CARLTON FIELDS

Silence Is Golden, or Is It?

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Louis Brandeis famously wrote in *Whitney v. California*, 274 U.S. 357 (1927), that the remedy for false or harmful speech "is more speech, not enforced silence." A recent Fifth Circuit case presented a novel question that turned this maxim on its head: When does more speech from a government agency operate to enforce silence? The case concerned a resolution passed by the elected board of trustees of the Houston Community College System, which censured one of its members for his persistent and allegedly "inappropriate" criticism of the board. The Fifth Circuit last month held in *Wilson v. Houston Community College System* that Wilson stated a claim against the college system for First Amendment retaliation for censuring him. The Fifth Circuit's decision deepens a circuit split with the Sixth, Ninth, and Tenth Circuits, which have treated similar censures as government speech entitled to its own protection. The Fifth Circuit case began in 2017 when Wilson vocally disagreed with the board's decision to fund a campus in Qatar. He also accused the board of violating its bylaws by allowing a trustee to vote via videoconference and by excluding him from a board executive session. Wilson arranged for robocalls to share his criticism of the board's decisions with voters. He maintained a website to air complaints about the board, calling out colleagues by name. He sued the community college system twice over the alleged bylaw violations. And he hired a private investigator to probe the college system and one of his colleagues to confirm whether she actually lived in the district from which she was elected. In January 2018, the board voted to censure Wilson for acting in a manner "not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct." The resolution said Wilson failed to respect trustees' differing views, engage in open and honest discussions in making board decisions, interact with trustees in a mutually respectful manner, and respect the board's collective decision-making process. Besides expressing disapproval of Wilson's aggressive style, the resolution also took action against him. The board ordered Wilson to cease all "inappropriate conduct." It made him ineligible for election as a board officer in 2018, prevented him from receiving reimbursement for college-related travel during the fiscal year, and required him to obtain board approval to use funds in his board account. Not surprisingly, Wilson sued. He alleged under section 1983 that the college system had retaliated against him for exercising his First Amendment rights. The district court dismissed his complaint for lack of standing. But the Fifth Circuit, in a decision released on April 7, 2020, reversed. The Fifth Circuit found that Wilson had standing and stated a claim for First Amendment retaliation, holding that a reprimand of an elected official for speaking about a matter of public concern could form a First Amendment retaliation claim under section 1983. It held that the board censured Wilson

to punish him for criticizing other board members. A formal reprimand was "punitive in a way that mere criticisms, accusations, and investigations are not." In so holding, the Fifth Circuit departed from other circuits that have treated the censure of an elected official as a form of political expression itself. The Tenth Circuit in *Phelan v. Laramie County Community College Board of Trustees* affirmed summary judgment against a community college trustee censured by her colleagues. The trustee had campaigned against a tax referendum approved by the board. The board majority then censured her, claiming she violated the board's ethics policy that required trustees to abide by and uphold the board's decisions. The Tenth Circuit found the censure simply expressed the board's view of its colleague. "Although the government may not restrict, or infringe, an individual's free speech rights, it may interject its own voice into public discourse." By censuring their colleague, "Board members sought only to voice their opinion that she violated the ethics policy and to ask that she not engage in similar conduct in the future." The Sixth Circuit in *Zilich v. Longo* found no First Amendment retaliation claim existed against the city council in Garfield Heights, Ohio, which had passed a resolution finding that former council member George Zilich had never been eligible to hold office. Zilich alleged that the council passed the resolution to retaliate for his opposition to the mayor. But the Sixth Circuit viewed the resolution as expressive itself, noting that political bodies often retaliate against opponents out of spite or for purely partisan motives. "The First Amendment is not an instrument designed to outlaw partisan voting or petty political bickering through the adoption of legislative resolutions." Similarly, the Ninth Circuit in *Blair v. Bethel School District* rejected a First Amendment claim where the Bethel School District Board removed a member as the board's vice president based on his persistent criticism of the school superintendent. "[W]e *expect* political officials to cast votes in internal elections in a manner that is, technically speaking, retaliatory, i.e., to vote against candidates whose views differ from their own." "[T]o accept Blair's argument is to hold that the First Amendment prohibits elected officials from voting against candidates whose speech or views they don't embrace." The Fifth Circuit could have distinguished *Wilson* from some of these decisions based on the board's action, rather than its expression, against Wilson. The Houston Community College System resolution not only condemned Wilson with words but also stripped Wilson of the ability to run for a board office and use board funds without approval. But the Fifth Circuit expressly declined to draw this distinction. It based its ruling on the punitive nature of the resolution's words. It noted in a footnote that the board could lawfully deprive Wilson of the right to run for an officer position or use public funds without approval. Wilson will get his chance to prove his claim against the community college system, but he will need to argue with the board members as a constituent. Wilson resigned his seat as a board member, representing District 2, in August 2019. Two months later, he ran as a candidate in District 1. He lost that election in December 2019 in a run-off. The Supreme Court granted certiorari on April 26, 2021, to review this case in the October 2021 term. Read the full opinion: *Wilson v. Houston Community College System*, 955 F.3d 490 (5th Cir. 2020).

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