No. 20-804

IN THE

Supreme Court of the United States

HOUSTON COMMUNITY COLLEGE SYSTEM,

Petitioner,

v.

DAVID BUREN WILSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND AND THE NATIONAL SCHOOL BOARDS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Over 750 public school districts and community colleges in Texas are members of the Texas Association of School Boards Legal Assistance Fund (TASB LAF), which advocates the interests of school districts and community colleges in litigation with potential state-wide impact. The TASB LAF is governed by members from three organizations: the Texas Association of School Boards, Inc. (TASB), the Texas Association of School Administrators (TASA), and the Texas Council of School Attorneys (CSA).

TASB is a Texas non-profit corporation whose members include the approximately 1,025 public school boards in Texas, along with 50 Texas community colleges. As locally elected boards of trustees, TASB's members are responsible for the governance of Texas public schools and community colleges throughout the state. TASB's mission is to promote educational excellence for Texas school children and community college students through advocacy, leadership, and high-quality services to TASB's members. TASA represents the State's school superintendents and other administrators responsible for implementing the education policies adopted by their local school boards and for following state and federal law. CSA is comprised of attorneys who represent more than 90 percent of Texas independent school districts, as well as Texas community colleges.

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1. All parties filed blanket consents with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* or its counsel, made a monetary contribution toward the preparation or submission this brief.

The National School Boards Association (NSBA) is a non-profit organization founded in 1940 that represents state associations of school boards and the Board of Education of the U.S. Virgin Islands. Its mission is to promote excellence and equity in public education through school board leadership. Through its member state associations, NSBA represents over 90,000 school board members who govern nearly 14,000 local school districts serving approximately 51 million public school students. NSBA strives to promote public education and ensure equal educational access for all children. Through legal and legislative advocacy, and public awareness programs, NSBA promotes its members' interests in ensuring excellent public education and effective school board governance. It closely monitors legal issues that affect the authority of public schools and regularly participates as *amicus curiae* in court cases.

The TASB LAF and the NSBA have a strong interest in ensuring that their members—locally elected boards—preserve their right to self-govern and their right to speak as a body. School boards operate as bodies corporate with independent authority to establish local policies and operating procedures. School boards should be able to maintain these standards without fear that individual members will seek intervention from a federal district court under the guise of a First Amendment violation when reprimanded or censured for violating such rules. Unfortunately, this is exactly what the Fifth Circuit's decision provides. The TASB LAF and the NSBA submit this *amicus* brief accordingly to address their interests in these issues and, more specifically, the impact the Fifth Circuit's decision would have on school districts and community colleges across the United States if the Court allows that decision to stand.

SUMMARY OF ARGUMENT

According to the Bylaws of the Board of Trustees for Petitioner Houston Community College System (HCC), "Board members serve as fiduciaries" and, as such, "must act solely and exclusively for the benefit of the College."[2] (J.A. 24). The Board of Trustees, in turn, governs HCC, through its administration, by "avoiding actions and situations detrimental to the College, and promoting educational opportunity for the benefit of the entire community." (J.A. 22). During 2017, it became clear to the HCC Board of Trustees that Respondent David Wilson's conduct did not comport with the Board's Bylaws or HCC's mission.

Instead of respecting the Board's collective decision-making process, Wilson initiated robocalls to the constituents of Board members with whom he disagreed. (Pet. App. 42a). Instead of engaging in open and honest discussions about Board decisions, Wilson maintained a website accusing his fellow Board members of unethical and/or illegal conduct. (Pet. App. 42a). Instead of interacting with his fellow Board members in a way that fostered and sustained mutual respect, Wilson hired private investigators to conduct surveillance on a fellow trustee. (Pet. App. 42a-43a).

Not surprisingly, HCC's accrediting body took notice of Wilson's conduct, requesting the submission of evidence establishing that Wilson's conduct did not result in HCC's violation of one of the accrediting body's core requirements. (Pet. App. 43a-44a). HCC had to submit evidence accordingly.

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2. The Joint Appendix contains the 2017 version of HCC's Bylaws. (J.A. 17-82).

The response to Wilson's conduct from HCC's Board of Trustees—a Resolution of Censure—did not run afoul of Wilson's First Amendment rights under existing authority from other circuit courts or, more importantly, from this Court. Indeed, censures and reprimands have a long and constitutional history in other governing bodies in the United States. But in one ruling, the Fifth Circuit has ignored that authority and has inexplicably created a new trajectory for free speech claims by elected officials—a trajectory that has far-reaching impact.

Splitting with its sister circuits, the Fifth Circuit recognized a valid First Amendment claim when an elected official is admonished by his peers for speaking on a matter of public concern, regardless of whether that admonishment prevented the elected official from carrying out the duties and responsibilities of his public office. In so holding, the Fifth Circuit effectively undercut an elected board's ability to self-govern and squelched an elected board's own right to exercise its voice under the First Amendment.

Simply put, the Fifth Circuit's application of a novel "public concern" test should not and cannot be the standard elected officials must meet to pursue a First Amendment claim against the entities they are charged with representing. To hold otherwise leaves nothing off limits as it brings all actions by an elected school board against a single member squarely within the purview of federal district courts, crippling a public body's ability to self-govern. The Fifth Circuit's decision creates an inequitable legal landscape in which the person or entity to speak first has the protected right while the other is unconstitutionally "retaliating" in violation of the First Amendment. The Court should decline to provide elected officials with such an avenue of relief.

ARGUMENT

On January 18, 2018, the Board of Trustees for HCC issued a Resolution of Censure addressing Wilson's improper conduct and violation of Board policy. (Pet. App. 3a, 42a-45a). The Resolution of Censure did not prevent Wilson from performing his duties as a member of HCC's Board of Trustees, continuing to attend and vote at Board meetings, speaking out against HCC or his fellow Board members, or continuing to engage in whatever conduct he saw fit. The pronouncement did not violate or otherwise interfere with Wilson's First Amendment rights. Rather, the Resolution of Censure pronounced the Board's disapproval of his conduct—disapproval Wilson was free to ignore.

The Fifth Circuit's decision to the contrary turns federal district courts into the arbiters of political infighting and hurt feelings even though it is well-established that elected officials at every level of government are expected to endure more criticism than an average citizen. *See Colson v. Grohman*, 174 F.3d 498, 514 (5th Cir. 1999) ("[T]he 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."). More importantly, the Fifth Circuit's decision distracts elected boards from their educational missions, directs their energy toward defending First Amendment lawsuits, and silences the voice of the board itself. The ironic aftermath of the Fifth Circuit's decision is that it has allowed the First Amendment—designed to protect free speech rights—to be used as a tool by one disruptive member to prevent elected boards from speaking and from doing their jobs.

I. The Fifth Circuit's decision runs contrary to this Court's precedent and the constitutional authority of the legislative branch to establish rules.

A. Under this Court's precedent, Wilson's censure by the Houston Community College Board of Trustees is not subject to First Amendment scrutiny.

In 1966, this Court faced head-on the question of whether a state legislator's disqualification from taking office as a result of statements he made violated his First Amendment rights. *See Bond v. Floyd*, 385 U.S. 116, 131-32 (1966). Because of statements Julian Bond made in opposition to the United States' involvement in Vietnam, the Georgia House of Representatives refused to seat him, albeit under the guise of Bond's alleged inability to swear a loyalty oath to the Constitution. *Id.* at 118-19, 132.

While never expressly stated in the Court's opinion, essential was the fact that the actions of the Georgia House of Representatives prevented duly-elected Representative Bond from performing the duties and functions of his office. And this Court ultimately found "that the disqualification of Bond from membership in the Georgia House because of his statements violated Bond's right of free expression under the First Amendment." *Id.* at 137.

In other words, this Court has already determined when an elected body runs afoul of its members' First Amendment rights—namely, when the elected body takes an action that prevents or impedes the duly-elected member from performing his duties as an elected official. The Third Circuit, the Ninth Circuit, and even the Fifth

Circuit, which went far astray in the present matter, have recognized the limit on First Amendment scrutiny set forth in *Bond*. *See Werkheiser v. Pocono Township Bd. of Supervisors*, 704 Fed. App'x 156, 159 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 1001 (2018); *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 454 n.4 (9th Cir. 2010); *Rash-Aldridge v. Ramirez*, 96 F.3d 117, 119 (5th Cir. 1996). Under the *Bond* analysis, as further applied by the circuit courts, HCC's censure of Wilson simply does not give rise to a violation of Wilson's First Amendment rights.

In *Werkheiser*, an elected member of the Board of Supervisors for Pocono Township also served, at his fellow Supervisors' pleasure, as the Township's Roadmaster. *Werkheiser*, 704 Fed. App'x at 157. After Harold Werkheiser lobbed criticism at Township management, his fellow Supervisors declined to continue his appointment as Roadmaster. *Id.* at 157-58. Werkheiser sued, alleging the Board of Supervisors violated his First Amendment rights. *Id.* at 158.

The Third Circuit subsequently held "that the type of retaliation Werkheiser cites [was] not actionable under the First Amendment." *Id.* The Third Circuit was careful to note, however, that this did not mean "absolutely anything goes in the political arena." *Id.* at 159. To the contrary, "[c]ourts have interpreted *Bond* to 'prohibit retaliation against elected officials for speech pursuant to their official duties [ ] when the retaliation interferes with their ability to adequately perform their elected duties.'" *Id.* at 159 (quoting *Werkheiser*, 780 F.3d 172, 181 (3d Cir. 2017)).

The Fifth Circuit reached the same conclusion in *Rash-Aldridge*, but inexplicably disregarded this decision

here by finding Wilson had a viable First Amendment claim. There, Arlene Rash-Aldridge, an elected member of the Laredo, Texas city council, filed suit claiming a violation of her First Amendment rights following her removal from the Laredo Urban Transportation Study (LUTS) at the hands of her fellow council members. *Rash-Aldridge*, 96 F.3d at 118-19. In distinguishing *Bond* from Rash-Aldridge's removal from the LUTS, the Fifth Circuit noted "[h]er capacity as an elected official was not compromised because the council did not try to remove her from her seat on the council nor take away any privileges of that office because of what she said or did."[3] *Id.* at 119. The same can be said for HCC's Resolution of Censure here: nothing in it prevented Wilson from performing the duties and functions of a duly-elected member of HCC's Board of Trustees.

Indeed, the most severe consequences arising from the censure—Wilson's ineligibility for election to a Board officer position for the 2018 calendar year, Wilson's ineligibility for reimbursement for college-related travel for the 2017-2018 fiscal year, and the required approval for Wilson to access Board funds—did not violate Wilson's First Amendment rights. (Pet. App. 15a-16a). None of these internal self-governance measures interfered with, or prevented Wilson from carrying out, his duties as a duly-elected member of the HCC Board of Trustees, namely, being an active, voting member of the Board to effectuate and implement its statutory powers, as well as

3. The Ninth Circuit echoes the same limitation in *Blair*—"[t]his would be a different case had Blair's peers somehow managed to vote him off the Board or deprive him of authority he enjoyed by virtue of his popular election." *Blair*, 608 F.3d at 545 n.4.

representing and communicating with his constituents.[4] Yet somehow this act of self-governance that in no way prevented Wilson from participating in meetings and voting on matters is now subject to First Amendment scrutiny in the Fifth Circuit.

Wilson did not like the public rebuke he received from the HCC Board of Trustees, but his displeasure with the Board's action does not transform the Resolution of Censure into an actionable First Amendment claim under the facts presented here and the Court's decision in *Bond*. *See Blair*, 608 F.3d at 545 (noting "the First Amendment does not succor casualties of the regular functioning of the political process"); *Werkheiser*, 704 Fed. App'x at 158 (noting "the right to free speech does not 'guard against every form of political backlash that might arise out of the everyday squabbles of hardball politics'"); *Zilich v. Longo*, 34 F.3d 359, 364 (6th Cir. 1994) (stating "[t]he First Amendment is not an instrument designed to outlaw partisan voting or petty political bickering through the adoption of legislative resolutions.").

Following the Resolution of Censure, Wilson had two choices—understand the serious nature of the Resolution of Censure and change his behavior accordingly or continue engaging in the same behavior. Under *Bond*, Wilson's options did not include proceeding to the federal courthouse steps armed with a First Amendment claim even as he maintained his seat on the HCC Board of Trustees, as well as the rights and privileges that came with his elected office.

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4. The powers of the HCC Board of Trustees are set forth in its Bylaws and the Texas Education Code. *See* J.A. 35-40; Tex. Educ. Code § 51.352.

B. The Constitution implicitly recognizes the constitutionality of censuring public officials for their bad acts.

Article I of the Constitution provides that Congress "may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." *See* U.S. CONST. art. I, § 5, cl. 2. Under this authority, for the past 200 years, the United States House of Representatives and the United States Senate have expelled, censured, and reprimanded Members for various infractions, ranging from criminal behavior to rules violations.[5] As explained by the United States Senate, and relevant here, "[a] censure does not remove a senator from office nor does it deny to a senator his or her rights or privileges." *See* United States Senate, Powers & Procedures, censure, last accessed on May 19, 2021, at https://www.senate.gov/about/powers-procedures/censure.htm.

To the contrary, censure serves "as a form of public rebuke." *See* United States House of Representatives, Origins & Development: From the Constitution to the Modern House, Discipline & Punishment, last accessed on May 19, 2021, at https://history.house.gov/Institution/Origins-Development/Discipline/#censure. And "[w]hile the constitutional authority to punish a Member who engages in 'disorderly Behaviour' is intended, in part, as an instrument of individual rebuke, it serves principally

5. Information regarding Congress' history with censure can be located at https://www.senate.gov/about/powers-procedures/censure.htm; https://history.house.gov/Institution/Origins-Development/Discipline/#censure; and https://history.house.gov/Institution/Discipline/Expulsion-Censure-Reprimand/.

to protect the reputation of the institution and to preserve the dignity of its proceedings." *See id.*

To that end, the United States House of Representatives has censured its Members for, *inter alia*, insulting the Speaker of the House during floor debate, supporting recognition of the Confederacy in a floor speech, and insulting a Member during debate (three different Members on three separate occasions). *See* United States House of Representatives, Origins & Development: From the Constitution to the Modern House, List of Individuals Expelled, Censured, or Reprimanded in the U.S. House of Representatives, last accessed on May 19, 2021, at https://history.house.gov/Institution/Discipline/Expulsion-Censure-Reprimand/.

In the legal world created by the Fifth Circuit's decision, censured Members of Congress could argue that they were engaging in speech protected by the First Amendment and that such protected speech prompted the "public rebuke," thereby implicating their First Amendment rights, much like Wilson has done here.[6] But such an argument would and should fail because issuing censures is not about the content of the speech; rather, it is about maintaining some semblance of decorum to ensure that proceedings do not devolve into chaos, and holding Members to expected standards of conduct by rebuking them if they step out of line, which could include engaging in some type of discriminatory conduct.

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6. Merriam-Webster defines "censure" as "1. a judgment involving condemnation; 2. the act of blaming or condemning sternly; 3. an official reprimand." *See* https://www.merriam-webster.com/dictionary/censure.

Even a cursory review of the conduct giving rise to other censures in the United States House of Representatives over the years reflects the proper and overarching goal of self-governance behind them. *See id.* But, as both houses of Congress explicitly recognize, a censure does not remove a Member from office.

In other words, Congress' right to self-govern its Members through the use of censures and reprimands never reaches First Amendment scrutiny because a public rebuke in no way prevents Members of Congress from representing their constituents. A censure or a reprimand might embarrass a Member of Congress; it may have the intended impact of putting a stop to the conduct in question as reprimands often do, or it could even lead to a decision by the final arbiter—the voters—to not send the censured individual back to Washington, D.C. But despite these potential consequences, a censured Member of Congress can still do his or her job. It is entirely nonsensical that Congress has the ability to self-govern without running afoul of the First Amendment, but that such protections would not extend to a locally elected board of trustees, which certainly has a vested interest in ensuring that the school district or educational institution it oversees is not derailed from the mission of educating students by rogue board members.

C. The punitive measures imposed by Wilson's censure did not prevent him from carrying out his duties as a duly-elected member of the Houston Community College Board of Trustees.

While the Fifth Circuit found the Resolution of Censure implicated Wilson's First Amendment rights, it

acknowledged that the punitive measures imposed therein were perfectly acceptable actions for the HCC Board of Trustees to take. (Pet. App. 15a-16a). Curiously, Wilson did not appeal the Fifth Circuit's decision in that regard and, as such, it is not before the Court. *Amici* nevertheless address these three measures—Wilson's ineligibility for election to a Board officer position for the 2018 calendar year, Wilson's ineligibility for reimbursement for college-related travel for the 2017-2018 fiscal year, and the required approval of his access to Board funds—because they underscore the misguided nature of the Fifth Circuit's decision. (Pet. App. 15a-16a, 42a-45a).

Wilson's ineligibility for election to a Board officer position for the 2018 calendar year (a consequence the majority of the Board could have voted later to ignore) did not prevent him from carrying out his duties. (Pet. App. 44a). Even the Fifth Circuit recognized that its precedent in *Rash-Aldridge* foreclosed any such argument. (Pet. App. 15a).

The same holds true regarding the required Board approval for Wilson to access his Board Account for Community Affairs (BACA) because under the HCC Board of Trustees Bylaws, all HCC Board members had to seek approval before expending BACA funds.[7] (Pet. App. 44a; J.A. 66-68). Wilson cannot articulate how a requirement shared by all members somehow prevents him alone from carrying out his duties and responsibilities as a Board member. This is particularly true when Wilson

7. During the relevant timeframe, Board members had to complete a BACA Fund Request Form seven days before an event, which then required approval. (J.A. 66-68).

could still attend meetings, vote on matters before the Board of Trustees, speak his views on and off the dais, and represent his constituents fully.

Likewise, Wilson did not have to travel at HCC's expense to fully carry out his duties and responsibilities as a Board member. Arguably, the only travel necessary for Wilson to carry out his duties and responsibilities would be for any required training that he could not obtain virtually. But Wilson, who was elected to the HCC Board of Trustees in November 2013, would have completed any required in-person training no later than the end of 2014, thereby rendering travel at HCC's expense during the 2017-2018 fiscal year wholly unnecessary.[8] (Pet. App. 2a). It follows then that the Board's three punitive measures aimed at Wilson's conduct did not implicate Wilson's First Amendment rights under *Bond*. Even the Fifth Circuit agreed, which highlights the absurdity of its decision.

8. The Texas Higher Education Coordinating Board provides detailed information on required training for board members. *See* Training Requirements for Governing Board Members of Texas Public Institutions and Systems of Higher Education, at https://reportcenter.highered.texas.gov/agency-publication/guidelines-manuals/commissioner-office-summary-training-requirements-for-governing-board-members/. The only yearly training required can be completed online, but the statute requiring yearly cybersecurity training was not enacted until 2019, and, as such, inapplicable to Wilson at the time the HCC Board of Trustees issued the Resolution of Censure. *See* Tex. Gov't Code § 2054.5191.

II. The Fifth Circuit's decision runs contrary to an elected body's recognized First Amendment rights.

A. The Fifth Circuit's inapposite First Amendment analysis comparing elected official Wilson's claims to those brought by public employees effectively nullifies an elected board's right to self-govern.

In finding Wilson had an actionable First Amendment claim stemming from the Resolution of Censure, the Fifth Circuit inexplicably relied on its prior precedent analyzing the free speech rights of Texas judges, who are elected employees of the state, county, or political subdivision they serve.[9] (Pet. App. 11a-15a). In doing so, the Fifth Circuit focused on whether Wilson's speech addressed a matter of public concern without any recognition of the difference between elected board members and elected employees or, more importantly, any acknowledgment that every matter taken up by an elected school or community college board of trustees, and addressed by its members, conceivably touches on a matter of public concern.

Indeed, matters of public concern are inescapable in the functions of a school or community college board, which include overseeing how tax dollars are spent and making decisions regarding how students are educated. More to the point, the Fifth Circuit's decision to protect an elected official's speech when that speech addresses a matter of public concern creates an unmanageable line—a line that runs afoul of the clear demarcation for actionable First Amendment claims set forth in *Bond*.

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9. *See Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1994); *Jenevein v. Willing*, 493 F.3d 551 (5th Cir. 2007).

The difference between Wilson, an elected member of the HCC Board of Trustees, and an elected employee is important and deserving of this Court's attention. While both are elected officials, community college and school board trustees serve in unpaid positions and act together as a body corporate, managing and governing their colleges and schools or, as more specifically applied here, managing and governing HCC.[10] It falls to the HCC Board of Trustees to self-govern its members, which includes ensuring board members understand and comply with the Board's internal rules, operating procedures, and bylaws.

A reprimand or censure is often the only way to attempt to ensure such compliance, as many jurisdictions do not provide a mechanism for community colleges and school districts to recall elected board members. But under the Fifth Circuit's decision here, elected boards have no recourse to publicly rebuke members who are not acting in the best interest of the school district or educational institution they represent. The Court needs to look no further than to Wilson's own conduct to understand the problematic nature of the Fifth Circuit's "public concern" test.

Wilson's time on the HCC Board of Trustees was undoubtedly mired in controversy.[11] This controversy

10. *See* Tex. Educ. Code §§ 1.001(a), 130.082(d), 130.084; *Tex. Ass'n of Steel Importers, Inc. v. Tex. Highway Comm'n*, 372 S.W.2d 525 (Tex. 1963).

11. For example, students and fellow Board members condemned Wilson for his anti-LGBT remarks on at least two occasions as such remarks failed to show support for all of HCC's students. *See* Trustee called out for anti-LGBT rant, again, at https://perma.cc/M2BM-8KGN.

came to a head in December 2017, when Wilson's conduct directly threatened HCC's accreditation with the Southern Association of Colleges and Schools Commission on Colleges. (Pet. App. 43a-44a). By the time HCC received this letter, Wilson had initiated robocalls to the constituents of other Board members when he disagreed with the Board of Trustees' decision to fund an overseas campus, hired private investigators to conduct surveillance of a fellow Board member, initiated an unauthorized independent investigation of the Board of Trustees and HCC, and filed at least two lawsuits. (Pet. App. 42a-45a). In response, the Southern Association of Colleges and Schools Commission on Colleges questioned whether Wilson's conduct reflected control by a minority of the Board of Trustees instead of governance in the collective. (Pet. App. 44a).

The HCC Board of Trustees took the only reasonable action available to address Wilson's conduct, respond to the Southern Association of Colleges and Schools Commission on Colleges' concerns, ensure its continued accreditation, and carry out its statutory mission of educating its students; it issued the Resolution of Censure, an act of self-governance in the form of a public rebuke intended to preserve HCC's reputation and, more importantly, its accreditation. *See* United States House of Representatives, Origins & Development: From the Constitution to the Modern House, Discipline & Punishment, last accessed on May 19, 2021, at https://history.house.gov/Institution/Origins-Development/Discipline/#censure.

To that end, the Resolution of Censure took care to set forth which Code of Conduct standards Wilson violated, as well as how he violated them.[12] (Pet. App. 42a-45a). But

12. The HCC Code of Conduct is contained within the HCC Board of Trustees Bylaws. (J.A. 25-27).

according to the Fifth Circuit's decision here, this act of self-governance ran afoul of Wilson's First Amendment rights because his rogue and disruptive actions touched on a matter of public concern. (Pet. App. 14a-15a).

The Fifth Circuit's decision effectively nullifies an elected board's ability to self-govern by holding its members to known standards of conduct. Indeed, there are no conceivable circumstances under which a board member's failure to respect an elected board's collective decision-making process—the standard Wilson violated several times over—does not touch on a matter of public concern. (Pet. App. 42a-45a). The mere fact that an elected board is making a decision brings that decision, and any commentary by a board member, within the sphere of "public concern" that triggers First Amendment scrutiny. The decision places elected boards between a proverbial rock and a hard place wherein they have to choose between self-governance on the one hand (and in HCC's case, its accreditation) and a First Amendment lawsuit on the other.

B. A board member's individual rights do not trump an elected board's right to exercise its own voice.

Integral to a school board's or community college board's right to self-governance is the right to "speak for itself" and to "select the views it wants to express." *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-68 (2009) (collecting cases). Indeed, "[a]xiomatic to the First Amendment is the principle that government 'may interject its own voice into public discourse.'" (Pet. App. 31a) (citing *Phelan v. Laramie Cty. Cmty. Coll.*

Bd. of Trustees, 235 F.3d 1243, 1247 (10th Cir. 2000)).[13] Sometimes this is done as a show of support, such as when the HCC Board of Trustees passed a resolution supporting Texas state policy giving certain non-citizens who graduated high school in Texas in-state tuition rates.[14] Sometimes this is done to publicly rebuke a board member who is violating clearly established board policy. As long as neither pronouncement "compel[s] others to espouse or to suppress certain ideas and beliefs," there are no First Amendment implications. *See Phelan*, 235 F.3d at 1247-48.

To find otherwise leaves the members of elected boards having to police the nuances that accompany the Fifth Circuit's "public concern" test while balancing one of a community college or school board's most important jobs: educating and protecting its students. Municipal liability—the standard that must be met when bringing constitutional claims against governmental entities—serves as the perfect backdrop to highlight the impossible dilemma the Fifth Circuit created.

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13. The Fourth Circuit, too, has acknowledged the "government speech" doctrine, finding "'the Government's own speech . . . is exempt from First Amendment scrutiny.'" *Page v. Lexington County Sch. Dist.*, 531 F.3d 275, 281 (4th Cir. 2008) (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005)).

14. Incidentally, in response to this resolution, Wilson went on record against "the pro-homosexual movement." *See* Trustee called out for anti-LGBT rant, again, at https://perma.cc/M2BM-8KGN. Notably absent from the Resolution of Censure is a public rebuke related to Wilson's "rant" because the Resolution of Censure was not about silencing opposing viewpoints; instead, it was about checking Wilson's conduct that violated the Board's Bylaws and threatened HCC's accreditation.

If a board member continually engages in conduct hinting at discrimination of a protected class of students and that conduct goes unchecked, it is easy to imagine the difficulties a school board could have in defending against claims questioning whether it adopted a custom or a policy giving rise to municipal liability.[15] This places a board in the untenable position of either risking a § 1983 claim by exercising its right to speak by reprimanding or censuring the board member or risking a § 1983 claim by failing to condemn the board member's discriminatory conduct. More to the point, a board's ability to speak for itself should not be squelched due to the threat of a potential lawsuit by one of its members.

C. The Fifth Circuit's decision is an exercise in semantics that has no place in First Amendment jurisprudence.

Further confounding the line between an acceptable censure (*i.e.*, the three punitive measures in the Resolution of Censure) and a censure violating the First Amendment (*i.e.*, the actual Resolution of Censure) is the Fifth Circuit's resort to semantics. Indeed, in its decision, the Fifth Circuit dismissed as distinct from censure the removal of a board member from the position of officer (*Blair*) and the adoption of a disciplinary resolution (*Zilich*). *See Blair*, 608 F.3d at 543-46; *Zilich*, 34 F.3d at 363-64. But these analogous decisions provide very concrete examples of a governmental body's constitutionally sound chastising—censure in all but name—of an elected peer. Indeed, the actions addressed in *Blair* and *Zilich* are comparable to the three punitive measures within the Resolution of Censure and, consistent therewith, the Fifth Circuit took no issue with those actions.

15. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978).

Instead, the Fifth Circuit focused on the fact that the three punitive measures were included within a document called the "Resolution of Censure," begging the question as to whether the Resolution of Censure would have passed constitutional muster if the HCC Board of Trustees would have called it by another name. While other circuits have set forth the limits on First Amendment claims such as Wilson's, the Fifth Circuit's exercise in semantics leaves school and community college boards grappling with what exactly constitutes a matter of public concern and what form an acceptable disciplinary action can take.

The delineation between what is and is not acceptable is, and should continue to be, the question answered in *Bond* and in the other circuits that have considered this issue—is the elected official still able to carry out his or her duties and responsibilities despite the reprimand or censure? If the answer is yes, the reprimand or censure simply does not implicate the First Amendment. There is no question that is the case here.

D. The implications of the Fifth Circuit's decision have a far-reaching impact on elected boards.

Elected boards throughout the country have faced the difficult task of addressing, and attempting to manage, a member who has acted in a way that damages or actively undermines the operations of the board and the entity it oversees. The examples are many: board members who do not come to meetings, disclose confidential executive session conversations, aggressively seek unauthorized access to district documents or facilities, interfere with the ability of the Superintendent or President to perform his

or her statutory responsibilities, and more.[16] In addition to damage and disruption to operations, such unlawful or unauthorized actions by a rogue board member can cause instability by creating a real risk of liability that might ultimately fall to the elected board to satisfy.

In such situations, an elected community college or school board must be able to act—to speak with its own voice—when a member's harmful behavior compromises its mission. Indeed, it is often the case that school boards are not able to remove members without considerable judicial process, leaving censures or reprimands as the only tool at an elected board's disposal to publicly address a rogue board member's continued improper conduct. *See,*

16. Even a quick internet search reveals numerous news articles highlighting such conduct. *See, e.g.*, *Menomonie School Board votes to censure member behind outburst*, at https://wqow.com/2020/08/14/menomonie-school-board-votes-to-censure-member-behind-outburst/; *Saugus Union school board member in hot water over alleged racist comments*, at https://www.scpr.org/blogs/education/2013/06/14/13993/saugus-union-school-board-member-in-hot-water-over/; *GCCS board censures school board member for 'unethical and unprofessional' conduct*, at https://www.wdrb.com/news/gccs-board-censures-school-board-member-for-unethical-and-unprofessional-conduct/article_1324f416-39c4-11eb-9cc1-ff8f111fb055.html; *Jefferson County Health Department Censures one of its Members*, at https://fox2now.com/news/missouri/jefferson-county-health-department-censures-one-of-its-members/; *Lexington-Richland Five Trustees Censure School Board Member*, at https://www.wltx.com/article/news/education/lexington-richland-five-censures-school-board-member/101-ebadb746-bbf0-4603-b99d-4edcf8292af7; *Derrick Draper Resigns from Board amidst Executive Session*, at https://www.argusobserver.com/news/derrick-draper-resigns-from-board-amidst-executive-session/article_0e8d36dc-a249-11eb-a4dd-2fc1fa321835.html.

e.g., Jones v. City of Canton, 278 So. 3d 1129, 1132 (Miss. 2019) (noting school board members may only be removed in accordance with the Mississippi Constitution); VA. CODE ANN. §§ 24.2-230, *et seq.* (providing for the removal of elected officials for specific reasons using specific judicial procedures). For example, in Texas, various statutes provide a cumbersome avenue for the removal of elected board members, which requires either intervention by the attorney general or the county or district attorney or a petition and trial in a district court. *See* TEX. CIV. PRAC. & REM. CODE §§ 66.001-66.003; TEX. EDUC. CODE § 130.0845; TEX. GOV'T CODE §§ 87.011-87.019.

Several other states leave the removal of elected board members to the voters through costly and time-consuming recall elections, similarly hampering an elected board's efforts to address a board member's conduct outside of a reprimand, censure, or other disciplinary action. *See, e.g.,* New Jersey School Boards Association, Uniform Recall Election Law Frequently Asked Questions, at https://www.njsba.org/wp-content/uploads/2020/08/legal-recall-election-law.pdf; California Procedures for Recalling State and Local Officials, at https://elections.cdn.sos.ca.gov/recalls/recall-procedures-guide.pdf; Election Officials' Manual, Michigan Bureau of Elections, Chapter 18: Recall Process (July 2021), at https://www.michigan.gov/documents/sos/June_2011_Clerk_Accred_Manual_Chapter_18_362762_7.pdf.

Given these constraints, the Fifth Circuit's decision holding that censures give rise to viable First Amendment claims essentially allows an individual public official to silence the voice of the public body by claiming retaliation. The ultimate result of this decision is the creation of an inequitable legal landscape in which the person—or public

body—to speak first has the protected right while the other is unconstitutionally "retaliating" in violation of the First Amendment.

CONCLUSION

For the foregoing reasons, the Fifth Circuit erred in finding Wilson has a cognizable claim under the First Amendment stemming from the HCC Board of Trustee's censure. In so finding, the Fifth Circuit ignored this Court's decision in *Bond*, split with the other circuits, failed to provide any real guidance to school districts and community colleges on when actions directed toward a board member implicate the First Amendment, and intruded on the ability of elected boards to self-govern and express their own views in the public sphere. Instead of settling an issue of law, the Fifth Circuit created an unnavigable system wherein elected boards must choose between governing and lawsuits. The Court should reverse the Fifth Circuit's decision accordingly.

Respectfully submitted,

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