No. 20-804

In the Supreme Court of the United States

HOUSTON COMMUNITY COLLEGE SYSTEM,

Petitioner,

v.

DAVID BUREN WILSON,

Respondents.

On Writ of Certiorari
to the U.S. Court of Appeals for the Fifth Circuit

Brief *Amicus Curiae*
of the Foundation for Individual Rights in Education (FIRE)
in Support of Neither Party

Eugene Volokh
Counsel of Record
Raquelle de la Rocha
FIRST AMENDMENT CLINIC
UCLA SCHOOL OF LAW
385 Charles E. Young Dr. E
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

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INTEREST OF THE *AMICUS CURIAE*[1]

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since its founding in 1999, FIRE has successfully defended the rights of tens of thousands of students at colleges and universities nationwide. FIRE believes that if our educational institutions are to best prepare students for success in our democracy, the law must remain unequivocally on the side of robust free-speech protections for students and faculty.

FIRE has a direct interest in this case because students and faculty are especially vulnerable to official reprimands by school authorities, and student speech is especially likely to be chilled by such reprimands. It therefore files this brief to argue that such reprimands should generally be seen as tangible retaliatory actions, and not just government speech.

SUMMARY OF ARGUMENT

This Court could well conclude that elected political bodies are free to censure their members based on their members' speech. *Amicus* expresses no view on that question.

But any such holding should be expressly limited to elected political bodies and their members, based on the special character of the relationship between them.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than counsel's employer (UCLA School of Law), make a monetary contribution to the preparation or submission of this brief. Counsel of record for each party has provided blanket consent to the filing of *amicus* briefs.

As politicians, elected officials can rightly be held accountable for their speech (or the exercise of other constitutional rights), whether by the voters or by their colleagues. Indeed, under this Court's patronage cases, such as *Branti* v. *Finkel*, 445 U.S. 507 (1980), even high-level appointed officials can often be fired outright based on their political affiliations; they can surely be reprimanded as well.

And political officials should be prepared even for blatantly political retaliation. To be an honest elected official, one must be ready to lose one's job—whether via recall, election loss, or perhaps even expulsion by one's colleagues (when that is legally authorized)—for doing or saying what one thinks is right. This Court could conclude that this extends to reprimands, too.

Yet this Court ought not make such a judgment simply by broadly endorsing the view that reprimands are "government speech" (e.g., Pet. Br. 14, 29-31, 34) and are thus categorically immune from Free Speech Clause scrutiny. In a wide range of other contexts, such as professional licensing, public education, and government employment, formal reprimands are properly viewed not as government speech, but as formal adverse actions, akin to demotion or suspension. Indeed, some of this Court's leading professional speech cases have set aside reprimands on First Amendment grounds.

The threat of formal reprimands, even ones that are not combined with any suspension or demotion, can have a powerful chilling effect on professionals, students, or employees, whose careers and livelihoods are on the line. This is especially so because people know that a past formal reprimand will often be considered in deciding on future, more tangible, disciplinary measures. Such formal reprimands therefore can easily violate the target's First Amendment rights to

the extent the reprimands are based on constitutionally protected speech. They raise materially different First Amendment considerations from this case, and this Court should be careful to distinguish such cases from this one.

I. Formal reprimands of licensed professionals based on constitutionally protected speech can violate the First Amendment.

Licensing authorities often use formal reprimands, whether public or private, as a potent means to control licensed professionals' speech. After all, a formal reprimand will often be made in a context that expressly or implicitly indicates that repetition of the speech will yield more coercive consequences, even if the reprimand does not lead to an immediate suspension or fine. And it may become part of the reprimanded professional's file, potentially serving as a basis to impose harsher punishment as to other matters in the future.

Perhaps because of this, this Court has recognized that the First Amendment applies to such reprimands or censures, if the speech on which they are based is constitutionally protected. In *Ibanez* v. *Fla. Dep't of Bus. & Prof'l Reg.,* for instance, this Court held "that the Board's decision censuring Ibanez [for her constitutionally protected commercial speech] is incompatible with First Amendment restraints on official action." 512 U.S. 136, 139 (1994).

Likewise, in *Zauderer* v. *Office of Discip. Counsel*, this Court, in part, set aside a reprimand on First Amendment grounds, "insofar as the reprimand was based on appellant's use of an illustration in his advertisement . . . and his offer of legal advice in his advertisement." 471 U.S. 626, 655-56 (1985); *see also In re Primus*, 436 U.S. 412, 414 (1978) (likewise); *Peel* v. *Attorney Reg. & Discip. Comm'n*, 496 U.S. 91, 93 (1990)

(likewise, as to "public[] censure[]"). ("Censure" and "reprimand" are essentially interchangeable in this context.) And this Court found a First Amendment violation even in "private reprimand[s]" based on lawyers' speech. *Gentile* v. *State Bar of Nev.*, 501 U.S. 1030, 1033 (1991) (noncommercial speech about a pending case); *In re R.M.J.*, 455 U.S. 191, 198 (1982) (commercial speech).

Likewise, courts recognize that public reprimands of lawyers by courts are a powerful sanction—indeed, to the point of being immediately appealable. *Bowers* v. *NCAA*, 475 F.3d 524, 543 (3d Cir. 2007) (citing cases). "The reason for the courts' [nearly complete] consensus is that a public reprimand carries with it the formal censure of the court and may, in many cases, have more of an adverse effect upon an attorney than a minimal monetary sanction." *Id.*

"[A] judicial reprimand is likely to have a serious adverse impact upon a lawyer's professional reputation and career. A lawyer's reputation is one of his most important professional assets. Indeed, such a reprimand may have a more serious adverse impact upon a lawyer than the imposition of a monetary sanction." *Precision Specialty Metals, Inc.* v. *United States*, 315 F.3d 1346, 1352-53 (Fed. Cir. 2003). It follows (as the cases cited in the preceding paragraphs show) that a public reprimand based on constitutionally protected speech may likewise have "an adverse effect" on professionals' willingness to speak in ways that risk such reprimands.

II. Formal reprimands of students based on their constitutionally protected speech violate the First Amendment.

Courts have likewise recognized that reprimands are powerful, and potentially unconstitutional, tools

for suppressing student speech at public schools. For example, in a case involving a teacher singling out a student in front of his entire class for failing to recite the Pledge of Allegiance, the Eleventh Circuit observed that "[v]erbal censure is a form of punishment," *Holloman* v. *Harland*, 370 F.3d 1252, 1268 (11th Cir. 2004), and noted that such censure would inevitably suppress First-Amendment-protected expression:

> Given the gross disparity in power between a teacher and a student, such comments—particularly in front of the student's peers—coming from an authority figure with tremendous discretionary authority . . . cannot help but have a tremendous chilling effect on the exercise of First Amendment rights.

Id. at 1269. Likewise, *Burch* v. *Barker*, 861 F.2d 1149 (9th Cir. 1988), concluded that discipline of students for distributing written materials at school without prior approval violated the First Amendment, even though the students were punished only through "reprimands for violating the policy." *Id.* at 1159. The court remanded the case for an order "directing the school to purge the plaintiff-students' records" of the reprimands. *Id.*

The same has been applied to formal reprimands of public university students as well. *See Flint* v. *Dennison*, 488 F.3d 816, 824 (9th Cir. 2007) ("If we were to determine that Flint's First Amendment rights were violated, declaratory relief would require the University to," among other things, "expunge any and all records of Flint's censure"). And this matches the treatment of public university faculty. *See Booher* v. *Bd. of Regents, N. Ky. Univ.*, No. 2:96-CV-135, 1998 WL 35867183, *12 n.21 (E.D. Ky. July 22) (allowing professor's First Amendment retaliation claim based on censure by his department to go forward, because the

censure could "affect committee appointments," the faculty member's participation in promotion decisions for other faculty, and teaching assignments), *appeal dismissed*, 163 F.3d 395 (6th Cir. 1998).

Courts have thus recognized that reprimands and censures can substantially affect the target's academic life. Allowing such action based on constitutionally protected speech can thus strongly chill such speech, and undermine academic freedom.

III. Formal reprimands of public employees based on their constitutionally protected speech may violate the First Amendment.

More broadly, many courts (including the First, Second, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits) have recognized that formal reprimands of public employees are a formal disciplinary action issued by a disciplinary authority, rather than just mere speech. "A formal reprimand issued by an employer is not a 'petty slight,' 'minor annoyance,' or 'trivial' punishment; it can reduce an employee's likelihood of receiving future bonuses, raises, and promotions, and it may lead the employee to believe (correctly or not) that his job is in jeopardy." *Millea* v. *Metro-N. R. Co.*, 658 F.3d 154, 165 (2d Cir. 2011) (so reasoning as to reprimand alleged to be in retaliation for the exercise of Family Medical Leave Act rights).

And such adverse employment decisions may be unconstitutional if they are based on constitutionally protected speech. "The *Pickering* line of cases protects against not only discharge but also any adverse employment action taken by the employer that is likely to chill the exercise of constitutionally protected speech," "*[e].g.*, refusal to hire, demotion, reprimand, refusal to promote." *Goffer* v. *Marbury*, 956 F.2d 1045, 1049 n.1 (11th Cir. 1992); *see also Wrobel* v. *County of Erie*, 692

F.3d 22, 31 (2d Cir. 2012) (likewise); *Texas A & M Univ.* v. *Starks*, 500 S.W.3d 560, 573-74 (Tex. App. 2016) (likewise); *Churchill* v. *Univ. of Colorado at Boulder*, 293 P.3d 16, 34 (Colo. App. 2010) (likewise), *aff'd on other grounds*, 285 P.3d 986 (Colo. 2012).

Thus, for instance, in *Kirby* v. *City of Elizabeth City*, 388 F.3d 440 (4th Cir. 2004), the court concluded that, because a "reprimand could have a chilling effect on [the reprimanded police officer] and other officers," it could violate the First Amendment. *Id.* at 448-49. Likewise, in *Pierce* v. *Texas Dep't of Crim. Justice*, 37 F.3d 1146 (5th Cir. 1994), the court held that:

> To establish a First Amendment violation, a public employee must demonstrate that she has suffered an adverse employment action for exercising her right to free speech. Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and *reprimands*.

Id. at 1149 (emphasis added); *id.* at 1150 (applying this approach in "determin[ing] whether a rational jury could find that Pierce's exercise of her protected speech was a substantial or motivating factor in her *reprimand* or probation/reduction in pay") (emphasis added); *Bart* v. *Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (treating "[r]eprimanding plaintiff for endorsing a candidate at a press conference following the primary election" as potentially actionable retaliation for constitutionally protected speech); *Barton* v. *Clancy*, 632 F.3d 9, 29-30 (1st Cir. 2011) (holding that "[e]ven 'relatively minor events' can give rise to § 1983 liability [for retaliation against an employee based on speech], so long as the harassment is not so trivial that it would not deter an ordinary employee in the exercise of his or her First Amendment rights," and citing *Bart* for the proposition that "reprimand[s]" can qualify);

Schuler v. *City of Boulder*, 189 F.3d 1304, 1310 (10th Cir. 1999) (listing a "written 'reprimand'" as part of the retaliatory conduct that could form the basis for a First Amendment violation).

To be sure, "when an employer's response includes only minor acts, such as 'bad-mouthing,' that cannot reasonably be expected to deter protected speech, such acts do not violate an employee's First Amendment rights." *Coszalter* v. *City of Salem*, 320 F.3d 968, 976 (9th Cir. 2003); *Durant* v. *D.C. Gov't*, 875 F.3d 685, 698 (D.C. Cir. 2017); *see also McKee* v. *Hart*, 436 F.3d 165, 173 (3d Cir. 2006) ("Courts have not found violations of employees' First Amendment rights 'where the employer's alleged retaliatory acts were criticism, false accusations, or verbal reprimands.'"). But more formal reprimands officially issued by the employer may well count as adverse employment actions. *Coszalter*, 320 F.3d at 971, 976.

A few courts (chiefly the Sixth, Eighth, and likely Third Circuits) take the opposite approach, and conclude that even formal letters of reprimand—indeed, even suspensions with pay—do not qualify as adverse employment action that could trigger a First Amendment retaliation claim. *Sensabaugh* v. *Halliburton*, 937 F.3d 621, 629 (6th Cir. 2019) (reprimand and suspension with pay); *Charleston* v. *McCarthy*, 926 F.3d 982, 990 (8th Cir. 2019) (reprimand and transfer, at least until they "materially alter[] the terms or conditions of employment, like an employee's title, pay, or benefits"); *Weston* v. *Pennsylvania*, 251 F.3d 420, 431 (3d Cir. 2001) (reprimand, though in a Title VII case rather than a First Amendment case), *overruled in part on other grounds by Burlington N. & S.F. Ry. Co.* v. *White*, 548 U.S. 53, 126 (2006). This, though, is a minority rule, and one that fails to recognize how such

employer actions can powerfully chill employees' constitutionally protected speech. In any event, this case does not present the opportunity to resolve this split, and the Court should not inadvertently endorse this minority view by concluding that reprimands are always mere government speech, even in situations far removed from the political fight among elected officials involved in this case.

Conclusion

Reprimands and censures based on constitutionally protected speech are not mere "government speech." They are often adverse employment, educational, or licensing actions that can powerfully chill the exercise of First Amendment rights, both by the target and by other employees, students, and licensed professionals.

Perhaps such censure may be constitutionally permissible when issued by an elected body against its elected members (a question on which *amicus* expresses no opinion). But even if this is so, the reasoning of the Court in this case should be limited to that unusual context, and not to censures more broadly.

Respectfully submitted,

Eugene Volokh
Counsel of Record
Raquelle de la Rocha
FIRST AMENDMENT CLINIC
UCLA SCHOOL OF LAW
385 Charles E. Young Dr. E
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

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