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 AMERICAN CIVIL LIBERTIES UNION, INSTITUTE FOR FREE SPEECH, AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI CURIAE[1]

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization with nearly two million members dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before this Court in First Amendment cases, both as direct counsel and as amicus curiae. To preserve freedom of speech, the ACLU and its affiliates have appeared in countless cases throughout the country. Accordingly, the proper resolution of this case is a matter of substantial interest to the ACLU and its members.

The **Rutherford Institute** is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom, ensuring that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by the Constitution and laws of the United States.

The **Institute for Free Speech** is a nonpartisan, nonprofit organization dedicated to the

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[1] All parties have given blanket consent to the filing of *amicus* briefs in this case. No party has authored this brief in whole or in part, and no one other than *amici*, their members, and their counsel have paid for the preparation or submission of this brief.

protection of the First Amendment rights of speech, press, assembly, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties.

STATEMENT

Petitioner Houston Community College System (HCC or the Board) is a political subdivision of Texas, responsible for operating community colleges in the Houston area. J.A. 6 (Am. Compl. ¶ 4). It is managed by its Board of Trustees, each of whom is elected to represent the interests of the people in a specific district. *Id.* Respondent David Wilson served as an elected trustee from 2013 through 2019.

Over that same period, the Board faced many public accusations—some from local reporters, others via lawsuits—of significant mismanagement and corruption. In 2018, one now-former trustee, who had served on the Board for more than 20 years, was convicted on federal bribery charges for accepting hundreds of thousands of dollars in exchange for influence over HCC's contract work.[2] The judge in that case was so troubled by the allegations of misconduct that she asked the defendant whether the college was a "cesspool" where such conduct was "standard procedure."[3]

Three years earlier, in 2015, HCC settled a wrongful termination lawsuit with a former Acting

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[2] Lindsay Ellis, *Former HCC Trustee Chris Oliver Gets 70 Months in Prison After Bribery Conviction,* Chron (Jan. 8, 2018), https://perma.cc/8ZHZ-X6MC.

[3] *Id.*

Chancellor who alleged she had been fired for talking to the Federal Bureau of Investigation about trustees' attempts to steer contracts to their friends and families.[4]

That same year, a local reporter's investigation found that HCC had been entering into "questionable land deals for years," including buying, then selling, and then rebuying a vacant lot at a loss of millions of dollars, and purchasing acres of land that the Federal Emergency Management Agency deemed high-risk for floods, while simultaneously announcing that there were no plans to ever use the land.[5]

During his tenure on the Board, Wilson openly criticized much of the Board's conduct. He spoke to the press about his disapproval of HCC's choice to fund an expensive college campus in Qatar and attempting to acquire property outside the taxpaying district for a new campus—both instances, as he saw it, of wasting taxpayer money. J.A. 7 (Am. Compl. ¶ 6). He expressed concern to residents in other trustees' districts about how HCC resources were being spent. *Id.* at 8 (Am. Compl. ¶ 7). And, after another trustee violated the Board's bylaws by casting a vote remotely, he sued for a declaration that doing so violated the Board's rules. *Id.* at 7 (Am. Compl. ¶ 6). When the Chair of the Board then excluded Wilson from an executive session, again without a basis in the Board's

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[4] Ted Oberg, *Final Settlement with Former Houston Community College Chancellor Comes to $850,000*, ABC 13 (Aug. 13, 2015), https://perma.cc/92RP-YJGM.

[5] Ted Oberg, *HCC's Real Estate Portfolio: Floodplains, Empty Warehouses, Questionable Deals Paid for with Your Tax Dollars*, ABC 13 (Apr. 29, 2015), https://perma.cc/2UAG-7PFX.

bylaws, Wilson again sought redress through the courts. *Id.*

On January 18, 2018, the Board censured Wilson for, among other things, "us[ing] public media to criticize[] other Board members," accusing Board members of unethical conduct on his own website, filing lawsuits alleging that HCC violated its own bylaws, and otherwise "demonstrat[ing] a lack of respect for the Board's collective decision-making process." Pet. App. 42a–43a. The Board accordingly adopted a Resolution of Censure that declared Wilson's conduct "not only inappropriate, but reprehensible"—and concluded that "such conduct warrants disciplinary action." *Id.* at 44a.

The Board therefore "PUBLICLY CENSURED" Wilson, invoking, in its own words, "censorship [that] is the highest level of sanctions 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." *Id.*

Critically, the Board did not merely express its disapproval, but imposed formal sanctions on Wilson, depriving him of multiple privileges of his office:

- it declared Wilson "ineligible for election to Board officer positions;"
- it made him "ineligible for reimbursement for any College-related travel;"
- it required him to get "Board approval" to "access [any] funds in his Board account;" and
- it "direct[ed Wilson] . . . to immediately cease and desist from . . . any repeat of improper behavior," and warned that failure to do so

would "constitute grounds for further disciplinary action by the Board."

Id.

SUMMARY OF THE ARGUMENT

Most of the briefing in this case concerns a question the Court need not resolve: whether a pure censure resolution, imposed on a member of a legislative body for protected speech outside the chamber, triggers First Amendment scrutiny. The Court need not resolve that issue because the Board here did not issue a "pure censure," merely expressing its disapproval of Wilson's speech. It imposed tangible penalties, stripping him of privileges enjoyed by all other trustees, and ordering him to cease and desist further public criticism of the Board. HCC ignores these facts; the Court cannot. Thus, to resolve this case, the Court need only decide that a censure resolution, issued pursuant to an elected body's disciplinary powers and including tangible penalties, triggers First Amendment scrutiny where, as alleged here, it was issued in response to protected speech that occurred outside the elected body.

I. The speech at issue here was indisputably protected. Wilson spoke on issues of public concern, calling the public's attention to conduct by other trustees of the Board that he deemed unethical and in violation of the Board's own bylaws. Members of legislative bodies, no less than anyone else, enjoy basic First Amendment freedoms, and cannot be penalized for protected speech that takes place outside the chamber.

II.A. While an elected body undoubtedly has authority to express its disapproval of a member's

speech, imposing tangible disciplinary penalties in response to otherwise protected speech is categorically different, and it triggers First Amendment scrutiny. The censure resolution at issue here imposed tangible "disciplinary action" on Wilson: it stripped him of the privileges of his elected position, including the ability to run for Board positions, to obtain reimbursement for college-related travel, and to access Board funds for community relations work. The resolution also ordered him to "cease and desist" from publicly criticizing the Board on pain of further discipline. This is not merely "speech and counter-speech," as HCC would have it. The Board used its regulatory authority over its trustees to assess tangible penalties against Wilson. That makes all the difference.

II.B. The district court concluded that the penalties did not violate the First Amendment because they did not entirely preclude Wilson from performing his duties as a trustee, and the United States as amicus seems to endorse that view. But First Amendment scrutiny is triggered by any tangible penalty imposed because of protected speech. A public employer who fined an employee $25 for protected speech outside the scope of his employment, or who reduced the employee's meal allowance by the same amount in retaliation for protected speech, would have no defense on the ground that the employee was still able to perform their job. The complaint alleges that the Board imposed tangible penalties in response to Wilson's protected speech, and as such, it states a First Amendment claim.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE SPEECH AT ISSUE IN THIS CASE.

There is no dispute that "the Constitution protects Wilson's right to speak in public on policy issues." Pet. Br. 10. Nor could there be.

The speech at issue—alleging improprieties and corruption by a Board elected by the people, with control over substantial taxpayer dollars—addressed matters of public concern. Criticism of government "occupies '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)). Its careful protection reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). And such protected speech "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.*

Wilson's filing of lawsuits alleging illegal conduct by the Board is also protected. The right to petition and access courts for redress undoubtedly protected by the First Amendment. *See Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (affirming that the "right of access to the courts is an aspect of the First Amendment right to petition").

That Wilson is an elected representative does not change the analysis. Indeed, this Court squarely rejected such a distinction more than fifty years ago. In *Bond v. Floyd*, 385 U.S. 116 (1966), the Court held that the state cannot exclude an elected

representative from a representative body because he publicly criticized the government. The State in *Bond* argued that the First Amendment should protect only "the citizen-critic," not "a legislator." *Id.* at 136. The Court found "no support for this distinction." *Id.* On the contrary, it held that legislators' ability to publicly criticize the government is essential to our system of government, "so that their constituents can be fully informed[,] . . . be better able to assess their qualifications[, and] . . . be represented in governmental debates by the person they have elected to represent them." *Id.* at 136–37. Indeed, the Court warned of the danger that, if granted the power to discipline legislators for their public criticisms, legislatures "could . . . utilize[]" it precisely as Petitioner did here—"to restrict the right of legislators to dissent from . . . a majority of their colleagues under the guise of judging their loyalty[.]" *Id.* at 132.[6]

II. DISCIPLINARY CENSURE CONSTITUTES PUNISHMENT, PARTICULARLY WHEN IT INCLUDES TANGIBLE PENALTIES.

The parties' briefs explore in extensive detail the history of legislative censure, but this case can be resolved on narrower grounds, without addressing the precise First Amendment limits on pure censure. That is because this case does not involve pure censure, but

[6] This case concerns only the rights of legislators to speak *outside* the legislative chamber. Legislatures have broad authority to censure members for speech or conduct *within the legislative sphere*. And the First Amendment will generally not be implicated by a legislature's disciplining of a member for *conduct,* as opposed to speech, outside the legislative sphere. Nor does this case involve the decision of one party to discipline one of its own members.

"censure plus." The Board did not merely engage in debate with Wilson, as HCC's brief would have it, *see* Pet. Br. 12–13, 15; rather, the Board imposed formal disciplinary sanctions, Pet. App. 42a–45a. The Court therefore need not decide whether and under what circumstances a "pure censure" might violate the First Amendment.

It is sufficient to hold that, when representative bodies impose formal, tangible discipline on their members for their protected speech outside the chamber, that action is subject to First Amendment scrutiny. *See Bond*, 385 U.S. at 136–37. Indeed, neither the Board nor the United States even attempts to argue otherwise. Instead, both defend the unremarkable proposition that legislative bodies have a right to express their views, as if all the Board did here was engage in a debate with Wilson. Pet. Br. 13 (contending that the censure was merely "the expression of a public body's opinion"). In their view, a ruling that Wilson stated a claim would impermissibly silence one side of the debate—HCC's—in the name of protecting the other side. *See id.* at 9 (arguing that "both statements[, Wilson's and HCC's,] are part of the cycle of speech and counter-speech that the First Amendment seeks to foster"); *see also* U.S. Br. 19 ("[G]overnmental counter-speech, even if highly critical of the member being spoken about, does not violate that member's free-speech rights."). But this argument mischaracterizes what the Board did, and therefore erects and knocks down a straw man, without addressing what actually happened.

A. The Board Imposed Substantial Tangible Penalties on Wilson for His Protected Speech.

Legislatures must have the ability to express their views. A pure statement of legislative displeasure is not generally restricted by the First Amendment. "Government speech" has its place, but the Board's resolution was not mere speech. While the resolution did condemn Wilson's speech as "not only inappropriate, but reprehensible," it did not stop there.

In particular, the Board went on to find that Wilson's "disrespect" for the Board "warrant[ed] *disciplinary action*." Pet. App. 44a (emphasis added). And it invoke[d] "the highest level of sanctions available to the Board under Texas law . . . ." *Id.* The Board revoked three privileges enjoyed by all other trustees, *and* ordered Wilson to cease further criticism on pain of yet more discipline. It barred Wilson from running for any elected position within the Board, getting reimbursed for travel, and accessing his Board funds without Board approval. *Id.* at 44a–45a.

There is a fundamental difference between government expression and government imposition of formal disciplinary penalties—and it is one of constitutional magnitude. Indeed, HCC acknowledges that when, as here, the government moves beyond the mere expression of opinion to exercising its "regulatory, proscriptive, or compulsory" authority, "generating 'specific present objective harm or a threat of specific future harm,' [its punishment] can cause actionable injury under the Free Speech Clause." Pet. Br. 11–12 (quoting *Laird v. Tatum*, 408 U.S. 1, 11, 14 (1972)). That is precisely what the Board

did here. It exercised its proscriptive and regulatory power to order Respondent to cease and desist from public criticism, and its regulatory and compulsory authority to suspend privileges and benefits. It could have merely adopted a resolution expressing its views under Article B § 1 of its bylaws. J.A. 35–38. Instead, it invoked its separate disciplinary power under Article A § 11(f) of the bylaws, *Id.* at 34, in order to impose formal discipline.

The ban on seeking election inside the board is comparable to Mr. Bond's exclusion from the representative body. *See Bond*, 385 U.S. at 349 & n.13. It is different in degree, but not in kind. Both restrict their targets' representative privileges *because of protected speech outside the chamber*.

The two restrictions on access to funds are similarly deprivations of legislative privileges every other trustee enjoyed, again because of protected speech outside the chamber. It is of no moment that the legislature revoked privileges rather than imposing a fine or other affirmative penalty. "[T]he Government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (cleaned up). Thus, in the context of government funding, while the government can impose conditions on speech *within* a funded program, it may not impose conditions or revoke funding based on speech "*outside* the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (emphasis added). Similarly, even if Wilson had no entitlement to travel reimbursement or access to Board funds, because the Board revoked them based on what Wilson said

outside the legislative sphere, the revocations trigger First Amendment scrutiny.

The revocation of travel reimbursement and access to Board funds are also akin to similar restrictions imposed on public employees. A public employer who deprived an employee of the right to seek reimbursement for travel based on the employee's speech outside the workplace would plainly trigger First Amendment scrutiny, and would not be viewed as merely engaging in "government speech." See *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("[I]mpos[ing] a financial burden on speakers because of the content of their speech" is "presumptively inconsistent with the First Amendment.").

The Board's directive that Wilson cease and desist from "any repeat of improper behavior," Pet. App. 45a, on pain of "further disciplinary action," *id.*, also infringes Wilson's First Amendment rights. Because the basis for the initial disciplinary action was Wilson's public criticism of the Board outside the chamber, this ban constituted a prior restraint. "[U]nlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468 (1995). Such government restrictions "come[] to [court] bearing a heavy presumption against [their] constitutional validity," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and the government "carries a heavy burden of showing justification," *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Whether it in fact restrained Wilson is beside the point; the government

presumptively cannot order a citizen to stop criticizing it.

The fact that all of these sanctions were triggered by the Board's disapproval of the particular views Wilson expressed further underscores the unconstitutionality of the Board's action. "[A]ttempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (holding that denial of funding to student group for expressing religious viewpoint violated the First Amendment); *see also id.* at 835 (rejecting government's argument that "from a constitutional standpoint, funding of speech differs" from other government action subject to First Amendment scrutiny); *see also Nat'l Endowment for the Arts v. Finley,* 524 U.S. 569, 587 (1998) (noting that "even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas'") (quoting *Regan v. Tax'n with Representation of Wash.,* 461 U.S. 540, 550 (1983)).

None of this is mere "government speech," Pet. Br. 30–33, and therefore HCC's brief simply misses the mark. The Board's censure resolution was expressly designed not just to express disapproval, but also to impose "disciplinary action" and to quash Wilson's public criticism going forward.

B. Tangible Penalties Imposed Because of Protected Speech Trigger First Amendment Scrutiny, Regardless of Whether They Entirely Preclude a Legislator from Performing His Duties.

The district court reasoned that the penalties did not violate Wilson's First Amendment rights because Wilson was "not prevented from performing his official duties." Pet. App. 27a. But the penalties cannot be so easily disregarded. The First Amendment does not protect against only those penalties that preclude one from performing one's job, but against any "adverse action" that places the individual in a "'worse position.'" *Nieves v. Bartlett,* 139 S. Ct. 1715, 1722 (2019) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286 (1977)); *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

Tangible penalties imposed because of one's protected speech trigger First Amendment scrutiny. *Elrod v. Burns*, 427 U.S. 347, 359 n.13 (1976) (plurality opinion) (noting that First Amendment "[r]ights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason"). In the context of assessing retaliation claims in employment, for example, "[a]dverse employment actions may include negative evaluation letters, express accusations of lying, assignment of lunchroom duty, reduction of class preparation periods, failure to process teacher's insurance forms, transfer from library to classroom teaching as an alleged demotion, and assignment to classroom on fifth floor which aggravated teacher's physical disabilities." *Zelnik v. Fashion Inst. of Tech.,* 464 F.3d 217, 226 (2d Cir. 2006)

(cleaned up). If assignment to lunchroom duty triggers First Amendment scrutiny when imposed in response to protected speech, certainly the substantial penalties imposed on Wilson do also.

It is irrelevant whether Wilson could still do his job, or still speak out. If the Board fined Wilson $25 for his public criticism, or reduced his reimbursable travel allowance by $25, he would still be able to do his job, but imposing such a tangible penalty for protected speech would nonetheless violate the First Amendment. Nor is the test whether Wilson was successfully silenced by the Board's action. A town that charged Republicans $100 more for demonstration permits than Democrats could not defend its action by noting that the Republican demonstration went forward anyway.

For its part, the United States acknowledges, in a classic understatement, that the penalties imposed on Wilson "are less readily characterized as governmental *speech*." U.S. Br. 21. But it dismisses their relevance in a sentence, because "the district court found that respondent had not shown any retrospective injury resulting from those punitive measures, and any prospective injury has since been mooted by respondent's failure to win reelection." *Id.* at 21–22 (cleaned up). But as Respondent argues, the fact that Wilson cannot obtain prospective relief does not mean he did not suffer retrospective injury. Resp. Br. 34–35. A public employee who, in retaliation for public criticism of the mayor, is denied eligibility for travel reimbursement and the opportunity to serve on employee committees, and ordered to cease criticizing the mayor, would have a First Amendment claim for damages for such action, even if he subsequently took

another job and therefore did not need prospective relief.

While action that is truly de minimis might not trigger First Amendment scrutiny, the disciplinary action imposed on Wilson was anything but; on the contrary, it was the "highest level of sanctions available to the Board under Texas law." Pet. App. 44a. Accordingly, his complaint stated a claim under the First Amendment, and if proven, he should be entitled to any damages that flowed from the Board's disciplinary action, including nominal, compensatory, or punitive damages.

Upholding the censure resolution and its accompanying disciplinary action as mere government speech would ignore the undisputed facts on the face of the Board's resolution itself. It would also have the perverse result of affording *more* First Amendment protection to government bodies than to private speakers, allowing them to fight criticism not merely by defending themselves through words, but also by imposing tangible penalties on their adversaries. And while it is true that "[t]he Free Speech Clause . . . does not regulate government speech," *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009), the First Amendment exists to ensure that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), and "to . . . put[ ] the decision as to what views shall be voiced largely into the hands of each of us," rather than the government, *Cohen v. California*, 403 U.S. 15, 24 (1971). Far from serving such purposes, accepting HCC's position would severely undercut them.

CONCLUSION

For the reasons stated above, the Court should affirm the judgment below.

Respectfully submitted,

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