

Supreme Court Finds Censure of Community College Trustee Did Not Violate First Amendment

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On March 24, the U.S. Supreme Court issued a unanimous decision in *Houston Community College System v. Wilson*, holding that the public censure of one of the plaintiff's elected trustees by his board colleagues did not violate the trustee's First Amendment rights.

Case Overview

The Houston Community College System (HCC) is a public entity, operating various community colleges in Texas. Its board of trustees comprises nine members, each elected from a single-member district for a six-year term.

David Wilson was elected to the board in 2013. He clashed frequently with board colleagues over HCC matters, including challenging the board's actions through a series of lawsuits. The total cost of Wilson's lawsuits would eventually cost HCC more than \$270,000 in legal fees.

These escalating disagreements led the board to reprimand Wilson publicly in 2016. Following the reprimand, Wilson persisted in airing his grievances. He told various media outlets that the board had violated various bylaws and ethical rules, arranged robocalls to his peers' constituents to convey his views, and hired a private investigator to conduct surveillance on a board colleague. He also continued to file lawsuits.

In 2018, in light of Wilson's actions following the reprimand, the board censured Wilson via public resolution. The resolution described Wilson's conduct as "not consistent with the best interests of the College" and "not only inappropriate, but reprehensible." The board also penalized Wilson by making him ineligible for a board officer position for one calendar year, making him ineligible for reimbursement for college-related travel, and subjecting certain of his funding requests to board approval. The board also recommended that Wilson complete training in governance and ethics.

Wilson thereafter amended the pleadings in one of his state court lawsuits to add claims against HCC and the trustees under 42 U.S. §1983, asserting that the censure violated his First Amendment rights.

District Court and Fifth Circuit Decisions

Wilson's state court case alleging violations of Section 1983 was removed to the U.S. District Court for the Eastern District of Texas, and the individual plaintiff trustees were dropped, leaving only HCC as a defendant. HCC responded by filing a motion to dismiss, which the District Court granted on the basis that Wilson lacked

standing.

A panel from the [Fifth Circuit Court of Appeal reversed the District Court](#). It found that Wilson's Section 1983 claim could proceed with respect to the board's censure, concluding a verbal "reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment Claim under § 1983." However, the Fifth Circuit determined the claim could not proceed as to the board's penalties on Wilson, reasoning that he had no "entitlement" to these privileges under circuit precedent, state law, or HCC's own bylaws. In [Rash-Aldridge v. Ramirez](#), an earlier Fifth Circuit case on which the *Wilson* court relied, the court notably held that an elected official was not entitled to a board officer position because denial of the position did not diminish the privileges of the office to which she was elected.

The Fifth Circuit did not grant HCC's petition for rehearing en banc.

Supreme Court Decision

On June 3, 2021, the U.S. Supreme Court granted HCC's petition for certiorari on a narrow question: "Does Mr. Wilson possess an actionable First Amendment claim arising from the Board's purely verbal censure." Unanimously, the Court found he did not.

In an opinion written by Associate Justice Neil Gorsuch, the Court noted that, as a core principle, "the First Amendment prohibits government officials from subjecting individuals to 'retaliatory actions' after the fact for having engaged in protected speech." Nonetheless, in an analysis that spanned the colonial period through the present day, the Court found this principle had not historically prevented America's elected bodies from exercising the power to censure their own members. The Court noted this censure power was wielded not only by Congress, but also it was "more common yet at the state and local level." Further, the Court noted that the model manual of the National Conference of State Legislatures contemplates this type of procedure, and Wilson did not dispute that at least 20 censures were issued by America's elected bodies in August 2020 alone.

The Court concluded that "what history suggests ... our contemporary doctrine confirms." First, citing the Court's opinion in *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019), Judge Gorsuch wrote that a person bringing a First Amendment claim must show that "the government took an 'adverse action' in response to his speech that 'would not have been taken absent the retaliatory motive.'" Noting that courts have a variety of approaches to determine the materiality of such adverse actions, the Court identified two considerations as central to its analysis of the adverse action alleged by Wilson.

First, Wilson was an elected official. The Court stated that "[w]e expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers — and to continue exercising their free speech rights when the criticism comes." Second, the Court noted that censure was "itself a form of speech from Mr. Wilson's colleagues that concerns the conduct of public office."

Because the censure was itself a form of free speech by elected representatives, concerning the public conduct of an equal member of the same deliberative body, and because the censure did not bar Wilson from performing the duties of his office, the Court held the board's censure was not materially adverse. Moreover, the facts showed that Wilson was not deterred from exercising his free speech rights after the board issued its first reprimand. It

noted that the reprimand and censure were essentially the same action, “We cannot see how [the use of the word censure] alone changed the equation and materially inhibited Mr. Wilson’s ability to speak freely.”

The Court cautioned that its holding in *Wilson* should be construed narrowly and not presumed to mean that, under different circumstances, a verbal reprimand or censure could never give rise to an actionable First Amendment claim. The Court specifically distinguished *Wilson* from possible scenarios involving a legislative censure accompanied by punishments, targeted at private individuals, or issued by the government in its role as a sovereign, employer, educator, or licensor.

Implications

The Supreme Court’s decision in *Wilson* makes clear that an individual trustee of a board of trustees of a public institution is not insulated from criticism, and a board is within its rights to censure a trustee. This decision has significant importance to public institutions governed by elected representatives because it reaffirms that government speech also is entitled to First Amendment protections, particularly in today’s polarized political environment. *Wilson* further recognizes that all trustees have equal rights and that the censure power is a form of expression entitled to First Amendment protections as well. While *Wilson* correctly recognizes that the First Amendment cannot be used as a weapon to silence a trustee seeking to engage in free expression, it does permit speech from fellow trustees that does not rise to the level of punishment (*i.e.*, expulsion or exclusion), defamation, or an act that prevents a trustee from performing her/his duties of office.

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