No. 19-20237

IN THE

Morris Tyler Moot Court of Appeals at Yale

DAVID BUREN WILSON,

Respondent,

v.

HOUSTON COMMUNITY COLLEGE SYSTEM,

Petitioner.

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

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED[1]

The Houston Community College System has censured a member of its board, David Wilson, for publicly criticizing Houston Community College for what he viewed as misconduct on the part of administrators and members of the Board. The question presented is:

1. Whether the First Amendment restricts the authority of an elected body to issue a censure resolution in response to a member's speech.

[1] Petitioner, defendant-appellee below, is the Houston Community College System. Respondent, plaintiff-appellant below, is David Buren Wilson.

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STATEMENT OF JURISDICTION

The Fifth Circuit entered judgment on April 7, 2020. A petition for rehearing was denied on July 15, 2020. After timely filing, the petition for a writ of certiorari was granted. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISION

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. 1.

STATEMENT OF THE CASE

Vigorous debates over matters of public policy lie at the heart of American democracy. In a political climate where commentators of every stripe attempt not only to impose their views on others but also to suppress opposing views, it is difficult to overstate the importance of the freedom of speech. In other eras of intense political turmoil, government actors have endeavored to impose political homogeneity on the citizenry. However, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . . ." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The First Amendment serves as a crucial shield against these insidious pursuits.

In this case, Houston Community College has attempted to disturb this essential American value by punishing David Wilson's minority opinions. These punishments have caused Wilson serious reputational damage and threaten to deter him and others from speaking out about critical public issues.

I. Factual Background

Houston Community College (HCC), one of the nation's largest community colleges, served 85,447 students in fiscal year 2018. *Approved Budget: Fiscal Year 2018*, Hous. Cmty. Coll. 20 (2017), https://www.hccs.edu/media/houston-community-college/district/pdf/Approved-Budget---FY-2018.pdf [https://perma.cc/66AY-C3W6]. HCC had an operating revenue of $348.3 million, of which 80% was made up of student tuition and fees as well as tax revenue from local property owners. *Id.* at 43. HCC also manages $425 million in bonds. Benjamin Wermund, *Two Years After Approval, HCC Breaks Ground on Bond Projects*, Hous. Chron. (Dec. 2, 2014), https://www.houstonchronicle.com/local/education/campus-chronicles/article/Two-years-after-approval-HCC-breaks-ground-on-5929754.php [https://perma.cc/2AVR-MYBN]. The nine-member Board of Trustees (Board), HCC's official governing body, is obligated to use this money in the service of providing "comprehensive higher educational services to the greater Houston region." Hous. Cmty. Coll., *supra*, at 17-18.

Despite this obligation, HCC, and especially its trustees, have been accused of—and, in some cases, confirmed to have been—accepting bribes and kickbacks, improperly awarding contracts to family and friends, ignoring conflicts of interest, and spending tens of millions of dollars on land that provides no foreseeable benefit to students.[2] Even when not engaging in

[2] *See, e.g.*, Press Release, Dep't of Justice, Former HCC Trustee Sent to Prison for Bribery Conviction (Jan. 8, 2018), https://www.justice.gov/usao-sdtx/pr/former-hcc-trustee-sent-prison-bribery-conviction [https://perma.cc/96K9-E3CW]; Ericka Mellon, *Former HCC Head Details Alleged Corruption by Trustees*, Hous. Chron. (Apr. 23, 2015, 9:24 AM), https://www.chron.com/news/houston-texas/education/article/Former-HCC-head-details-alleged-corruption-by-6216988.php [https://perma.cc/6UMP-2FY2] (detailing the former acting chancellor of HCC's allegations that "eight current or former trustees" attempted to violate the law or did so and explaining that "HCC has drawn scrutiny for years over alleged conflicts of interest"); Editorial, *It's About Time at HCC*, Hous. Chron. (May 25, 2011), https://www.chron.com/opinion/editorials/article/It-s-about-time-at-HCC-Results-of-investigation-1394635.php [https://perma.cc/5REZ-QFQA] (Findings of misconduct "confirm what has been an open secret at HCC: Over many years, board positions have too often been treated as personal fiefdoms by trustees for the benefit of friends and family members."); Editorial, *Who Benefits from HCC Land Deals?*, Hous. Chron. (Aug. 22, 2015, 12:13 AM) , https://www.chron.com/opinion/editorials/article/Who-benefits-from-HCC-land-deals-6458669.php [https://perma.cc/CD9D-78K9] ("HCC's land purchases raise questions of either corruption or incompetence."); Editorial, *HCC Problems*, Hous. Chron. (Sept. 12, 2014),

misconduct, HCC often operates behind closed doors or without complying with its bylaws. Amid an astonishing array of controversial projects, HCC's 2010 partnership with Qatar is notably egregious due to its "missteps" and wastefulness. *See* Michael Hardy, *The Crazy College of Qatar*, New Republic (Aug. 31, 2016), https://newrepublic.com/article/135746/crazy-college-qatar [https://perma.cc/2YEF-B67L]. After the significant effort and time put into the relationship, during which trustees enjoyed luxurious perks, the "promised payoff never materialized." *Id.*

Before and since his election to the Board in 2013, David Wilson (Wilson) advocated for students and taxpayers, promoted the best interests of HCC, and denounced HCC's culture of corruption.[3] For example, through interviews with the media and other information campaigns, Wilson communicated to the public his "concern that trustees were violating the Board's bylaws and not acting in the best interests of HCC." *Wilson v. Hous. Cmty. Coll. Sys.*, 955 F.3d 490, 493 (5th Cir. 2020). Wilson also filed lawsuits against HCC about a "questionable land deal," Ted Oberg, *Trustee Files Criminal Complaint with DA over $8.5 Million HCC Land Deal*, ABC 13 (Aug. 19, 2015), https://abc13.com/hcc-land-deal-david-wilson-houston-community-college/948390/ [https://perma.cc/PQ6F-8D8V], and about trustee conduct that violated Board bylaws or Texas law, *Wilson*, 955 F.3d at 493. Through it all, Wilson has remained remarkably committed to holding HCC and the Board accountable.

Wilson's criticism did not sit well with the other trustees. On January 18, 2018, HCC chose the nuclear option: "a resolution publicly censuring Wilson for his actions." *Id.* at 493-94. In addition to formally reprimanding Wilson for his speech, HCC revoked Wilson's access to Board

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https://www.chron.com/opinion/article/HCC-problems-5752117.php [https://perma.cc/9WJJ-MDQ8] ("[S]ubcontractors are being selected based on connections over skill and politics over policy.").

[3] The Texas Monitor has an investigative series titled "*HCC: Culture of Corruption*" containing dozens of articles. *HCC: Culture of Corruption*, Tex. Monitor, https://texasmonitor.org/investigative-series/hcc-culture-of-corruption [https://perma.cc/P8M9-9VAM]. The Houston Chronicle also has run an investigative series into HCC's misconduct. *HCC Investigation*, Hous. Chron., https://www.houstonchronicle.com/hcc-investigation [https://perma.cc/2CB5-6BAM].

funds for community activities, withheld reimbursement for "any College-related travel," and blocked Wilson from running for an officer position on the Board. App. D at 44a. HCC also threatened Wilson with "further disciplinary action" if he continued any behavior deemed improper. *Id.* at 45a. Perhaps realizing the gravity of its punishment, the Board issued the censure narrowly; only five of the nine trustees voted in favor of the censure. Lindsay Ellis, *HCC Trustee Dave Wilson Censured*, Hous. Chron. (Jan. 18, 2018), https://www.chron.com/local/education/campus-chronicles/article/HCC-Wilson-Censure-12509066.php [https://perma.cc/W4G5-NDA6].

After being censured by HCC, Wilson resigned from his position as trustee and ran in the November 2019 election to represent a different HCC district. He was eventually defeated in a run-off election. *Wilson*, 955 F.3d at 494.

II. Prior Proceedings

The district court granted HCC's motion to dismiss on the basis that Wilson did not suffer "an actual injury to his right of free speech" and thus lacked standing to sue. *Wilson v. Hous. Cmty. Coll. Sys.*, No. 4:18-CV-00744, 2019 WL 1317797, at *3 (S.D. Tex. Mar. 22, 2019).

The Fifth Circuit panel unanimously reversed, finding that "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim." *Wilson*, 955 F.3d at 498. The Supreme Court granted certiorari on the question whether the First Amendment restricts the authority of an elected body to issue a censure resolution in response to a member's speech.

SUMMARY OF ARGUMENT

The First Amendment does not grant HCC the authority to punish constitutionally protected speech it dislikes or finds embarrassing simply because the speaker is a member of

HCC's Board of Trustees. To the contrary, the right to free speech vigorously protects elected officials' right to speak publicly on matters of societal importance.

First, Wilson engaged in activity protected by the First Amendment. His speech does not fall into one of the narrow categories of unprotected speech. In fact, because his speech discussed political issues, it is precisely what the First Amendment is meant to protect. Because Wilson is an elected official who is obligated to inform and opine on issues for his constituents, his speech receives even more protection.

Second, HCC's censure was punitive and actually injured Wilson. As courts have noted, if HCC had merely censured Wilson, HCC would have had inflicted sufficient reputational harms to constitute an actual injury. But HCC did not only impose an unconstitutionally punitive censure on Wilson; it also barred him from Board funds for community activities, travel reimbursements, and any officer position on the Board. Further, HCC imposed an unconstitutional prior restraint on future speech by threatening additional discipline. Because HCC denied Wilson benefits and opportunities due to his speech and chilled future speech, Wilson has suffered a cognizable injury.

Third, as an elected official, Wilson should be given the widest latitude possible, and the First Amendment analysis for public employees set forth in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), should not apply. In *Bond v. Floyd*, this Court articulated an expansive view of elected officials' First Amendment rights and a narrow view of elected bodies' authority to punish their members. 385 U.S. 116 (1966). The instant case is materially indistinguishable from *Bond*, so the *Bond* analysis should apply. Because *Bond* requires only that an elected official speak about a political issue, Wilson prevails.

Fourth, even if Wilson is considered a public employee covered by *Pickering*, he prevails. Wilson spoke on the Board's improper conduct in running a massive system of taxpayer-funded

schools. This is a matter of public concern under *Pickering*. Wilson's interest in speaking freely, as well as the public's interest in hearing Wilson's opinions, outweighs HCC's interest in the efficient provision of public services. Wilson did not meaningfully impair the Board's efficiency, and even if he did, his First Amendment right prevails. The value of Wilson's speech is high, and HCC's censure was not necessary to promote efficiency.

Finally, HCC's censure is invalid on its face because it is unconstitutionally vague and overbroad. A reasonable person would not be able to discern from HCC's restrictions what they can or cannot do without being punished, and HCC's restrictions will tend to chill speech that should be protected.

Of course, elected bodies must have the authority to issue a censure in response to a member's speech. In some rare situations, a censure is appropriate. However, this Court has been asked to determine whether the First Amendment *restricts* that authority. The First Amendment undoubtedly does and should here. The Court should affirm the Fifth Circuit's decision.

ARGUMENT

I. Wilson engaged in activity protected by the First Amendment.

As a threshold matter, Wilson's speech is protected by the First Amendment. Because it is speech that addresses a matter of public concern, Wilson's speech lies at the heart of what the First Amendment was intended to protect. Wilson's status as a legislator does not reduce this long-established protection—in fact, legislators receive enhanced free speech protections.

"[M]atters of public concern . . . occup[y] 'the highest rung of the hierarchy of First Amendment values,'" *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). Few matters are of greater societal importance or closer to the public than education, corruption, and misuse of taxpayer money. Here, Wilson "convey[ed]

information" about concerning behavior he witnessed firsthand and "[sought] to bring to light actual or potential wrongdoing or breach of public trust" on the part of HCC. *Id.* at 148. Wilson's speech thus advanced the very purpose of the First Amendment: "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

As this Court has already ruled in *Bond*, elected officials like Wilson receive no fewer protections than ordinary citizens who criticize government actions—in fact, elected officials receive particularly robust protection under the First Amendment due to the unique importance of their speech. 385 U.S. 116 (1966). Elected officials "have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them." *Id.* at 136. There is no meaningful difference between Bond, a state representative elected by the public to a body with the authority to make law, and Wilson, a trustee elected by the public to a body with the authority, "[t]hrough the resolutions and orders it passes, [to] shap[e] HCC's policy." *Wilson*, 955 F.3d at 493. Thus, the First Amendment protects Wilson's speech.

II. HCC's censure was punitive and actually injured Wilson.

In order for government action to receive First Amendment scrutiny, it must "abridg[e] the freedom of speech." U.S. Const. amend. 1. HCC, by taking the exceptional step of a formal censure, punished Wilson for his speech. In addition to weaponizing the inherent punitiveness of a censure, HCC further retaliated against Wilson for his speech by imposing additional punishments and

threatening future punishment. As a result, HCC's censure damaged Wilson's reputation and chilled future constitutionally protected speech.

A. The censure is a rare, extreme measure that damages reputations and chills speech.

Censures are highly punitive and should be issued only in the most extreme circumstances. This is apparent from the facts of this case, but it is also clear from looking at how courts treat censures generally.

1. HCC intended its censure to punish Wilson.

First, HCC itself described its censure of Wilson as "the highest level of sanction available to the Board under Texas law" and suggested that, if possible, it would have preferred "remov[ing him] from elected office." App. D at 44a. HCC was thus "motivated by an intent to punish [Wilson] for exercising First Amendment rights of speech . . . rather than by—or distinctly in addition to—the antagonism that arises between a regulator and the regulated." *Beechwood Restorative Care Ctr. v. Leeds*, 436 F.3d 147, 154 (2d Cir. 2006). HCC clearly viewed its censure as punitive and intended for Wilson to suffer the most serious disciplinary consequences available under Texas law.

2. Wilson has suffered reputational harm due to HCC's censure, which has deterred him and others from exercising their First Amendment rights.

HCC achieved its goal of punishing Wilson. A censure mars an elected official's reputation and discourages them, as well as similarly situated officials, from speaking frankly on issues of crucial public importance.

Harm to Wilson's "personal, political, and professional reputation" is a cognizable injury under the First Amendment. *Meese v. Keene*, 481 U.S. 465, 473 (1987) (finding that an elected

official would suffer reputational harm if the government labeled films he wanted to show "political propaganda"). A government censure is an exceptional condemnation of behavior. *See infra* Section II.A.3. Indeed, although there is "no specific disqualification or express consequence" after a censure, the "political ignominy of being formally and publicly admonished and deprecated by one's colleagues . . . has led some Members of Congress who face a potential censure or other formal House discipline for certain misconduct to resign before any official recommendation or other action is taken." Jack Maskell, *Expulsion, Censure, Reprimand, and Fine*, Cong. Rsch. Serv. 12 (June 27, 2016), https://sgp.fas.org/crs/misc/RL31382.pdf [https://perma.cc/TM3P-TSGZ].

Voters are unlikely to look favorably upon a candidate whose conduct has been declared "reprehensible" by the government. App. D. at 44a. As a result, by censuring Wilson, HCC has "substantially harm[ed] his chances for reelection and . . . adversely affect[ed] his reputation in the community." *Meese*, 481 U.S. at 474. The past shows us that, "[a]lthough there is no specific disability that automatically follows a censure by the Senate, the public reprobation and formal rebuke by one's peers in the Senate may have arguably contributed to the unsuccessful reelection efforts of Senators subject to censure in recent times." Jack Maskell, *Expulsion and Censure Actions Taken by the Full Senate Against Members*, Cong. Rsch. Serv. 26 (Nov. 12, 2008), https://sgp.fas.org/crs/misc/93-875.pdf [https://perma.cc/T42B-DX9M]. Accordingly, Wilson lost his bid for re-election, likely in part due to HCC's censure. Therefore, the harm done to Wilson's public reputation demonstrates that Wilson was injured by HCC's censure.

HCC's censure also had significant secondary effects: it deterred Wilson and others like him from continuing to exercise their constitutional rights. "Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right.'" *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 (1988)).

Though this Court has not yet articulated a standard for what constitutes an adverse government action that threatens to suppress protected speech, the lower courts have coalesced around a test: whether the action "would dissuade a public official of ordinary firmness from exercising his or her First Amendment rights." *Perkins v. Township of Clayton*, 411 F. App'x. 810, 815 (6th Cir. 2011); *see, e.g.*, *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267 (2d Cir. 2011); *Bennie v. Munn*, 822 F.3d 292 (8th Cir. 2016); *Capp v. Cnty. of San Diego*, 940 F.3d 1046 (9th Cir. 2019). Here, HCC explicitly threatened to muzzle Wilson when it warned him that continuing his constitutionally protected behavior would result in "further disciplinary action by the Board." Seeing this, an official of ordinary firmness would undoubtedly be dissuaded from continuing their conduct. In issuing this censure, HCC has sought to suppress unpopular political views—the very outcome the First Amendment seeks to avoid. If HCC's censure is upheld, governments across the country may follow suit and censure elected officials who are disliked or hold minority opinions. Local officials will live in fear that expressing their opinions on critical political issues will be punished with a humiliating and damaging official censure.

3. Courts consistently treat censures and similar formal reprimands as punitive.

Both this Court and the lower courts have repeatedly held that the First Amendment restricts government bodies' authority to issue formal reprimands like censures. In doing so, courts have implicitly recognized that censures cause actual harm.

This Court has already recognized that censures in other settings are extremely punitive and harm the person who is censured. *See Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990) (finding that an oversight agency's public censure of an attorney for violating the Illinois Code of Responsibility violates the First Amendment); *Ibanez v. Fla. Dep't of Bus. & Pro. Reg., Bd. of Acct.*, 512 U.S. 136 (1994) (finding that a licensing board's censure of

an attorney for misleading advertising is "incompatible with First Amendment restraints on official action"). Indeed, Justice Scalia, dissenting in *Rankin v. McPherson*, equated a government official's authority to formally censure an employee with the authority to fire the employee for their speech. 483 U.S. 378, 401 (1987) (Scalia, J., dissenting). Thus, this Court has already established that censures inflict real damage on those who are censured.

The lower courts have followed suit, finding that censures and other formal reprimands are more than "a 'petty slight,' 'minor annoyance,' or 'trivial' punishment." *Millea v. Metro-North R.R Co.*, 658 F.3d 154, 165 (2d Cir. 2011) ("[A] letter of reprimand would deter a reasonable employee from exercising his [statutory right to medical leave]."); *see, e.g.*, *Daggett v. Comm'n on Governmental Ethics & Election Pracs.*, 205 F.3d 445, 464 (1st Cir. 2000) (an election funding system does not burden freedom of speech because it does not "threaten censure or penalty"); *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992) (a university official's implicit threat of formal discipline creates a judicially cognizable chilling effect on First Amendment rights); *Kirby v. City of Elizabeth City*, 388 F.3d 440, 449 (4th Cir. 2004) ([T]he reprimand could have a chilling effect on [a police officer] and other officers."); *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007) (a university senate's censure of a student may cause the student harm in the future); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1268-69 (11th Cir. 2004) (verbal censure of a student, "coming from an authority figure . . . whose words carry a presumption of legitimacy, cannot help but have a tremendous chilling effect on the exercise of First Amendment rights."). In sum, the lower courts have found that censures create cognizable injuries under the First Amendment.

HCC's censure is no different from those listed here—an entity censured a member for the member's constitutionally protected speech, damaging his reputation and chilling future speech.

This Court's precedent and the lower courts' decisions both make clear that censures like HCC's are highly punitive.

B. HCC's censure was even more punitive than an ordinary censure.

Wilson would have suffered a cognizable harm under the First Amendment even if HCC had merely censured him. In addition to the significant punishment inherently associated with a censure, though, HCC also revoked Wilson's access to Board funds for community activities, withheld reimbursement for "any College-related travel," and blocked Wilson from running for an officer position on the Board. App. D at 44a. On top of it all, HCC threatened "further disciplinary action" if Wilson repeated any behavior deemed improper by the Board. *Id.* at 45a. As a result, HCC has caused far more than a "subjective chill"; HCC has committed a "specific present objective harm" and, by threatening "further disciplinary action," App. D at 45a, has "threat[ened] specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). The district court mistakenly concluded that Wilson did not suffer an actual injury to his right of free speech because he was not "prohibit[ed] from speaking publicly" or "from performing his official duties" and because he remained "free to continue attending board meetings and expressing his concerns regarding decisions made by the board." *Wilson*, 2019 WL 1317797, at *3. However, in determining whether a government action has actually injured a plaintiff, this Court has applied a standard that is far more protective of individuals' constitutional rights than the one used by the district court. Each of HCC's punishments constitutes a constitutionally cognizable injury to Wilson.

First and most egregiously, HCC denied funds to Wilson. Though Wilson may have no "right" to reimbursements for travel or access to Board funds and "even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his

constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). That is precisely what HCC has done here. HCC withdrew valuable governmental benefits from Wilson and did so explicitly because Wilson exercised his First Amendment rights.

Next, HCC blocked Wilson from running for any officer positions on the Board. Wilson was harmed by losing this opportunity. This Court has held in other contexts that the denial of an opportunity is sufficient to establish a cognizable injury to a constitutional right. *Cf., e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (the denial of "the chance to compete . . . for every seat in the class" to white college applicants is a cognizable injury); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (the loss of an opportunity for housing is an injury that can support a plaintiff's standing).

Finally, HCC's warning to Wilson about further discipline is an impermissible prior restraint. Because "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand," *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975), HCC's censure "bear[s] a heavy presumption against its constitutional validity," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). HCC has preemptively silenced Wilson and other trustees who wish to speak out against it, imposing an unjustifiable restraint on speech before the speech occurs.

Therefore, while Wilson can nominally "perform[]" his official duties, *Wilson*, 2019 WL 1317797, at *3, he cannot be reimbursed for College-related travel, conduct community affairs without Board approval, or run for higher office within the Board. He cannot realistically fulfill his duties to his greatest potential and has thus suffered harm. Under the district court's

interpretation, HCC can impose any restrictions it wants on a trustee's speech so long as the trustee can still theoretically do their job. This outcome is perverse and must be avoided.

III. As an elected official speaking about political issues, Wilson should be given the widest latitude possible and restrictions on his speech should receive the strictest scrutiny.

When conducting a First Amendment inquiry, courts consider the identity of the speaker as well as the subject matter of the speech. Because Wilson is an elected representative speaking on issues of significant public importance, his speech receives powerful protections and any restriction on it is presumptively invalid. Due to the functional differences between elected officials and public employees, as well as the consistent practice of the courts, the *Pickering* analysis does not apply to elected officials. Instead, *Bond* is materially indistinguishable and controls the outcome in this case. HCC bears the heavy burden of showing that Wilson's conduct merited the extreme step of a formal censure. HCC has not, and cannot, meet this burden.

In *Pickering*, this Court laid out a framework for evaluating First Amendment claims brought by government employees. 391 U.S. 563. However, Wilson's status as an elected public official entitles him to greater First Amendment protection than a typical employee would receive under *Pickering*. This Court ruled in *Bond* that "[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." 385 U.S. at 135-36.

Elected officials must receive different treatment from public employees because the two roles differ in meaningful ways. Wilson "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." *Scott v. Flowers*, 910 F.2d 201, 212 (5th Cir. 1990). His

relationship with the Board thus differs from an ordinary employer-employee relationship. Coming from an elected official, Wilson's speech also has more public value than the speech of a public employee. *See supra* Part I.

Tellingly, this Court decided *Bond* just two years before *Pickering*. If the Court wanted to apply a *Pickering*-style balancing test to elected officials like Wilson, it would have done so in *Bond*. The lower courts have also declined to apply *Pickering* to elected officials, including those who have upheld legislative censures of members. *See, e.g.*, *Camacho v. Brandon*, 317 F.3d 153, 161 (2d Cir. 2003) (describing *Pickering* as applying to "nonelected public employees); *Whitener v. McWatters*, 112 F.3d 740, 744-45 (4th Cir. 1997); *McPhelan v. Laramie Cnty. Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1246 (10th Cir. 2000). The courts have plainly recognized the differences between elected officials and public employees.

The inquiry into whether HCC violated Wilson's First Amendment should end here. The *Bond* Court, after finding that an elected official's speech was protected by the First Amendment and that the official spoke on "issues of policy," concluded that the legislature violated the official's constitutional rights without further analysis. 385 U.S. at 136-37. Use of taxpayer money, government corruption, and official misconduct are undoubtedly policy issues. The only difference between Bond and the instant case is the degree to which the elected official was punished—Bond was excluded from the legislature entirely while Wilson was disciplined and denied several of the office's privileges. This distinction, however, is irrelevant for First Amendment purposes. Both HCC and the legislature in *Bond* obstructed members' abilities to perform their duties as elected officials. By way of analogy, a government actor could not get away with infringing upon First Amendment rights because it fined an individual twenty dollars rather than two hundred. Wilson thus prevails.

Of course, a legislative body must be able to "punish its Members for disorderly behavior." U.S. Const. art. 1, § 5, cl. 2. Still, this authority is a narrow one and should be used sparingly; legislatures have the authority to censure speech that harms "the integrity and dignity of the legislature and its proceedings," Maskell, *supra*, at 1, but they cannot punish speech simply they dislike its content or how it is presented. In most cases, legislative bodies should leave punishment of their members to a built-in disciplinary system: elections.

IV. Even if Wilson is considered a public employee under *Pickering*, HCC violated his First Amendment rights.

Even if this Court applies the less protective *Pickering* framework to evaluate HCC's censure, Wilson prevails. Under *Pickering*, courts use a two-step inquiry to determine whether a government actor infringes upon a public employee's First Amendment rights: (1) whether the employee spoke on a matter of public concern, and (2) whether the government's interest in the efficient operation of its office outweighs the employee's right to freedom of expression. 391 U.S. 563.

A. Wilson spoke on a matter of public concern.

The first step in the *Pickering* balancing test is whether Wilson's actions may be "fairly characterized as constituting speech on a matter of public concern." *Rankin*, 483 U.S. at 384 (citing *Connick*, 461 U.S. at 146). "After all, public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights." *Lane v. Franks*, 573 U.S. 228, 236 (2014).

HCC is infamous for its overspending and graft. These issues directly affect residents of HCC's taxpaying area and touch on some of our most foremost public debates, including education

and how tax revenue should be used. *See Pickering*, 391 U.S. at 571 (finding that a disagreement "as to the preferable manner of operating the school system," including allocation of funding and government attempts to mislead taxpayers, "clearly concerns an issue of general public interest"); *Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972) ("[T]he public schools in a community are important institutions, and are often the focus of significant grievances"); *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) ("Exposing governmental inefficiency and misconduct is a matter of considerable significance."). Moreover, Wilson, as a trustee, was "in the best position to know what ail[ed]" HCC. *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion). Because of Wilson's greater access to information about the Board, "[t]he interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *Lane*, 573 U.S. at 236 (internal quotes and citation omitted).

HCC may dislike the substance or tone of Wilson's comments. However, "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin*, 483 U.S. at 387. Here, Wilson's speech was assuredly on a matter of public concern.

B. Wilson's interest in his right to free speech outweighs any harm done to the efficient functioning of HCC.

Because Wilson spoke on a matter of public concern, Wilson's interest "in commenting upon matters of public concern" must be weighed against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs." *Pickering*, 391 U.S. at 568. HCC "must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation of the Government.'" *United States v. Nat'l Treasury*

Emps. Union, 513 U.S. 454, 468 (1995) (citing *Pickering*, 391 U.S. at 571). HCC cannot meet this standard's exacting burden.

First, it is far from clear that Wilson's actions harmed the long-term efficiency of HCC. HCC bizarrely sees Wilson's use of "public media to criticize other Board members for taking positions that differ from his own," App. D at 42a, as "reprehensible", *id.* at 44a. Wilson's other "reprehensible" actions include "identif[ying] Board members who voted in favor of a transaction he opposed" in a radio interview and "regularly publish[ing] information on a website that he created and maintains." App. D at 42a. Beside these meager complaints, HCC has failed to articulate harms to its operations beyond vague references to the Board's "collective decision-making process," "open and honest discussions," and legal fees that pale in comparison to the corruption HCC is accused of. Moreover, Wilson's speech was in service of exposing and ending inefficiency within HCC, not promoting it.

Even assuming for the purpose of argument, however, that Wilson's conduct damaged the efficiency of HCC's operations, his First Amendment right prevails. The Constitution does not confer upon government a right to totally unfettered operations. Indeed, the First Amendment is inherently in tension with a completely smooth government office. "[D]ebate on public issues should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 376 U.S. at 270. Wilson's methods may have been unorthodox or unpleasant for some Board members, who seemingly take issue primarily with Wilson's tone and methods. However, this Court has already "unequivocally reject[ed]" the notion that "even comments on matters of public concern that are substantially correct," as Wilson's comments were, "may furnish grounds for dismissal if they are sufficiently critical in tone." *Pickering*, 391 U.S. at 570. "[P]olitical speech by its nature will

sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). As discussed *supra* Section IV.A, the public and private interest in Wilson's speech is significant and outweighs HCC's interest in efficiency.

"So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti*, 547 U.S. at 419. HCC's censure was far from necessary. HCC is free to take positions on policy and express opinions on the way it prefers for Board members to behave. *See Rust v. Sullivan*, 500 U.S. 173, 194 (1991). HCC's censure, however, was a highly punitive action and a far cry from government speech that merely expresses an official preference. If HCC wanted to express its disapproval of Wilson's actions, it could have done so in a litany of ways that would not have reached the disciplinary extremes of a censure. For example, other trustees could have done their own media interviews denouncing Wilson's conduct; HCC could have issued official factual corrections if it wanted to disagree with the truth of Wilson's statements; the trustees, either as individuals or as the Board, could have informally or formally announce their continued support for their policy decisions and explained their dedication to HCC's mission and collegial dialogue among trustees; and so on. If HCC saw Wilson's speech as negative or unhelpful, the appropriate response was more speech, not a severe punishment. *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion, the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."); *United States v. Alvarez*, 567 U.S. 709, 727 (2012) ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout

lie, the simple truth."). Despite having a veritable menu of effective, nonpunitive options to express its opinions, HCC leapt to the most punitive option at its disposal and even lamented its inability to expel Wilson from elected office entirely.

Because Wilson did not impair the efficiency of operations to the point of requiring a censure and because the censure was not necessary for HCC's efficient provision of public services, Wilson must prevail under the *Pickering* standard.

V. HCC's censure is unconstitutionally vague and overbroad.

Finally, HCC's censure is invalid on its face because it is vague and, due to its vagueness, overbroad. Thus, it is unconstitutional on its face. While vagueness and overbreadth are due process claims under the Fourteenth Amendment, this Court has shown particular sensitivity to vagueness and overbreadth in the First Amendment context. *See Grayned*, 408 U.S. at 109.

When the government restricts speech, it is especially important that its regulations "provide a person of ordinary intelligence fair notice of what is prohibited" and are not "so standardless that [they] authorize[] or encourage[] seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 432-33 (1963). HCC has failed to promulgate clear, specific regulations. In its censure resolution, HCC points to Wilson's media interviews and personal website as unsatisfying examples of improper behavior and merely gestures toward its bylaws to explain why Wilson deserved a formal reprimand. The HCC bylaws, however, do not provide any more guidance, much less articulate a clear standard for appropriate behavior. *Cf. Baggett v. Bullitt*, 377 U.S. 360, 371 (1964) (finding that "[t]he range of activities which are or might be deemed inconsistent with the required promise [to promote respect for the flag and the institutions of the

United States and State of Washington] is very wide indeed" and that the crucial terms of the regulation, such as institution, are overly vague). HCC only requires trustees to "encourage and engage in open and honest discussion," "respect differences of opinion," "keep an open mind," and "[r]espect the Board's collective decision-making process." *Board of Trustees Bylaws*, Hous. Cmty. Coll. art. A, § 4 (Jan. 1, 2010), https://www.hccs.edu/about-hcc/board-of-trustees/board-information/board-bylaws/HCC_BYLAWS_FINAL_Adopted2010Jan_Amended_20200902.pdf [https://perma.cc/3MMX-GXBS]. If HCC's censure is upheld, future trustees who want to sound the alarm about potential irresponsibility and corruption within HCC will be unsure of how they can do so without facing severe retaliation.

Because HCC's censure is so vague, it is also overbroad. Even if this Court finds that HCC's restrictions are constitutional as applied to Wilson, Wilson has standing to challenge HCC's restrictions on speech based on HCC's impact on the expressive activities of others. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981). A government restriction on speech cannot "be an impermissibly broad prophylactic ordinance" or "unnecessarily interfere with First Amendment rights." *Grayned*, 408 U.S. at 119. The restriction must be narrowly tailored to further the state's legitimate and substantial interest. If HCC's goal is to promote collective decision-making within the Board, which is a legitimate interest, HCC's censure resolution casts far too broad of a net. While HCC's restrictions surely capture speech HCC can properly regulate, they also inhibit speech that HCC cannot. Therefore, they unnecessarily interfere with constitutionally protected free speech rights.

CONCLUSION

For the foregoing reasons, the Court should reject the constitutionality of HCC's censure and affirm the judgment of the Fifth Circuit.

Respectfully submitted,

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