (5th Cir. 2009). The court highlighted other instances in which strict scrutiny was used to protect free speech concerning public matters. *Id.* at 525 n.25.

[52] *Jenevein*, 493 F.3d at 560–62.

[53] *Harmon v. Dall. Cty.*, 927 F.3d 884, 893 (5th Cir. 2019), *as revised* (July 9, 2019) (per curiam). *See also Lane v. Franks*, 573 U.S. 228, 241 (2014) ("[C]orruption in a public program and

a claim against HCC under § 1983 in alleging that its Board violated his First Amendment right to free speech when it publicly censured him.

HCC tries to distinguish *Scott* and *Jenevein*, arguing that the cases concerned judges, not local legislators. But the fact that these cases dealt with judges matters not. The *Jenevein* court emphasized that elected judges are, ultimately, "political actors"—if anything, judges are afforded *less* protection than legislators.[54] HCC also contends that, unlike here, the Texas Commission on Judicial Conduct could order judges to undergo additional education, suspend them, or remove them from office. Even if true, the Commission's censure did not draw upon such authority in either case.[55]

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misuse of state funds [] obviously involve[] a matter of significant public concern."); *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) ("Exposing governmental inefficiency and misconduct is a matter of considerable significance.").

[54] 493 F.3d at 560. *See Scott v. Flowers*, 910 F.2d 201, 212 (5th Cir. 1990) ("[W]e have recognized that the state may restrict the speech of elected judges in ways that it may not restrict the speech of other elected officials.").

[55] HCC is correct that the additional measures taken against Wilson—(1) his ineligibility for election to Board officer positions, (2) his ineligibility for reimbursement for college-related travel, and (3) the required approval of Wilson's access to Board funds—do not violate his First Amendment rights. A board member is not entitled to be given a position as an officer. *See Rash-Aldridge v. Ramirez*, 96 F.3d 117, 119 (5th Cir. 1996) (per curiam) (a city council member did not have a First Amendment claim after the council removed her from a board following her public disagreement with the council majority). Second, nothing in state law or HCC's bylaws gives Wilson entitlement to funds absent approval. As for travel reimbursements, we have held that a failure to receive travel

HCC also argues that it had a right to censure Wilson as part of its internal governance as a legislative body and that Wilson's First Amendment rights were not implicated. It cites to numerous cases from our sister circuits, purportedly supporting its argument. A close review of those cases, however, reveals that those cases either did *not* involve censures, or involved claims against only the individual members of a governing body (and not the governing body itself) who were entitled to assert legislative immunity. For example, *Blair v. Bethel School District* did not involve a public censure but a vote by a public school board to remove a fellow board member as vice president of the board.[56] *Zilich v. Longo* also did not concern a censure, but a city council resolution declaring that a former council member had violated the residency requirement and a council ordinance authorizing suit to be filed to recover the former member's salary.[57] Consequently, these cases are inapposite.

The remainder of the cases relied upon by HCC involved claims against only the individual members

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reimbursement is not an adverse employment action for a public employee's First Amendment retaliation claim. *Benningfield v. City of Houston*, 157 F.3d 369, 376 (5th Cir. 1998).

[56] 608 F.3d 540, 542 (9th Cir. 2010). The Ninth Circuit's decision in Blair that the school board was entitled to remove a board member from a titular position is consistent with our decision in *Rash-Aldridge* that an elected official does not have a fundamental right to an appointed leadership position. 96 F.3d at 119.

[57] 34 F.3d 359, 361 (6th Cir. 1994).

of a governing body.[58] As we have noted, under Supreme Court precedent, absolute legislative immunity is a "doctrine[] that protect[s] individuals acting within the bounds of their official duties, not the governing bodies on which they serve."[59] "Thus, even if the actions of the [state agency's] members are legislative, rather than administrative, the [state agency] itself as a separate entity is not entitled to immunity for violation of the [plaintiff's] constitutional rights."[60] Wilson has filed his claims against only HCC, which is not entitled to legislative immunity from Wilson's § 1983 suit.

Lastly, HCC argues that Wilson's conclusory statements that he suffered emotional harm are insufficient support for mental anguish damages. "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when

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[58] *See Rangel v. Boehner*, 785 F.3d 19, 21 (D.C. Cir. 2015) (claim by United States congressman against fellow congressmen and other individuals for violating his constitutional rights in issuing "a punishment of censure"); *Whitener v. McWatters*, 112 F.3d 740, 741 (4th Cir. 1997) (claim by county board member against fellow board members for violating his First Amendment rights in censuring him for using abusive language); *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 34 (1st Cir. 1996) (claim by former governor of Puerto Rico against individual legislators for violating his constitutional rights during legislative hearings investigating governor's role in a political scandal).

[59] *Minton v. St. Bernard Par. Sch. Bd.*, 803 F.2d 129, 133 (5th Cir. 1986); *see also Owen v. City of Independence, Missouri*, 445 U.S. 622, 657 (1980).

[60] *Mintoni*, 803 F.2d at 133.

assumed to be true 'raise a right to relief above the speculative level.'"[61] As explained, Wilson has alleged a plausible violation of his First Amendment rights under § 1983. He contends that, stemming from the defendant's unlawful acts, he has suffered mental anguish that warrants $10,000 in damages.[62] Based on the allegations set forth in his pleadings, Wilson has alleged a plausible claim supporting mental anguish damages.[63]

III. CONCLUSION

Based on the foregoing, we REVERSE the district court's judgment dismissing Wilson's complaint for lack of jurisdiction and REMAND Wilson's § 1983 claim for damages for further proceedings consistent with this opinion. Wilson's claims for declaratory and injunctive relief are moot, as Wilson is no longer a trustee on the Board of HCC. Therefore, we GRANT HCC's motion for partial dismissal of Wilson's appeal

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[61] *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). *See also* 5 Charles Alan Wright et al., FED. PRAC. & PROC. § 1202 (3d ed. 2019) ("[Rule 8(a)] requires the pleader to disclose adequate information regarding the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.").

[62] Wilson will still need to support such a claim properly in order to prevail after remand. *See, e.g.*, *Hitt v. Connell*, 301 F.3d 240, 250–51 (5th Cir. 2002) (detailing the evidence needed to support compensatory damages for mental anguish stemming from a § 1983 free speech jury verdict).

[63] Although Wilson also seeks $10,000 in punitive damages, punitive damages are not available against HCC. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270–71 (1981) (holding that municipalities and other government entities are immune from punitive damages under § 1983).

and instruct the district court to dismiss Wilson's claims for declaratory and injunctive relief after remand.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; MOTION FOR PARTIAL DISMISSAL GRANTED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAVID BUREN WILSON, Plaintiff, v. HOUSTON COMMUNITY COLLEGE SYSTEM, et al., Defendants.	[FILED 3/22/2019] Civil Action No. 4:18-cv-00744

MEMORANDUM OPINION AND ORDER

KENNETH M. HOYT, United States District Judge

I. INTRODUCTION

Pending before the Court is the defendant's, Houston Community College System's, (the "defendant"), motion to dismiss pursuant to 12(b)(1) and 12(b)(6) (Dkt. No. 17), the plaintiff's, David B. Wilson's (the "plaintiff"), response to the motion (Dkt. No. 21), and the defendant's[1] motion to dismiss reply. (Dkt. No. 24). After having carefully considered the motion, response, reply and the applicable law, the

[1] Here, "defendant" also refers to the members of the board of trustees named in the suit. While not listed, they serve as part of the Houston Community College System entity for purposes of this Memorandum Opinion and Order.

Court determines that the defendants' motion to dismiss should be **GRANTED**.

II. FACTUAL BACKGROUND

In November 2013, the plaintiff was elected to the Houston Community College System's, nine-member board of trustees (the "board"). Trustees are elected by the public to serve on the board for six-year terms. On January 18, 2018, a majority of the board voted to publicly censure the plaintiff for conduct that was in the judgment of his fellow board members detrimental to Houston Community College Systems and its' mission. Alleging violations of its bylaws, the board determined that the plaintiff failed to (1) respect the board's collective decision-making process; (2) engage in open and honest discussions in making board decisions; (3) respect trustees' differing opinions; (4) interact with trustees in a mutually respectful manner; and (5) act in Houston Community College System's best interest. The board also resolved that the plaintiff would be: (1) ineligible for election to a board officer position for the 2018 calendar year; (2) ineligible for travel-related expense reimbursements for college year 2017-2018; and (3) required to maintain board approval when requesting access to funding for community affairs programs for college year 2017-2018.

On February 7, 2018, the plaintiff amended his state court complaint suing the defendant under 42 U.S.C. § 1983, seeking money damages for alleged violations of his rights secured by the First and Fourteenth Amendments. Subsequently, the defendant removed the case to this Court. On Jun 14, 2018, the plaintiff filed his second amended

complaint with the Court. On July 24, 2018, the defendant filed its motion to dismiss.

III. STANDARD OF REVIEW

A. Standard Under Fed. R. Civ. P. 12(b)(1)

Rule 12(b)(1) permits the dismissal of an action for the lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). "If [a federal] court determines at any time that it lacks subject-matter jurisdiction, [it] must dismiss the action." Fed. R. Civ. P. 12(h)(3); *see also Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F.2d 874, 880 (3d. Cir. 1992) (citing *Rubin v. Buckman*, 727 F.2d 71, 72 (3d Cir. 1984)) (reasoning that "[t]he distinction between a Rule 12(h)(3) motion and a Rule 12(b)(1) motion is simply that the former may be asserted at any time and need not be responsive to any pleading of the other party."). Since federal courts are considered courts of limited jurisdiction, absent jurisdiction conferred by statute, they lack the power to adjudicate claims. *See*, *e.g.*, *Stockman v. Fed. Election Comm'n*, 138 F. 3d 144, 151 (5th Cir. 1998) (citing *Veldhoen v. United States Coast Guard*, 35 F. 3d 222, 225 (5th Cir. 1994)). Therefore, the party seeking to invoke the jurisdiction of a federal court carries "the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Vantage Trailers, Inc. v. Beall Corp.*, 567 F.3d 745, 748 (5th Cir. 2009) (citing *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 327 (5th Cir. 2008)); *see also Stockman*, 138 F.3d at 151.

When evaluating jurisdiction, "a [federal] court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *MD*

Physicians& Assoc., Inc. v. State Bd. Of Ins., 957 F.2d 178, 181 (5th Cir. 1992) (citing *Williamson v. Tucker*, 654 F.2d 404, 413 (5th Cir. 1981)); *see also Vantage Trailers*, 567 F.3d at 748 (reasoning that "[i]n evaluating jurisdiction, the district court must resolve disputed facts without giving a presumption of truthfulness to the plaintiff's allegations."). In making its ruling, a court may rely on any of the following: "(1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *MD Physicians*, 957 F.2d at 181 n.2 (citing *Williamson*, 645 F.2d at 413).

B. Standard Under Fed. R. Civ. P. 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) authorizes a defendant to move to dismiss for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). Under the demanding strictures of a Rule 12(b)(6) motion, "[t]he plaintiff's complaint is to be construed in a light most favorable to the plaintiff, and the allegations contained therein are to be taken as true." *Oppenheimer v. Prudential Sec., Inc.*, 94 F.3d. 189, 194 (5th Cir. 1996) (citing *Mitchell v. McBryde*, 944 F.2d 229, 230 (5th Cir. 1991)). Dismissal is appropriate only if, the "[f]actual allegations [are not] enough to raise a right to relief above the speculative level, on the assumption that all the allegation in the complaint are true (even if doubtful in fact).' *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Moreover, in light of the Federal Rule of Civil Procedure 8(a)(2), "[s]pecific facts are not necessary; the [factual allegations] need only 'give the defendant fair notice of what the

...claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (quoting *Twombly*, 550 U.S. at 555). Even so, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than lables [sic] and conclusions, and a formulaic recitation of the elements of a cause of action will not do.' *Twombly*, 550 U.S. at 555 (citing *Papason v. Allain*, 478 U.S. 265, 286 (1986)).

In *Ashcroft v. Iqbal*, the Supreme Court expounded upon the *Twombly* standard, reasoning that '[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' *Iqbal*, 556 U.S. at 78 (citing *Twombly*, 550 U.S. at 556). "But where the well-leaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]'– 'that the pleader is entitled to relief.' " *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

Nevertheless, when considering a 12(b)(6) motion to dismiss, the Court's task is limited to deciding whether the plaintiff is entitled to offer evidence is support of his or her claims, not whether the plaintiff will eventually prevail. *Twombly*, 550 U.S. at 563, 127 D. Ct. at 1969 n.8 (citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974)); *see also Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999). In this regard, its

review is limited to the allegations in the complaint and to those documents attached to a defendant's motion to dismiss to the extent that those documents are referred to in the complaint and are central to the claims. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F. 3d 285, 288 (5th Cir. 2004). The Court may also, however, "take judicial notice of documents in the public record..., and may consider such documents in determining a motion to dismiss." *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 640 n. 2 (5th Cir. 2005) (citing *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017–18 (5th Cir. 1996)). "Such documents should be considered only for the purpose of determining what statements [they] contain, not to prove the truth of [their] contents.' *Lovelace*, 78 F.3d at 1018 (internal citation omitted). "If, based on the facts pleaded and judicially noticed, a successful affirmative defense appears, then dismissal under Rule 12(b)(6) is proper." *Hall v. Hodgkins*, No. 08-40516, 2008 WL 5352000, (5th Cir. Dec. 23, 2008) (citing *Kansa Reinsurance Co., Ltd v. Cong. Mortg. Corp. of Tex.*, 20 F.3d 1362, 1366 (5th Cir. 1994)).

IV. ANALYSIS AND DISCUSSION

The plaintiff's request for declaratory and injunctive relief alleges that the defendant violated his First Amendment right of speech. The defendant contends that the plaintiff lacks standing to assert his claim. Standing is a threshold question in every federal court case. It is well-settled that, "the irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). These elements are: (1) an injury-in-fact that is concrete and actual or imminent, not hypothetical; (2) a fairly traceable

causal link between the injury and the defendant's actions; and (3) that the injury will likely be redressed by a favorable decision. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 167 (1997); *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009).

The plaintiff alleges that the board injured his right to free speech by censuring him for actions they disagreed with. Another circuit has established that a majority's decision to censure a member of a political body does not give rise to a First Amendment violation claim. *Phelan v. Laramie Cnty. Cmty. Coll., Bd. Of Trustees*, 235 F. 3d 1243 (10th Cir. 2000). While not binding, the court's reasoning in *Phelan*, is instructive here. In *Phalen*, a community college board of trustees passed a resolution censuring one of its' members for violating the college's ethics policy. The censure allowed the board to voice its' opinion that the member had violated the policy and to ask that she not engage in similar conduct in the future. The board member claimed that she was injured by the censure because it tarnished her reputation. The court found that the board's censure did not injure the plaintiff's free speech rights since it did not prevent her from performing her official duties or restrict her opportunity to speak or her right to vote as a board member. *Id.* at 1248. Ultimately, the censured member remained free to express her views publicly and to criticize the ethics policy and the board's censure. *Id.*

The facts in *Phelan* are analogous to the facts before the Court. Here, the defendant, a community college and board of trustees, passed a similar resolution publicly censuring the plaintiff for conduct violating its bylaws. The censure described the

plaintiff's conduct as inappropriate and reprehensible. The plaintiff maintains that the censure injured his free speech rights by enjoining him from holding an office position on the board, from accessing funds in his board account for community affairs without board approval and from reimbursement of travel related expenses. Like in *Phelan*, however, the censure does not cause an actual injury to his right to free speech. The plaintiff is not prevented from performing his official duties. In spite of the censure, the plaintiff is free to continue attending board meetings and expressing his concerns regarding decisions made by the board. Further, the censure does not prohibit him from speaking publicly.

The plaintiff has failed to demonstrate any injury-in-fact as required to establish standing under 12(b)(1). In order to prevail the plaintiff must show that he suffered "an invasion of a legally protected interest" that is concrete and particularized' and "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). The plaintiff argues that he suffered harm by not being reimbursed for travel expenses. The defendant maintains, however, that the plaintiff has not made a claim for reimbursement. Additionally, at this time, the plaintiff has access to the board account for community affairs and may run for a board officer position. The actions complained of by the plaintiff are not actual in that he may still exercise his right to free speech. Since there is no injury-in-fact, and injury is necessary for analysis of the second and third elements of standing, they are not addressed.

The plaintiff's Fourteenth Amendment "due process" claim rests on a theory that the plaintiff suffered harm coupled with the denial of his constitutional right to speak without retaliation. *See Paul v. Davis,* 424 U.S. 693, 711 (1976). Consequently, the Court's determination that the defendant did not infringe the plaintiff's First Amendment freedoms leads the Court to conclude that the board did not injure his Fourteenth Amendment rights.

V. CONCLUSION

The plaintiff's suit must be dismissed for lack of subject matter jurisdiction. Based on the foregoing analysis and discussion, the defendant's motion to dismiss is **GRANTED**.

It is so **ORDERED**.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States
Court of Appeals
Fifth Circuit
FILED
July 15, 2020
Lyle W. Cayce
Clerk

No. 19-20237

DAVID BUREN WILSON,

Plaintiff–Appellant

v.

HOUSTON COMMUNITY COLLEGE SYSTEM,

Defendant–Appellee

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion April 7, 2020, 5 Cir., _____, F.3d _____)

Before DAVIS, SMITH, and STEWART, Circuit Judges.

PER CURIAM:

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH

CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, eight judges voted in favor of rehearing (Chief Judge Owen, Judge Jones, Judge Elrod, Judge Higginson, Judge Willett, Judge Ho, Judge Duncan, and Judge Oldham), and eight voted against rehearing (Judge Smith, Judge Stewart, Judge Dennis, Judge Southwick, Judge Haynes, Judge Graves, Judge Costa, and Judge Engelhardt).

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
UNITED STATES CIRCUIT JUDGE

EDITH H. JONES, Circuit Judge, joined by WILLETT, HO, DUNCAN, and OLDHAM, Circuit Judges, dissenting from the denial of rehearing *en banc*.

Axiomatic to the First Amendment is the principle that government "may interject its own voice into public discourse." *Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1247 (10th Cir. 2000) (citing *Meese v. Keene*, 481 U.S. 465, 480–82, 107 S. Ct. 1862, 1870–72 (1987)).[1] According to the panel opinion, however, the "government," *i.e.* Houston Community College's Board, does not enjoy First Amendment protection to "speak" by issuing a censure against this gadfly legislator. In so holding, the panel opinion exacerbates a circuit split, threatens to destabilize legislative debate, and invites federal courts to adjudicate "free speech" claims for which there are no manageable legal standards. The First Amendment was never intended to curtail speech and debate within legislative bodies. I respectfully dissent from the denial of rehearing *en banc*.

The facts of this case are straightforward. David Wilson, then a trustee of the Board of Trustees for Houston Community College Systems ("HCC"), publicly alleged that fellow Board members were

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[1] *See also Pleasant Grove City v. Summum*, 555 U.S. 460, 467, 129 S. Ct. 1125, 1131 (2009) ("A government entity has the right to speak for itself. [I]t is entitled to say what it wishes, and to select the views that it wants to express.") (alteration in original) (internal quotation marks and citations omitted); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny.").

violating the Board's bylaws and not acting in HCC's best interests. He hired a private investigator to check on the alleged residency of one member, produced robocalls, and gave interviews voicing his criticisms. The Board responded by censuring him for acting 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." Wilson countered with a lawsuit against HCC, which alleged that the censure violated his free speech rights and injured his reputation.[2] HCC moved to dismiss for lack of jurisdiction and failure to state a claim, and the district court granted that motion. A panel of this court reversed, concluding that "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983." *Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490, 498 (5th Cir. 2020).

First, the panel's holding is out of step with four sister circuits, all of them in agreement that a legislature's public censure of one of its members, when unaccompanied by other personal penalties, is not actionable under the First Amendment.[3]

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[2] The Board took away certain of Wilson's perks of office but did not otherwise act against him or his personal property.

[3] *See, e.g.*, *Werkheiser v. Pocono Twp.*, 780 F.3d 172, 181–83 (3d Cir. 2015); *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543–46 (9th Cir. 2010); *Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1247 (10th Cir. 2000); *Zilich v. Longo*, 34 F.3d 359, 363–64 (6th Cir. 1994); *see also Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 34 (1st Cir. 1996) (concluding there is "no First Amendment protection for a politician whose rights to freedom of speech, freedom of association, and freedom to disassociate [oneself] from unpopular views have been injured by other politicians seeking to undermine his credibility within

Decisions from the Tenth and Sixth Circuits are particularly compelling. In *Phelan,* the Tenth Circuit held—on facts strikingly similar to the case at bar—that a college board's censure did not infringe a board member's free speech rights because it did not punish her for exercising those rights nor deter her future speech. 235 F.3d at 1247. As the court explained, "[t]he crucial question is whether, in speaking, the government is *compelling* others to espouse or to suppress certain ideas or beliefs." *Id.* (emphasis in original). "In order to compel the exercise or suppression of speech, the governmental measure must punish, or threaten to punish, protected speech by governmental action that is 'regulatory, proscriptive, or compulsory in nature.'" *Id.* (quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972). Such action could include imprisonment, fines, injunctions, or taxes, but "[a] discouragement that is 'minimal' and 'wholly subjective'"—such as a censure resulting in reputational injury—"does not . . . impermissibly deter the exercise of free speech rights." *Id.* at 1247–48 (quoting *United States v. Ramsey*, 431 U.S. 606, 624 (1977)). Fellow legislators may strike hard verbal blows, and all's fair when they exercise corporate authority to censure or reprimand one of their members; such actions are not a *violation* of the First Amendment, but its *embodiment* in partisan politics. As *Phelan* explained, hurt feelings or reputational injuries are "not enough to defeat constitutional interests in furthering 'uninhibited, robust' debate on public issues." *Phelan*, 235 F.3d at 1248 (quoting

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his own party and with the electorate") (alteration in original) (internal quotation marks and citation omitted).

New York Times v. Sullivan, 376 U.S. 254, 270 (1964)). The panel opinion here failed to confront *Phelan* on its merits.

Zilich v. Longo, 34 F.3d 359 (6th Cir. 1994), is also exemplary.[4] There, a former city councilman sued the council members who passed a resolution, after he left office, challenging whether he ever resided in his district and urging legal action for disgorgement of his official salary. As in *Phelan*, the Sixth Circuit concluded that resolutions condemning or approving the conduct of elected officials "are simply the expression of political opinion." *Id.* at 364. "They do not control the conduct of citizens or create public rights and duties like regular laws," *id.*, and thus do not infringe on censured policymakers' free speech rights. *Zilich* reveals a very practical grasp of the squabbles that legislative politics involve:

> The First Amendment is not an instrument designed to outlaw partisan voting or petty political bickering through the adoption of legislative resolutions. . . . This principle protects Zilich's right to oppose the mayor without retribution and it also protects defendants' right to oppose Zilich by acting on the residency issue which was left unresolved for over two years.

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[4] The panel opinion mistakenly suggests that *Zilich* is distinguishable because it involved a "resolution" against the dissenting member rather than a "censure." *Wilson*, 955 F.3d at 499–50. Query what difference this semantic distinction, even if accurate, would make? But the panel neglects that the Board here actually passed a "resolution of censure"!

34 F.3d at 363. These cases' application of true First Amendment principles put the reasoning of our court's panel to shame.

Second, on its own terms, the *Wilson* panel misplaced its reliance on circuit precedent, principally cases concerning official reprimands against elected Texas judges. *See Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990); *Jenevein v. Willing*, 493 F.3d 551 (5th Cir. 2007). These decisions stand on insecure legal footing and are otherwise clearly distinguishable. *Scott* originated in the body of law that protects First Amendment rights of ordinary government employees and used to be characterized by the *Connick/Pickering* balancing test. Whether this analogy was ever appropriate to evaluate judicial impropriety is dubious, so much so that the *Jenevein* court essentially abandoned it in favor of a classic First Amendment strict scrutiny standard. But even if these decisions remain sound,[5] this court had and has sufficient familiarity with judicial ethics to determine the extent to which a judge's (constitutionally protected) statements on a matter of public concern comport with (the compelling governmental interest in) assuring the courts'

[5] Pursuant to *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the scope of First Amendment protection from discipline by governmental employers has been narrowed. *See Anderson v. Valdez*, 845 F.3d 580, 592–93 (5th Cir. 2016) ("[W]hen public employees [speak] pursuant to their official duties, [they] are not speaking as citizens Such [j]ob-required speech is not protected, even when it irrefutably addresses a matter of public concern.") (second, third, fourth, and fifth alterations in original) (internal quotation marks and citation omitted). Application of such case law to elected judges has thus become even more tenuous.

integrity and impartiality. We have no adequate background to determine how, in the hurly-burly political world of a legislative body, either elemental First Amendment principles or background ethical standards apply to "balance" the public statements of one official against the retaliatory statements of his co-legislators in their capacity as "the government."

Scott and *Jenevein* are distinguishable for another reason. Judicial discipline is incommensurable with legislative debates. The body meting out discipline in the judicial cases was the Texas Commission on Judicial Conduct, which has authority to impose progressive discipline up to and including a recommendation to the state Supreme Court of the judge's removal from office. TEX. CONST. art. V, § 1-a. HCC's Board lacks authority to remove its own members, whose ultimate discipline resides in the ballot box. Further, judges, even elected judges, are not equivalent to legislators when it comes to participating in the public square. Judges must submit our extrajudicial "speech" to institutional discipline for the sake of public confidence in the impartiality of our judicial work. In contrast, the duty of legislators is precisely to "speak" on matters of public concern, either individually or in their capacity as the majority, without inhibition. Such "speech" includes addressing the (mis)conduct of the legislative body's own members. Indeed, "[v]oting on public policy matters coming before a legislative body is an exercise of expression long protected by the First Amendment." *Camacho v. Brandon*, 317 F.3d 153, 160 (2d Cir. 2003). As the Supreme Court observed in *Bond v. Floyd*, 385 U.S. 116, 135–36 (1966), "[t]he manifest function of the

First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." Because the sanction of fellow Board members generally lies with the voters, policymakers—like HCC's Board of Trustees—must be able to "speak" by issuing official resolutions, censures, or reprimands. Otherwise, as in this case, the First Amendment becomes a weapon to stifle fully protected government speech at the hands of a fully protected speaker.

Our own case law actually respects the lack of a constitutional remedy for ordinary intra-legislative squabbling. In *Colson v. Grohman,* 174 F.3d 498 (5th Cir. 1999), this court denied First Amendment relief to a city councilwoman who asserted that the city and other public officials engaged in retaliatory criticism, false accusations, and investigations because of her political views and votes. *Id.* at 500. While acknowledging the *Scott* decision's framework for actionable First Amendment conduct against an "elected public official," this court nevertheless found the hardball tactics employed against the plaintiff insufficient to withstand summary judgment. This court concluded that "the defendants' allegedly retaliatory crusade amounted to no more than the sort of steady stream of false accusations and vehement criticism that any politician must expect to endure." *Id.* at 514. *Colson* stands as a practical rebuke to this *Wilson* panel's insistence on judicializing legislative disputes.

Finally, although it makes no attempt to explain what happens next, the panel opinion also raises serious questions about how to apply strict scrutiny in a novel context and an already muddled area of

the law. What judicially manageable tests are there for deciding when a body's censure of one of its members' speech violates a "compelling interest" and isn't "narrowly tailored"? *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) ("If our recent cases illustrate anything, it is how easily the Court tinkers with levels of scrutiny to achieve its desired result."). The panel leaves that question for an uninstructed district court on remand. But I am skeptical that any cogent judicial response is possible.

Given the increasing discord in society and governmental bodies, the attempts of each side in these disputes to get a leg up on the other, and the ready availability of weapons of mass communication with which each side can tar the other, the panel's decision is the harbinger of future lawsuits. It weaponizes any gadfly in a legislative body and inflicts an immediate pocketbook injury on the censuring institution. Political infighting of this sort should not be dignified with a false veneer of constitutional protection and has no place in the federal courts.

I respectfully dissent.

JAMES C. HO, Circuit Judge, dissenting from denial of rehearing en banc:

Holding office in America is not for the faint of heart. With leadership comes criticism—whether from citizens of public spirit or personal malice, colleagues with conflicting visions or competing ambitions, or all of the above.

Those who seek office should not just expect criticism, but embrace it. Tough scrutiny is not a bug, but a defining feature of our constitutional structure. In America, we trust our citizens to determine for themselves what is right—and to count on vigorous, unrelenting debate to guide them. As Benjamin Franklin once wrote, "a free constitution and freedom of speech have such a reciprocal dependence on each other that they cannot subsist without consisting together." Benjamin Franklin, *On Freedom of Speech and the Press*, *in* 2 THE WORKS OF BENJAMIN FRANKLIN 310 (Sparks ed., 1882).

Of course, no one *enjoys* being booed.[1] But as de Tocqueville observed nearly two centuries ago, "[t]he social state naturally disposes Americans not to be easily offended in little things," and "the democratic freedom they enjoy makes this indulgence pass into the national mores." 2 ALEXIS DE TOCQUEVILLE,

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[1] Studies show, for example, that in sports, fear of being booed causes "referee bias" toward the home team: "[F]aced with enormous pressure—say, making a crucial call with a rabid crowd yelling, taunting, and chanting a few feet away—it is natural to want to alleviate that pressure." TOBIAS J. MOSKOWITZ & L. JON WERTHEIM, SCORECASTING: THE HIDDEN INFLUENCES BEHIND HOW SPORTS ARE PLAYED AND GAMES ARE WON 159, 165 (2011).

DEMOCRACY IN AMERICA 541 (Mansfield ed., 2000) (1840).

And because our citizens don't fear criticism, it is only natural to insist that officials don't either. We expect officials in every branch of government to rise to the challenge—not wilt under the pressure. Churchill once wrote: "Courage is rightly esteemed the first of human qualities, because, as has been said, 'it is the quality which guarantees all others.'" WINSTON CHURCHILL, GREAT CONTEMPORARIES 211 (Muller ed., 2012) (1937). Translation: Leaders lead. They listen to reason. But they won't be cowed by the mob.

No one would confuse the typical public officeholder today for Churchill. But whatever fortitude an official may happen to possess, we know this to be true: The First Amendment guarantees freedom *of* speech, not freedom *from* speech. It secures the right to criticize, not the right *not* to be criticized.

The panel here took a different view, holding that public officials have a right not to be censured for engaging in speech critical of others.[2] Our court has previously found such rights for judges. *See Scott v. Flowers*, 910 F.2d 201, 209 (5th Cir. 1990); *but see id.* at 215–16 (Garwood, J., dissenting); *see also Jenevein v. Willing*, 493 F.3d 551, 562 (5th Cir. 2007). So the

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[2] Plaintiff also complained about certain "additional measures," beyond the words of censure, that have been taken against him. But the panel allowed him to proceed based on words alone. *See Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490, 499 n.55 (5th Cir. 2020).

panel understandably applied those precedents to officials outside the judiciary.

But our sister circuits have found no such right. *See*, *e.g.*, *Phelan v. Laramie Cty. Cmty. Coll. Bd.*, 235 F.3d 1243, 1248 (10th Cir. 2000) ("[C]ensure is clearly not a penalty that infringes Ms. Phelan's free speech rights.") (citing *Zilich v. Longo*, 34 F.3d 359, 364 (6th Cir. 1994)). As then-Judge Scalia once wrote, "[w]e know of no case in which the [F]irst [A]mendment has been held to be implicated by governmental action consisting of no more than governmental criticism of the speech's content." *Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986). After all, the First Amendment does not "consider[] speakers to be so timid, or important ideas to be so fragile, that they are overwhelmed by knowledge of governmental disagreement." *Id.*

Leaders don't fear being booed. And they certainly don't sue when they are. I join Judge Jones's excellent opinion dissenting from the denial of rehearing en banc.

APPENDIX D

RESOLUTION OF CENSURE

WHEREAS, Houston Community College ("College") Board of Trustees ("Board") member, Mr. David Wilson, has used public media to criticize other Board members for taking positions that differ from his own, including an April 19, 2017 robocall initiated by Mr. Wilson to the constituents of other Board members, and (2) an April 20, 2017 interview with a local radio station in which he identified Board members who voted in favor of a transaction that he opposed and accused those Board members of "not representing the people in their district." In doing so, Mr. Wilson has 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; and

WHEREAS, Mr. Wilson regularly publishes information on a website that he created and maintains, alleging that other Board members have engaged in unethical and/or illegal conduct, without facts to support his allegations. In doing so, Mr. Wilson has demonstrated a lack of respect for the Board's collective decision-making process and a failure to encourage and engage in open and honest discussions in making Board decisions, and a failure to respect differences of opinion; and

WHEREAS, on at least two separate occasions, Mr. Wilson hired personal investigators to conduct surveillance of Trustee Adriana Tamez. In doing so, Mr. Wilson has failed to interact with fellow Board

members in a way that creates and sustains mutual respect; and

WHEREAS, Mr. Wilson filed a lawsuit against the College and Board members, complaining of the interpretation of Board Bylaws and state law regarding the ability of Board members to participate in meetings remotely. In filing this lawsuit, Mr. Wilson demonstrated a lack of respect for the Board's collective decision-making process and caused the College to incur $20,983 in legal fees for the defense of the lawsuit to date; and

WHEREAS, Mr. Wilson filed a second lawsuit against the College and Board members, complaining of his exclusion from closed session pursuant to Texas Attorney General Opinion No. JM-1004. In filing this lawsuit, Mr. Wilson demonstrated a lack of respect for the Board's collective decision-making process and caused the College to incur $5,400 in legal fees for the defense of the lawsuit to date; and

WHEREAS, Mr. Wilson created and maintains a personal website www.davewilsonhcc.com that uses the College's name in violation of Board Policy BBF (Local); and

WHEREAS, in August 2017, Mr. Wilson hired an independent investigator to conduct an investigation of the Board and the College without the consent of the Board. In doing so, Mr. Wilson has demonstrated a lack of respect for the Board's collective decision-making process and a failure to encourage and engage in open and honest discussions in making Board decisions. These actions by Mr. Wilson also contributed to an inquiry by HCC's accrediting agency, the Southern Association of Colleges and

Schools Commission on Colleges ("SACSCOC"). In a letter dated December 11, 2017, SACSCOC referenced a news article discussing Mr. Wilson's independent investigation, and requested the submission of evidence establishing that Mr. Wilson's actions were not indicative of a failure to comply with SACSCOC Core Requirement 4.1.d, which requires that the "members of the governing board are not controlled by a minority and act with authority only as a collective entity."

THEREFORE, BE IT RESOLVED THAT, because Mr. Wilson has repeatedly acted in a manner not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct, the Board finds that Mr. Wilson's conduct was not only inappropriate, but reprehensible, and such conduct warrants disciplinary action.

BE IT FURTHER RESOLVED THAT, Mr. David Wilson is hereby PUBLICLY CENSURED for his conduct. Such censorship is the highest level of sanction available to the Board under Texas law since neither Texas law nor board policy allow the Board to remove a Board member from elected office.

BE IT FURTHER RESOLVED THAT, Mr. Wilson is ineligible for election to Board officer positions for the 2018 calendar year. Further, for College fiscal year 2017-2018, Mr. Wilson is ineligible for reimbursement for any College-related travel. Any requests for access to the funds in his Board account for community affairs will [require] Board approval. The Board also recommends that Mr. Wilson complete additional training relating to governance

and ethics. Mr. Wilson is directed by the Board to immediately cease and desist from all inappropriate conduct and any repeat of improper behavior by Mr. Wilson will constitute grounds for further disciplinary action by the Board.

ADOPTED THIS 18 day of Jan., 2018

Dr. Carolyn Evans-Shabazz
Chairman, Board of Trustees
Houston Community College

ATTEST:

Zeph Capo
Secretary, Board of Trustees
Houston Community College