

Supreme Court Holds that Censures Don't Violate the First Amendment

June 07, 2022

Introduction by Garrett Baxter, VLCT Senior Staff Attorney

In a case reminiscent of one decided by the Vermont Supreme Court over twelve years ago (see LaFlamme v. Essex Junction School District and Essex Junction Prudential Committee, 170 Vt. 475 (2000) <https://law.justia.com/cases/vermont/supreme-court/2000/97-493op.html>), the U.S. Supreme Court unanimously held that a verbal censure imposed by an elected public body on one of its own members does not violate that member's First Amendment right to free speech. See Houston Community College System v. Wilson, 595 U.S. ____ (2022) at: https://www.supremecourt.gov/opinions/21pdf/20-804_j426.pdf). Much like Vermont's own censure case that came before it, the Houston Community College case is a very narrow holding and leaves many questions unanswered. As the Court said, its opinion doesn't address censures accompanied by punishment (e.g., expulsion, exclusion, etc.), those aimed at private individuals (e.g., students, employees, licensees, etc.), or even those issued by government bodies against government officials who serve on other bodies. It involves only a First Amendment retaliation claim and none other.

The takeaway from this case is that under the right circumstances, censure is a constitutionally viable expression of disapproval. Due to the uncertainty that still remains regarding its use, care will need to be exercised when it is wielded.

Lisa Soronen, Executive Director of the State & Local Legal Center, provides this summary of the case.

Case Summary: Supreme Court Holds that Censures Don't Violate the First Amendment

In a unanimous opinion in *Houston Community College v. Wilson*, the U.S. Supreme Court held that when a government board censures a member it doesn't violate the First Amendment.

As Justice Gorsuch describes in his opinion David Wilson's tenure on the Houston Community College board was "stormy." He accused the board of violating its bylaws and ethics rules in the media, he hired a private investigator to determine whether another board member lived in the district which elected her, and he repeatedly sued the board. The board censured him stating his conduct was "not consistent with the best interests of the College" and "not only inappropriate, but reprehensible."

The Supreme Court held that Wilson has no actionable First Amendment free speech claim arising from the Board's purely verbal censure.

The Court began its analysis by noting that "elected bodies in this country have long exercised the power to censure their members. In fact, no one before us has cited any evidence suggesting that a purely verbal censure analogous to Mr. Wilson's has ever been widely considered offensive to the First Amendment."

According to the Court, censures have been common in Congress since the 1800s and even more common at the state and local government level. The Court specifically cited to a National Conference of State Legislatures manual which contemplates censure procedures. While the Court acknowledged "longstanding practice does not 'put at rest' the question of the Constitution's meaning for the dispute before us, it surely leaves a 'considerable impression.'"

The Court also reasoned that Wilson could only have a First Amendment claim if he had been subject to an adverse action. The Court concluded a censure of a board member by a board isn't an adverse action. First, "[i]n this country, we 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, Wilson can't use the First Amendment "as a weapon to silence" his board colleagues who want to "speak freely on questions of government policy," just as he does.

Before the Supreme Court Wilson tried to argue that other punishments the board issued against him such as limiting his eligibility for officer positions and access to certain funds violate the First Amendment. The Fifth Circuit held these punishments didn't violate Wilson's free speech rights because they were privileges not entitlements. The Supreme Court refused to consider the Wilson's punishment claims because he failed to petition the Court to hear them.

The Court went out of its way to explain that its opinion is narrow and only applies when an elected board verbally reprimands one of its members. According to the Court, "government officials who reprimand or censure students, employees, or licensees may in some circumstances materially impair First Amendment freedoms." Likewise, the Court stated that it wasn't deciding whether censures accompanied by punishments or those aimed at private parties may violate the First Amendment. "Nor do we pass on the First Amendment implications of censures or reprimands issued by government bodies against government officials who do not serve as members of those bodies."